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IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

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[1] Appointed March 1, 1919.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

KENNEDY v. NATIONAL TUBE CO.

(Circuit Court of Appeals, Third Circuit. January 16, 1919.)

No. 2412.

1. BROKERS ⟨⊃82(4)—COMPENSATION—ACTIONS—ISSUES AND PROOF.
   Where, in an action on a contract for commissions on a sale, plaintiff declared on an express contract, he must prove the contract declared on in order to recover.
2. CONTRACTS ⟨⊃176(1)—JURY—CONSTRUCTION.
   Where the terms of an oral contract are established without conflict of evidence, its interpretation, as in the case of written contracts, is a question of law for the court; but where the evidence is conflicting, or the meaning doubtful, the question of the interpretation of the contract should be submitted to the jury.
3. CONTRACTS ⟨⊃29—JURY—EXISTENCE OF CONTRACT.
   Where plaintiff declared on an express contract, and the evidence would not have sustained a finding that there was such contract, the court need not submit the matter to the jury, but may direct verdict for defendant.
4. BROKERS ⟨⊃86(1)—COMMISSIONS—CONTRACT TO PAY—EVIDENCE.
   In an action for commissions on a sale, where plaintiff informed defendant of a concern that had for sale material which defendant wanted to buy, evidence *held* insufficient to establish an express contract on the part of defendant to pay plaintiff for his service.
5. BROKERS ⟨⊃40—SERVICES—COMPENSATION.
   Where plaintiff informed defendant of a concern from which it could purchase material it wanted to buy, such service, though requiring little effort on plaintiff's part, will support an agreement by defendant to compensate plaintiff.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Joseph W. Kennedy against the National Tube Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Arthur O. Fording, of Pittsburgh, Pa., for plaintiff in error.

George E. Shaw, Reed, Smith, Shaw & Beal, and John G. Frazer, all of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is not an action on a contract for commissions on a sale. It is an action brought by the plaintiff, on an alleged oral contract, to recover compensation for informing the defendant of a concern that had for sale material which the defendant wanted to buy.

[1] The contract declared on is an express contract, not an implied contract. To succeed, either in the trial court or in this court, the plaintiff must show that the evidence proves the contract declared on.

Negotiations were conducted by Kennedy, the plaintiff, and Lynch, the purchasing agent of the defendant. They were embraced in one or two very brief and informal conversations, the substance of which is disclosed in the testimony of the plaintiff alone.

At a casual meeting, Kennedy asked Lynch if his company would be interested in purchasing 20,000 tons of steel ingots. Lynch replied that it would be very much interested, and asked Kennedy to get him a quotation. Kennedy told Lynch that "the approximate price of the ingots would be $61.50," saying:

"If you buy them, I want a dollar a ton, which will make it cost you approximately—this price will have to be checked—it will make it $62.50 a ton."

After some discussion as to Kennedy's compensation for bringing about a transaction of this size, Lynch told Kennedy to "go on and get (me) a quotation." Neither then nor later did Kennedy undertake to get a quotation, but he said to Lynch:

"I will put the people in touch with you, so you can get the thing closed up."

Kennedy then gave Lynch the name of Edgewater Steel Company as the proposed vendor and communicated to that company the name of the defendant. The two concerns were thus brought together. On this introduction, they made a contract for the sale and purchase of 20,000 tons of ingots. Kennedy had no part in making this contract.

The defendant refused to compensate the plaintiff for his service in bringing the contracting parties together; whereupon the plaintiff brought this action. The trial court entered a compulsory non-suit, without opinion; and the plaintiff sued out this writ of error.

The question in the case is, whether there was a contract between the plaintiff and defendant. This question turns, however, on one of two others, first, whether the minds of the acting parties ever met; and, if so, second, whether one of them—the defendant's purchasing agent—acted within either the actual or apparent scope of his authority in making a contract that would bind his principal, where something different from the purchase of materials was involved.

While the question, whether the agent's undertaking in behalf of his principal was within the scope of his authority as agent, was certainly in the case if it appeared that, but for the single question of his authority, the parties had entered into a valid contract, it seems to us, that the principal question—and, indeed, the first question—for decision is, whether there was in fact a contract between the parties, test-

ed by the meeting of their minds. We think a decision on this question will dispense with the consideration of the other.

At the argument, counsel for the plaintiff regarded the question of the existence of a contract in two aspects: First, that there was a contract and that the court should have so found; and second, if the court entertained a doubt as to the existence of a contract, that doubt should have been submitted to the jury as a question of fact and should have been left with them to be solved.

[2, 3] We are not unmindful of the general rule, that where the terms of an oral contract are established without conflict of evidence, its interpretation, as in the case of written contracts, is a question of law for the court; and also, where the evidence as to the terms of an oral contract is conflicting, or the meaning doubtful, because of the ambiguous nature of words used or because of obscure references to unexplained circumstances, the jury are allowed—in fact, are required—under proper instructions, to ascertain the intention of the parties and determine what was the contract. Cases cited in 6 R. C. L. § 249; 9 Cyc. 592. But here we are not concerned with conflicting terms of a contract or with a doubtful meaning arising from ambiguity of terms or obscurity of references; we are concerned with the question whether there was a contract at all, as shown by the plaintiff's testimony alone, and, whether, accordingly, there was any evidence on which either the court or the jury could have found a contract such as is contemplated by the law in the meeting of minds of the parties. If the evidence was such as would not have sustained a finding by the jury that there was a contract, then, very certainly, the trial court committed no error in declining to submit to the jury the question whether there was a contract. We must inquire, therefore, whether the evidence is such, that, had it been submitted to the jury, it would have sustained a finding by the jury that a contract had in fact been entered into by the parties.

[4, 5] What is the evidence? It is clear that Kennedy expected compensation for bringing the vendor and vendee "in touch," and that Lynch, the defendant's purchasing agent, also expected Kennedy to be compensated for that service. But how and from whom did Kennedy and Lynch agree that the contemplated compensation should be paid? Was it to be included in the price and to be paid by the vendor? The vendor said it was not. Was it to be excluded from the price and to be paid by the vendee? The vendee (the defendant) said it was not. What did Kennedy say? So far as we can find after a careful search of the very brief record, he said nothing. He did not leave it uncertain that he expected compensation; he made it very clear before he revealed the name of the vendor what he expected, but he did not say from whom he expected it, whether from the vendor or the vendee. He left this most material feature of the proposed contract to inference, and it may be as readily inferred that his compensation was to be included in the price and to be paid by the vendor as that it was to be excluded from the price and to be paid by the vendee. This is the substance of the negotiations which Kennedy put in evidence as proof of the contract.

After the sale had been made, Kennedy inquired about his compensation. Even then he seemed uncertain as to which of the parties—whether the vendor or vendee—was to pay for his service in bringing them together. He demanded payment from neither. He went to Lynch, however, and said to him, that he "understood that he (Lynch) had purchased the ingots," and upon being told that he had, he inquired of him: "Did you arrange to take care of me as per our understanding?" Lynch replied that "Mr. Bell (president of the vendor) had agreed to do that." To this statement, Kennedy took no exception and made no comment. Later, when Bell, Lynch and Kennedy were together, Bell denied agreeing to any such thing. Then followed a discussion between Lynch and Bell as to whether Kennedy's compensation was included in the price and to be paid by the vendor—with Kennedy sitting by and remaining silent, so far as the record shows. There followed also a discussion between Lynch and Kennedy concerning the ethics of Kennedy demanding payment from the defendant in view of his business relations with the vendor.

At these discussions, it does not appear that Kennedy asserted a claim that the defendant had promised to pay him nor does it appear that he then demanded payment from the defendant. Kennedy's demand and the defendant's refusal followed later.

We thus have a situation, disclosed by the plaintiff's own testimony, in which the vendor said that Kennedy's compensation was not included in the selling price and therefore it was not liable for its payment; the vendee said that the compensation was included in the price and therefore it was not due from the defendant; and Kennedy himself said nothing. Instead of showing an understanding between the parties, even assuming that the purchasing agent of the defendant was acting with full authority from his principal, the evidence shows a misunderstanding between them, and, therefore, fails to show a meeting of their minds on a most material part of the proposed contract. Utley v. Donaldson, 94 U. S. 29, 24 L. Ed. 54; First National Bank v. Hall, 101 U. S. 43, 25 L. Ed. 822; La Compania Bilbaina de Navegacion de Bilbao, App. v. Spanish American Light & Power Co., Consolidated, 146 U. S. 483, 13 Sup. Ct. 143, 36 L. Ed. 1054.

The service that Kennedy rendered, though requiring little effort on his part, was not inconsiderable when considered with reference to war conditions under which the concern that wanted steel was brought in touch with the concern that had steel for ready sale. This service was undoubtedly a valid consideration for a promise to pay for it. But Kennedy fell between the vendor and vendee in failing to get such a promise from either one or the other. While the defendant doubtless profited by Kennedy's service (as also did the vendor), this suit was brought not in indebitatus assumpsit, but on the defendant's express promise to pay. In the absence of evidence of such a promise, no finding by the jury that the defendant had made such a promise, if the case had been submitted, could have been sustained.

The question of the authority of the defendant's purchasing agent to make a contract of the kind here declared on ceases to be an issue

in the case when no such contract is found to have been entered into. Being of opinion that the non-suit was properly entered, we direct that

The judgment below be affirmed.

TJOSEVIG et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

No. 3167.

1. CONTEMPT ⟹2—ACTS CONSTITUTING CONTEMPT OF COURT—AFFIDAVITS FOR CHANGE OF VENUE.

The filing of an affidavit for change of venue or change of judge on the ground of bias or prejudice of the presiding judge, even where there is no statute authorizing change of venue, is not in itself a contempt of court, if done in good faith and in a proper manner.

2. CONTEMPT ⟹66(7)—REVIEW—JUDGMENT FOR CONTEMPT.

The Circuit Court of Appeals in a contempt case is limited to a review of matters of law, and cannot disturb a finding on the facts, if supported by any competent evidence.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

Proceeding for criminal contempt against Christian Tjosevig and Martin J. Lund. Judgment of conviction, and defendants bring error. Reversed.

The plaintiffs in error, Tjosevig and Lund, were respectively client and attorney in an equitable suit pending at Juneau, in the District Court of Alaska. The client signed, and the attorney filed in court, an affidavit in which the following was stated: "That affiant is informed and verily believes that the plaintiff, T. J. Donohoe, is the national committeeman for the Democratic party for the territory of Alaska; that as such he controls the appointment of judges, or to a great extent influences all appointment and confirmation of judges; that he is a personal friend of the honorable judge of this court before whom this cause is pending; that such friendship is very intimate and of long standing, and that affiant is informed and verily believes that, prior to the appointment of the honorable judge of this district to the judgeship, said plaintiff spent his time in Washington City, at great personal expense and loss of time to himself, urging upon the President and Senate the appointment and confirmation of the honorable judge of this district; that affiant is informed and verily believes that the said plaintiff, by reason of such friendship and such political services rendered by the said plaintiff, Donohoe, for and on behalf of this honorable judge, claims and intends to thereby influence the decision of the court in this case in his favor; that affiant in no way intends to reflect upon the honor or integrity of the honorable judge of this district, but owing to the circumstances above set forth he feels that he is at a disadvantage in submitting the issues of facts in this case to the decision of said honorable judge, and therefore asks that the issues of facts be submitted to the determination of the jury, and in event that that is denied affiant asks and demands that some other judge be called in to hear and determine said *costs*." With the affidavit a motion was presented that the issues of fact in the suit be submitted to a jury, or that the cause be transferred to some other judge for trial, or that some outside judge be called in to try the same. Thereupon the court ordered plaintiffs in error to appear and show cause why they and each of them should not be adjudged guilty of contempt of court in making, filing, and presenting said affidavit. It was

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⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 12, 1919.

charged in the order, and upon the hearing it was found, that the affidavit was intended to obstruct and embarrass the administration of justice in said cause, and to scandalize and degrade the court; that it was not filed in good faith, but was for the purpose of intimidating and influencing the court; and that the filing of the same constituted contempt of court. The plaintiffs in error were each adjudged guilty of contempt of court, and fined each in the sum of $100 and costs.

John Rustgard, of Juneau, Alaska, for plaintiffs in error.

James A. Smiser, U. S. Atty., and John J. Reagan, Asst. U. S. Atty., both of Juneau, Alaska.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] The defendant in error contends that the filing of an affidavit in the district of Alaska, alleging prejudice or bias of a judge of the district, of itself constitutes contempt of court, and cites In re Jones, 103 Cal. 397, 37 Pac. 385, and Johnson v. State, 87 Ark. 45, 112 S. W. 143, 18 L. R. A. (N. S.) 619, 15 Ann. Cas. 531, in which it was held that an affidavit filed for the purpose of disqualifying a judge on account of alleged prejudice or bias, or for the purpose of changing venue, is contempt of court, in the absence of a statute rendering such prejudice or bias ground for such a motion. Upon principle, and upon a careful consideration of the few adjudicated cases concerning the question, we think that the reasonable view is as it is expressed in 6 R. C. L. 494:

"An attorney may in a proper case, in a respectful manner, as, for example, on an application for change of venue, allege that the judge is prejudiced against his client, and unless the act is done with reckless disregard of truth, or with the express intention to reflect upon the honor and integrity of the judge, it is not a contempt."

There is no statute of Alaska authorizing change of venue on the ground of the prejudice or bias of a judge. On March 3, 1911 (Judicial Code [36 Stat. 1090, c. 231] § 21 [Comp. St. § 988]), Congress made provision that upon a showing by affidavit that the judge before whom an action or proceeding is to be tried has a personal bias or prejudice against a party or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated to hear such matter. That statute is by its terms made applicable only to the District Courts of the United States, and it does not extend to a territorial court. But it is important to be considered here as embodying the deliberate expression of the mind of Congress that such a step is proper in judicial procedure. To hold that the filing of an affidavit for change of venue or change of judge on the ground of prejudice and bias is proper and permissible in all jurisdictions where by statute such prejudice or bias is recognized as ground for disqualification, but that in other jurisdictions it is per se contempt of court, involves a process of reasoning which we are unable to follow.

We think the true rule is stated in Le Hane v. State, 48 Neb. 105, 66 N. W. 1017, where, notwithstanding, as the court said, there was no express provision of the law of Nebraska whereby a judge was disqualified from sitting in a case because of bias or prejudice with regard to one of the parties, it was held that it is the right of a party and of his counsel to apply to the judge before whom a case is pending for the purpose of having another judge try the case because of prejudice of the first judge which would prevent an impartial trial, and that the presenting of such an application in respectful language and in a respectful manner is not of itself contempt of court. In the present case it is not alleged or shown that there was anything improper or disrespectful in the manner in which the application was made.

It remains to be considered whether the circumstances attending the filing of the affidavit and the evidence adduced as to the intention of the accused are such as to justify the judgment. There was no formal charge of contempt. The charge recited in the order to show cause is that the motion and affidavit contain defamatory and scandalous matter, reflecting upon the integrity and judicial fitness and fairness of the judge, and that it was intended to intimidate the judge of the court, and was calculated and intended to obstruct and embarrass the court in the administration of law and justice. It is not charged that the affidavit contained matter that was false. The plaintiffs in their answer alleged that the motion and affidavit were made in good faith and upon the honest belief that they were necessary for the protection of the rights of the defendants in the action. Each of the plaintiffs in error was examined before the court as to the circumstances under which the affidavit was made and filed, and their purpose in filing it, and both disclaimed any ulterior or improper motive in so doing. The court found, not only that the matters set up in the affidavit were defamatory and scandalous, but that they were false, and were intended to obstruct and embarrass the administration of justice, and that the filing and presentation thereof were not in good faith, but were done for the purpose of intimidating the court, and influencing it, through fear of possible criticism and the charge of partiality. There was no evidence that the actual intent with which the affidavit was presented was other than that which the plaintiffs in error declared it to be. The judge asked the plaintiff in error Lund:

"Q. Has it ever occurred to you that there are some students of human nature who think the way to intimidate a judge and get rulings in their favor is to play upon the supposed timidity of the judge—to let the judge know that this is a case between one of his friends and somebody that he does not know, and that, if the judge does not decide the case in favor of the person he does not know, that the lawyer or the community will hold him up as partial to his friends, and therefore, in order not to be partial to his friends, or to have that insinuation, he will do an injustice to his friends—you know there are such lawyers, don't you? A. There may be—there may be, but I am not one of them. I do not practice law that way. All that was in my mind, I wanted to guard against the unconscious influence that your friendship with Donohoe might have upon you; that is all I had in my mind. I did not come up here to interfere in any way. I am strictly here attending to my own business, and if I have gone too far here it was entirely unintentional on my part."

[2] This is a case of criminal contempt, and in such a case it is the rule that the trial court must be convinced of the guilt of the accused beyond a reasonable doubt. But in this court on review the finding of the court below will not be disturbed in a case where there is any competent evidence to support it, since the power of this court in contempt cases is limited to a review of questions of law. Bessette v. W. B. Conkey Co., 194 U. S. 324, 328, 24 Sup. Ct. 665, 48 L. Ed. 630. If there is anything in the record which tends to support a finding of improper intent, it is the fact that the allegation in the affidavit that Donohoe "by reason of such friendship and such political services * * * for and on behalf of this honorable judge claims and intends to thereby influence the decision of the court in this case in his favor" is unsupported by any evidence that Donohoe had made such a claim or had expressed such an intention. While the writer of this opinion is inclined to the view that this absence of evidence of Donohoe's actual claim or intention is sufficient to sustain a finding that the affidavit was contemptuous, for the reason that the natural effect of such a charge might be to prejudice the judge against Donohoe, the other party to the suit, who was alleged to claim and intend to influence the judge in his favor as the reward of friendship and political services, and thus obstruct the administration of justice in the case so pending, the majority of the court think otherwise, and are of the opinion that that portion of the affidavit was but the expression of the apprehension and suspicion in the mind of the affiant, because of information which he said had been carried to him, and which he detailed, and that the honesty of the affiant is shown by his further statement that he disavows any intention to reflect upon the honor or integrity of the judge, but "owing to the circumstances above set forth he feels that he is at a disadvantage in submitting the issues of fact in this case to the decision of said honorable judge," and that the embarrassment which he felt was only such as most laymen would feel under similar circumstances.

The judgment is reversed.

CENTRAL STAMPING CO. v. McKEON et al.

(Circuit Court of Appeals, Third Circuit. January 14, 1919. On Petition for Rehearing, January 31, 1919.)

No. 2419.

1. MASTER AND SERVANT ⟸332(4)—AUTHORITY OF AGENT—JURY QUESTION.

In an action by boy hurt while alighting from one of defendant's wagons, on which he was riding at the invitation of driver, where the case was tried and submitted on theory that defendant's stableman acquiesced in the driver's unauthorized invitation, *held*, under the evidence, that the question of stableman's authority to bind defendant should have been submitted to the jury.

On Petition for Rehearing.

2. COURTS ⟸405(17)—CIRCUIT COURT OF APPEALS—ASSIGNMENT OF ERROR—NECESSITY.

In an action by a boy, hurt while alighting from one of defendant's wagons, on which he was riding at the invitation of the driver, where it

appeared at the argument that the crux of the case was the authority of defendant's stableman to ratify the driver's unauthorized invitation, and the record and supplemental briefs, filed at the request of the appellate court, showed that the question of the stableman's authority had not been submitted to the jury, the omission constituted error, which, though not assigned, might be considered, under court rule 11 (224 Fed. vii, 137 C. C. A. vii).

In Error to the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Action by Matthew J. McKeon, by Patrick McKeon, his next friend, and Patrick McKeon against the Central Stamping Company. There was a judgment for plaintiffs, and defendant brings error. Reversed, and new venire awarded.

Samuel Kalisch, Jr., and Kalisch & Kalisch, all of Newark, N. J. (Isador Kalisch, of Newark, N. J., on the brief), for plaintiff in error.

John W. Palmer, of Newark, N. J. (Frank Bergen, of Newark, N. J., of counsel), for defendants in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The defendant corporation (plaintiff in error) used in its business a number of wagons for the delivery of wares. Brady, one of the defendant's drivers, asked McKeon, a boy of tender years, to ride with him and help him make deliveries. The wagon was drawn by a pair of horses that had long been known, it is alleged, to have vicious propensities. Brady drove with the boy into the defendant's stableyard, there had conversation with Clarke, the stable foreman, who saw or could have seen the boy on the wagon, and then proceeded on his delivery route. A box having fallen from the wagon, Brady alighted to adjust the tailboard and ordered the boy to get off and get the box. As the boy was descending, the horses jumped and started to run, thereby throwing him under the wheels and causing injuries that made necessary the amputation of his leg.

This action was brought by the next friend of the boy to recover damages for the injuries the boy had sustained and by the father for the loss of the boy's services. The action is based on negligence charged to the defendant for violating a duty of reasonable care, which, it is alleged, the defendant owed the boy. The verdict was for the plaintiffs and the defendant sued out this writ of error.

There was evidence of a custom or practice pursued through many years by the defendant's drivers (in which, it is alleged, the defendant acquiesced for its own profit) of picking up boys to help them make deliveries without payment or reward other than the boyish pleasure of riding. But the case was tried mainly on questions involving, first, the negligence of the driver in inviting an irresponsible boy to ride behind unruly horses and in failing to give him a proper measure of care when the driver alighted from the wagon and left the horses unhitched and unguarded; and, second, the defendant's duty to the boy and its liability to him for the consequences of its driver's negligence, according as the driver's unauthorized invitation was ratified or

acquiesced in by the defendant's stable foreman under authority to bind the defendant.

[1] The jury having found that the boy's injuries were occasioned by Brady's negligence, we are here concerned only with the question of the defendant's liability for its driver's negligence. This question centers on Clarke, the stable foreman, and, we think, on his authority to acquiesce in Brady's invitation to the boy, for manifestly the defendant is not liable to the boy for what happened following Brady's admittedly unauthorized invitation, unless his unauthorized invitation had been ratified or acquiesced in by someone in the defendant corporation having authority to bind it.

In disposing of the defendant's motion for a directed verdict and the plaintiff's prayers for instructions, before charging the jury, the learned trial judge discussed the law. He drew the distinction—very correctly, we think—between cases where employers are charged with a duty of exercising reasonable care toward children invited by their employés without authority upon instrumentalities of recognized danger, such as railroad engines, trains, trolley cars, and where consequently employers are liable for injuries occasioned by negligence of their servants (Danbeck v. N. J. Traction Co., 57 N. J. Law, 463, 31 Atl. 1038; Solomon v. Railway Co., 87 N. J. Law, 284, 92 Atl. 942, Ann. Cas. 1917C, 356; Wilton v. Middlesex Railway Co., 107 Mass. 108, 9 Am. Rep. 11), and cases involving no such duty and consequently no such liability, as where a child rides on a wagon upon the bare unauthorized invitation of a driver (Kiernan v. N. J. Ice Co., 74 N. J. Law, 175, 63 Atl. 998). Following these cases, the learned trial judge declined to give instructions holding the defendant liable on the theory that Brady's act of inviting the boy to ride was alone and of itself a violation of a duty which the defendant owed the boy. He indicated, however, that he would instruct the jury in his charge that they could find the defendant liable if they found that the defendant had ratified Brady's invitation. No question is very seriously raised by the defendant on this writ as to the correctness of this position, nor is any question raised by us as to the grasp which the trial judge had of the issues of the case and of the law properly applicable to them. This is shown by one statement made in disposing of the motion for a directed verdict, which covers the case in a few words. He said:

"I think that, under all of the circumstances, *it is a question for the jury* to say whether or not the unauthorized invitation of the driver *was acquiesced in* (by Clarke) *so as to have become ratified by the company*, and then if it was, whether or not the subsequent action of the driver was negligent as respects this boy so as to make the company liable for the painful injuries which he has received. *If the unauthorized action of the driver was never ratified by the company*, then the boy was a trespasser, or at the very best, a mere licensee, to whom, under the rules of law prevailing in this state, the company owed no other duty than that of refraining from acts wilfully injurious. *If, however, he was there at the express or implied invitation of the company*, the latter owed him the duty of exercising reasonable care."

From this very clear statement of the issues and of the law applicable to them, it is plain that the case as tried turned mainly on the defendant's ratification of Brady's unauthorized invitation. Its ratifi-

cation, if made at all, was made through Clarke, the stable foreman, and, therefore, depended, first, upon the act of Clarke in acquiescing, and second, upon Clarke's acquiescence being within the scope of his authority to speak for the defendant in a way that bound it. What was the scope of Clarke's authority? This was a question of fact, which, in the state of the evidence, could be determined only by the jury. But when the learned trial judge came to charge the jury, he failed—inadvertently, we think—to submit the question, which, in his previous discussion of the law, he had recognized was for the jury. This question, stated broadly, is, whether acquiescence by Clarke in Brady's invitation was within the scope of Clarke's authority, and, whether, accordingly, the defendant had, by Clarke's acquiescence, ratified Brady's unauthorized invitation and had become liable for its consequences.

The judge submitted only the question, whether Clarke did in fact acquiesce. The jury were instructed that the test of this question was what Clarke did or failed to do, and were told that if they found that Clarke did not see the boy on the wagon, then no duty devolved upon the defendant and no liability ensued; but, if, on the contrary, they found that he saw the boy on the wagon and did not make him get off, then there arose in the defendant a duty of reasonable care to the boy, for violation of which by Brady the defendant was liable. We feel that in failing to submit to the jury the question of the scope of Clarke's authority to acquiesce in Brady's unauthorized invitation, the learned trial judge fell into error. This, we think, was a question for the jury. Acquiescence by Clarke in a way that bound his employer depended upon the scope of Clarke's employment. Without first determining the scope of his employment, it is quite impossible to determine his ability to acquiesce in a way that legally bound his employer.

It appears in the testimony that the defendant had instructed Clarke to order boys off the wagons. In imposing this duty upon Clarke, the plaintiff argues, the defendant clothed him with control over wagons and their occupants with full authority to speak and act for it, and therefore it conferred upon him authority to acquiesce in Brady's invitation in a way that made the defendant liable for Brady's negligence. But Clarke's authority to acquiesce and thereby bind the defendant cannot be gathered alone from the defendant's act of imposing upon him a duty to warn boys off wagons; it must be gathered from evidence of Clarke's position in representing the corporation as foreman and as being the corporation at that place, in the sense of being the official or employé through whom the corporation there spoke and acted. But much of the plaintiff's testimony as to Clarke's authority was controverted by testimony for the defendant, by which it intended to show that Clarke was a mere stableman without authority over anything but the teams. In this state of the testimony, we think the scope of Clarke's authority to bind the defendant was a question which the defendant had a right to have submitted and determined by a jury. Because the question was not submitted, and on this ground alone, we direct that the

Judgment below be reversed and a new venire be awarded.

On Petition for Rehearing.

PER CURIAM. [2] By their petition for rehearing, the plaintiffs complain that this court disposed of the writ of error and reversed the judgment in this case on a matter not raised by assignment of error based on any exception in the record. No other error is charged.

It appeared at the argument that the crux of the case was Clarke's authority to ratify the unauthorized act of the defendant's servant and thereby make the defendant liable for his negligence.

Though plainly appearing in the record, this question was not raised by assignment of error, nor was it discussed in the briefs. We therefore asked for supplemental briefs on this one question. The briefs, when filed, as well as the record, when read, disclosed very certainly that this matter had not been submitted to the jury. This omission we thought constituted error, which, though not assigned, we noticed under rule 11 of this court (224 Fed. vii, 137 C. C. A. vii). P. & R. Ry. Co. v. Marland, 239 Fed. 1, 152 C. C. A. 51.

The petition is dismissed.

WASHINGTON & C. RY. CO. v. MOBILE & O. R. CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1919.)

No. 3230.

1. CARRIERS ⊂=202—INTERSTATE COMMERCE—DIVIDING EARNINGS—ILLEGAL TRANSACTION—RECOVERY.

Where plaintiff and defendant had a joint tariff providing a through rate on lumber shipments, but there was no provision for remilling at the point of junction, and defendant, on shipments remilled, collected the local rate to the junction point, plaintiff, though it paid defendant a portion of the through rate, may recover the same, regardless of knowledge of the true facts; the transaction violating the Interstate Commerce Act (Comp. St. § 8563 et seq.), and the rule that the courts will refuse redress to joint violaters of the law having no application.

2. CARRIERS ⊂=29—REGULATIONS—DIVIDING EARNINGS—"PUBLIC CORPORATION."

A railroad company is a "public corporation" charged with public duties, and in view of the rate-making powers of the state such a company cannot make voluntary payments to another railroad company out of rates which it has collected and is entitled to.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Corporation.]

3. CARRIERS ⊂=29—INTERSTATE COMMERCE—DIVIDING EARNINGS.

Where defendant railroad company was not entitled to any part of the rates received by plaintiff, the shipment not being one falling within a joint through rate, *held*, that plaintiff could not make voluntary payments to defendant, for that would defeat the purpose of the Interstate Commerce Act (Comp. St. § 8563 et seq.).

4. EVIDENCE ⊂=208(7)—JUDICIAL ADMISSIONS—DEMURRERS.

Though a demurrer to a plea is sustained, an admission of fact therein may be considered.

5. APPEAL AND ERROR ⊂=1051(3)—REVIEW—HARMLESS ERROR.

Where defendants own plea admitted the facts shown by evidence, the admission of such evidence, though erroneous, was harmless.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

6. CARRIERS ⟸202—CHARGES—CONNECTING CARRIERS—OVERPAYMENT—RECOVERY.
Where plaintiff sued to recover from defendant amounts paid to defendant as its share of joint through rates, and it appeared that plaintiff was not entitled to recover on all of the cars on which such rates were paid, plaintiff was bound to establish its case by showing the shipments and cars on which it was entitled to recover.

7. APPEAL AND ERROR ⟸1175(1)—REVIEW—HARMLESS ERROR.
Where a judgment for plaintiff was for too large an amount, and the record did not contain evidence from which the error might be corrected, the case must be remanded.

In Error to the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Action by the Mobile & Ohio Railroad Company against the Washington & Choctaw Railway Company. There was a judgment for plaintiff (242 Fed. 531), and defendant brings error. Reversed and remanded.

Harry T. Smith and Wm. G. Caffey, both of Mobile, Ala., for plaintiff in error.

S. R. Prince, of Mobile, Ala., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

BATTS, Circuit Judge. The Washington & Choctaw Railway Company has a point of junction with the Mobile & Ohio Railroad Company at Yellow Pine, Ala. Both railroads are common carriers, under the jurisdiction of the Interstate Commerce Commission. Joint tariffs were published, covering shipments originating on the Washington & Choctaw and transported over the line of the Mobile & Ohio. The latter company instituted suit against the former for sums paid upon statements of the defendant of amounts claimed as due as its division of the through rate from points on its line. It was alleged and proved that the course of business was for the Washington & Choctaw to transport lumber from points on its line to Yellow Pine, where it was remilled or redressed, and that thereafter further shipment was made on through bills of lading from the original shipping point. The contention is made that these were not through shipments, but that the initial shipment was concluded at Yellow Pine, and that another shipment was begun at that place over the Mobile & Ohio. It is alleged and proved that the Washington & Choctaw collected a local rate from the shipper to Yellow Pine.

The circumstance that the Choctaw received its local rate, and thereafter received a part of the through rate from the Mobile & Ohio, cannot affect the case. The Choctaw is not, of course, entitled to both a local rate and a division of the through rate. But this case is concerned alone with the right of the Mobile & Ohio to recover that part of the rate improperly collected from it by the Washington & Choctaw.

[1] The defense is made that the Washington & Choctaw and Mobile & Ohio were joint violators of the law, and it is contended that the

courts will refuse redress when either of the parties to an illegal transaction appeals to the courts. The Mobile & Ohio claims that it was without knowledge of the fact that these were not through shipments; but it insists that, even if it had known of the facts which make the transaction illegal, it would, nevertheless, be entitled to recover.

The general rule with reference to recovery by one person against another in a transaction involving illegal acts upon the part of both is well settled. No general rule of this kind can apply to a case in which the rights of the parties are governed by the unequivocal terms of the law. It is a part of the duty of the Mobile & Ohio Railroad to collect from all shippers and from all railroads all that is due to it under any tariff under which it is operating. If it should collect less than it is entitled to, or pay out too much on a joint rate, it is under obligations to collect the balance, or the amount erroneously paid, as definitely as it is under obligations to return any excess charged, or any amount improperly retained.

The method used by the Washington & Choctaw was clearly in violation of the law. Its illegality was not dependent upon the fact that it secured a double rate. No tariff promulgated by it, or by it and connecting lines, provided for stoppage of the lumber in transit for remilling or redressing. It had the right to collect a legal rate from points on its road to Yellow Pine. As to shipments originating at Yellow Pine on the Mobile & Ohio, it had no rights of any sort, and was not entitled to any part of any rate received by the Mobile & Ohio. If by deceit or misstatements, or by any understanding with the Mobile & Ohio, or otherwise, it secured a part of the rate to which the latter was exclusively entitled, it violated the law, and was under obligations to return to the Mobile & Ohio that which it had unlawfully received.

If the Mobile & Ohio and the Washington & Choctaw both had cognizance of the fact that shipments were being made and divisions being effected under a tariff not promulgated in accordance with law, or not promulgated at all, both concerns became liable for violation of the Interstate Commerce Act (Comp. St. § 8563 et seq.); and it would be the duty of both to see to the restoration of that which had been unlawfully exacted or paid.

[2, 3] Defendants make the proposition that, after having received money in payment of a freight charge, the Mobile & Ohio had the right to do with it as it pleased, and the right to give it to the Washington & Choctaw, if it so desired. This proposition cannot receive the sanction of the courts. It is a mistake to assume that the railroad companies may do as they please with that which they receive. They are public corporations, charged with public duties, and those duties cannot be performed without a proper conservation and administration of their revenues. The rate-making bodies of the country must see to it that reasonable rates are fixed, with the view of enabling the companies to perform their public duties. The proper fixing of rates is inconsistent with an unrestrained right upon the part of the railroad companies to donate or otherwise dispose of their funds, except for the purposes and in the manner contemplated by the laws. Even

if this general proposition could be controverted, there could be no question about the duty of railroad companies to conform their interstate transactions to the terms of the Interstate Commerce Act. Tariffs and divisions would be rendered nugatory, if the interested companies could, by repayments and readjustments of accounts, bring about any result they might desire as between themselves and connecting lines, or between themselves and shippers.

It is the right and the duty of railroad companies which have improperly paid out money to connecting lines under a mistake of fact, or with knowledge of the unlawful character of payment, to recover such payments. The conclusions reached, and so well stated, by the trial judge, are concurred in entirely.

[4, 5] The defendants in this case insist that the allegations of the petition have not been established by competent evidence. The court permitted records of the Mobile & Ohio Railroad Company, not shown to have been made by any person directly familiar with the facts, to be admitted in evidence against the defendants. It is not necessary in this case to determine whether the business of the country is to be hampered and the efficiency of the courts destroyed by appeals to archaic rules of evidence; for, even if the evidence was technically inadmissible, the defendant could not have been harmed by the action of the court in permitting its introduction to prove facts which have been formally admitted by the defendant in its pleadings or established as against it by statements furnished by it to the plaintiff. A plea of defendant contained the averment that the plaintiff "voluntarily paid the defendant the amount which it is now seeking to recover." Though a demurrer to the plea was sustained, cognizance could be taken of an admission which it contained. The most that could be said against the admission of the evidence is that it was improperly admitted to prove facts, the truth of which the record shows was not disputed.

[6, 7] There is, however, deficiency in the evidence in one respect. The testimony indicates that payment was made on a small number of cars that were, in fact, through shipments from points on the Washington & Choctaw other than Yellow Pine. As to these cars the payments were properly made. While it is assumed from the testimony that the number of such cars was very limited, yet this fact does not relieve the plaintiff from establishing its case by distinguishing these from the other cars. It is apparent that it has recovered judgment for an amount somewhat in excess of that for which judgment should have been given. The record does not furnish sufficient evidence for reformation of the judgment, and it will have to be reversed for further evidence upon this issue.

Reversed.

APGAR v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1919. Rehearing Denied March 15, 1919.)

No. 3204.

1. CRIMINAL LAW ⊂⊃1144(2)—APPEAL.
Where plea in abatement to indictment did not show that the district judge appointing the jury commissioner was without the district at the time he entered the order and the record did not show that fact, the overruling of the plea cannot be held erroneous on writ of error.

2. JURY ⊂⊃79(1)—DRAWING OF JURORS—RULE IN UNITED STATES COURT—TRIAL OF CRIMINAL CASE.
In the absence of a rule and order governing the drawing of jurors for the trial of cases in the federal courts, that matter is in control of those courts, subject only to the restrictions Congress has prescribed and to such limitations as are recognized by the settled principles of criminal law.

3. JURY ⊂⊃82(2)—PETIT JURY—PANEL.
Though district judge who was designated to hold court in an adjoining district entered an order while without the district directing that the panel of petit jurors be drawn, *held* that, as the Judicial Code does not make such an order a prerequisite to the validity of a drawing of the names of those to be summoned to serve as petit jurors, the action of the jury commissioner in following the order amounted to no more than the drawing of jurors without an order, which irregularity the District Court could waive.

4. JURY ⊂⊃79(1)—PETIT JURY—DRAWING.
Where a district judge was designated to hold court in an adjacent district with the powers provided for by Judicial Code, § 14 (Comp. St. § 981), *held*, under section 19 (section 986), and in view of section 17 (section 984), that an order entered by such judge, while without the second district directing the drawing of petit jurors, was valid, for the order was one which could be made by the judge while in chambers, and it is not necessary that it be made within the territorial limits of the district wherein it was to be effective, as the judge's chambers are considered to be where he is and authorized to be engaged in performing his judicial duties.

5. BANKS AND BANKING ⊂⊃257(3)—NATIONAL BANKS—OFFENSES.
In a prosecution under Rev. St. § 5209 (Comp. St. § 9772), where it was charged that defendant, while acting as the cashier of a national banking association, willfully misapplied its moneys, funds, or credits, and such misapplications were effected by the payment of checks drawn on the bank by persons having no money or funds to their credit who were insolvent and financially unable to pay the sums, evidence that defendant, while acting as cashier, obtained money from the bank by discounting a note which he knew to be a forgery, is admissible to show intent.

6. CRIMINAL LAW ⊂⊃1172(8)—REVIEW—HARMLESS ERROR.
Where defendant was convicted on many counts, and sentenced to a penitentiary term of five years on each count, the terms to be served concurrently, an error in the charge, affecting the conviction as to only one count is harmless and no ground for reversal.

7. CRIMINAL LAW ⊂⊃829(1)—TRIAL—INSTRUCTIONS.
The refusal of requested charges fairly covered by the charge given is not error.

In Error to the District Court of the United States for the Western District of Louisiana; Rufus E. Foster, Judge.

Harvey D. Apgar was convicted of violation of Rev. St. § 5209 (Comp. St. § 9772), in that while acting as cashier of a national banking

association he willfully misapplied moneys, etc., and he brings error. Affirmed.

John C. Theus, of Monroe, La., and J. M. Foster, Frank J. Looney, and W. A. Wilkinson, all of Shreveport, La., for plaintiff in error.

Joseph Moore, U. S. Atty., and J. H. Jackson, Asst. U. S. Atty., both of Shreveport, La.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. On the 21st day of March, 1917, the Senior Circuit Judge of the Fifth judicial circuit designated "the Honorable Rufus E. Foster, Judge of the Eastern District of Louisiana, to hold the District Court in the Western District of Louisiana in the place and in aid of the judge thereof, and therein to have the powers provided in section 14 of the Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1089 (Comp. St. § 981)]." The indictment against the plaintiff in error (who will be referred to as the defendant) was filed in the Monroe division of the Western district of Louisiana on May 31, 1917. On the 1st day of October, 1917, the defendant filed a plea in abatement to the indictment and a challenge to the array of the panel of petit jurors drawn and served for the October, 1917, term of court at Monroe; both of which were overruled.

[1] The ground relied on in argument against the correctness of the court's action in overruling the plea in abatement is that the indictment was subject to be abated because an order made by Judge Foster on May 14, 1917, appointing George G. Weaks jury commissioner for the Western district of Louisiana, Monroe division, was illegal and invalid for the reason that Judge Foster, at the time the order was made, was absent from the Western district of Louisiana. The ground mentioned was not stated in the plea in abatement. Furthermore, the record does not show that it was proved or admitted that Judge Foster was absent from the Western district of Louisiana when he made the order appointing the jury commissioner. There is a recital in the bill of exceptions of the admission of the truth of the allegations of specified filed pleas and motions. The record does not contain any filed plea or motion which alleges that Judge Foster was absent from the Western district of Louisiana when he made the order in question. Assuming, without conceding, that the indictment was subject to be abated or quashed on the ground mentioned, in the absence of proof or admission of the existence of such ground, it cannot be held that the court erred in refusing to abate or quash the indictment on that ground.

[2, 3] The ground stated in the above-mentioned challenge or motion to quash the panel of petit jurors was the following:

"That the order of the Honorable Rufus E. Foster, District Judge of the Eastern District of Louisiana, directing that said panel of petit jurors be drawn, is illegal and invalid for the reason that the said Honorable Rufus E. Foster, judge as aforesaid, gave and executed said order while without the jurisdiction of the Western District of Louisiana and while within and discharging the duties and functions of United States District Judge for the Eastern District of Louisiana."

The truth of this allegation was admitted. The record made up for this court does not contain the order referred to. The attack on the panel is based on the circumstance that Judge Foster was in the district of which he is the judge when he made the order directing the drawing of the panel. A statute prescribes how grand and petit jurors shall be drawn. Judicial Code, § 276 (Comp. St. § 1253). Another statute forbids the summoning of a grand jury to attend any district court unless the issue of a venire therefor is ordered by the judge. Judicial Code, § 284 (Comp. St. § 1261). There is no statute making such an order a prerequisite to the validity of a drawing of the names of those to be summoned to serve as petit jurors. The panel of petit jurors here in question was drawn for a regular term of the Monroe division of the court. If such action by the jury commission is taken without having been ordered, it may be subject to be disapproved by the judge or the court; but, in the absence of any law requiring an order for the drawing of petit jurors, such drawing may be sanctioned as well after as before it occurred. It is enough that the court acquiesced in the drawing of petit jurors for the term, whether a valid order was or was not made before the drawing occurred. Breese v. United States, 203 Fed. 824, 828, 122 C. C. A. 142. In the absence of a rule or order governing the drawing of jurors for the trial of cases in the courts of the United States, that matter is in the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses. Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

[4] We are not to be understood as concurring in the contention that the order in question was invalid because it was made by Judge Foster "while within and discharging the duties and functions of United States District Judge for the Eastern District of Louisiana." An effect of the order designating him "to hold the District Court in the Western District of Louisiana in the place and in aid of the judge thereof, and therein to have the powers provided in section 14 of the Judicial Code," was to add to the territory in which he was required to exercise the functions of a District Judge. Judicial Code, § 19 (Comp. St. § 986). So long as he was in either the Eastern or the Western district of Louisiana, while the order of designation was effective, he was within the territorial limits in which he was authorized and required to perform judicial duties. Where the order is one which may be made at the chambers of the judge, it is not necessary that it be made within the territorial limits of the district in which the order is to be effective, if it is made where the judge at the time is performing the duties of his office, as the judge's chambers are considered to be where he is, and authorized to be, engaged in performing his judicial duties. Ex parte Hollon Parker, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123; Horn v. Pere Marquette R. Co. (C. C.) 151 Fed. 626; Ex parte Harlan (C. C.) 180 Fed. 119. Nothing in the languages of sections 14 and 17 of the Judicial Code (Comp. St. § 984) indicates an intention to make the rule just stated inapplicable to cham-

bers orders made by a district judge acting under a designation made in pursuance of the first-mentioned section. The court did not err in overruling the challenge or motion attacking the panel of petit jurors drawn for the term during which the trial occurred.

[5] The counts of the indictment upon which the case went to the jury charged the commission by the defendant of offenses denounced by section 5209 of the Revised Statutes (Comp. St. § 9772), in that, while acting as the cashier of a named national banking association, he willfully misapplied its moneys, funds, or credits, to the use or benefit of himself and others, with intent to injure or defraud the association. The alleged misapplications upon which were based 27 of the 29 counts of the indictment which were submitted to the jury were charged to have been effected by the defendant paying or causing to be paid checks drawn on the bank by parties having no money or funds to their credit therein, and who, when the checks were drawn and paid, were insolvent and financially unable to pay the amounts called for by the checks. Over the defendant's objection, the prosecution was permitted to introduce evidence tending to prove that the defendant, while acting as cashier, obtained money from the bank by discounting a note purporting to be that of a third party, but which was known to the defendant to be a forgery; the transaction to which that evidence referred not being one which was charged in any count of the indictment which was submitted to the jury. The evidence was admissible on the question of the intent which accompanied the alleged misapplications for which the defendant was tried. The existence of an intent on his part to injure or defraud the bank was in issue. The fact that, while acting as cashier, he obtained money from the bank on a note he knew to be forged, had some tendency to prove that when, on other occasions, he obtained the bank's money in the way charged in the indictment, he did so with intent to injure or defraud it. Dorsey v. United States, 101 Fed. 746, 41 C. C. A. 652; s. c., 178 U. S. 613, 20 Sup. Ct. 1030, 44 L. Ed. 1216; Trent v. United States, 228 Fed. 648, 143 C. C. A. 170; Farmer v. United States, 223 Fed. 903, 139 C. C. A. 341. There were other similar rulings on evidence and in instructions given which are sustainable on the ground above indicated.

It is not deemed necessary to say more in regard to other rulings on evidence which are complained of than that none of those rulings involved such error as would justify a reversal of the judgment.

[6] One count of the indictment was based upon the alleged abstraction of a bill of lading which was attached to a draft sent to the bank for collection. Evidence was adduced to the effect that one Brown, a depositor in the bank, verbally agreed that the amount of that item be charged to his account. It was not so charged, and the amount of the draft was not collected by the bank. An exception was reserved to the following part of the court's charge in reference to that transaction:

"Now, the guaranty that Mr. Brown is supposed to have given, in law, amounts to nothing. It was not in writing, and a man cannot be held to pay the debt of a third person unless he agreed to do so in writing. No evi-

dence would be admitted on the stand to prove it up. However, you may consider that circumstance in making up your minds as to whether or not there was any guilty intent on the part of the defendant in this case in that transaction."

It is suggested in argument that the court erred in treating the agreement referred to as one to pay the debt of a third person. If that was an error, it affected the conviction on only one count of the indictment. The verdict of the jury was one finding the defendant guilty as charged in the 29 counts of the indictment submitted to them. The defendant was sentenced to a penitentiary term of five years on each count of the indictment on which he was convicted, the judgment providing that the terms of imprisonment imposed be served concurrently. Such a judgment is not to be reversed because of an error affecting the conviction on only one of the counts, because the result is practically the same as it would have been if there had been no conviction on that count. Frankfurt v. United States, 231 Fed. 903, 146 C. C. A. 99.

[7] The defendant requested a number of written charges, some of which were given and the others refused. The charge given by the court fairly covered the only propositions applicable to the case which are claimed in argument to have been correctly stated in any of the refused charges. A refusal of a requested charge under such circumstances is not a reversible error.

In our opinion, the record does not show the commission of any reversible error.

The judgment is affirmed.

DRUID S. S. CO., Inc., v. ALLAUN.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 96.

1. BROKERS ⇐86(3)—ACTION FOR COMMISSION—EVIDENCE.
Evidence that defendant agreed to pay plaintiff a commission on sale of a vessel by a certain date, and that it refused an offer within the time, but accepted it afterward, falsely stating that it received more, *held* to sustain a finding that its uttered refusal was in bad faith.

2. APPEAL AND ERROR ⇐1039(13)—HARMLESS ERROR—VARIANCE.
Variance between complaint, alleging employment of plaintiff on commission of a certain per cent. on selling price to procure the United States to purchase a vessel before a certain date, and proved contract to pay such per cent. of purchase price for commission and legal advice if the United States purchased the vessel before such date, *held* not prejudicial.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by William E. Allaun against the Druid Steamship Company, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Prior to April 14, 1917, the Druid Company owned the steamship Druid, which it desired to sell and hoped that the United States would purchase. For reasons not clearly appearing in the record, the plaintiff below, Allaun, was employed to bring about this sale. It seems to have been admitted that prior to April 14 he rendered some services in respect to the matter; but, whatever were the earlier agreements in regard thereto, they were superseded by a letter written to Allaun by the Druid Company on said April 14, as follows:

"Dear Sir: It is hereby mutually agreed and understood that this letter cancels all previous agreements between your good self and the Druid Steamship Company. In the event that the steamer Druid is purchased by the United States government before May 31, 1917, and the purchase price is $175,000, your share for commission and legal advice will be $15,000. In the event the purchase price is under $175,000, your share for commission and legal advice will be 8 per cent. of the purchase price."

The rest of the letter is immaterial. It was signed by the president of the defendant below and agreed to in writing by Allaun.

This action was brought by Allaun to recover 8 per cent. of $90,000, at which price the Druid Company did sell the steamer to the United States, but made such sale after May 31st, viz. on or about June 2d.

At trial Allaun testified that not later than April 27 he ascertained that the government would buy the boat and would pay $90,000 and no more, that being her appraised value as declared by a naval board of appraisers; and he communicated this fact to the president of the Druid Company, who refused to take less than $170,000, and continued such refusal, although repeatedly reminded that the smaller sum was the government's figure and would not be departed from, until about May 15th, when said president left New York and could not be found by Allaun until about June 11th, when, meeting him on the street, he informed plaintiff below that he had sold the boat to the government and got $100,000 for it. Thereupon Allaun investigated the matter, found that only $90,000 had been paid, and brought this suit.

The complaint stated the matter under three so-called causes of action:

(1) That plaintiff had been employed to procure the United States to purchase the Druid at a commission of 8 per cent. upon the selling price, such procurement to be effected before May 31, 1917; that he had so procured the government as purchaser at $90,000, "which was acceptable to the" steamship company, wherefore commission was claimed.

(2) Set forth the same state of facts, but alleged that the period to end May 31st had been extended "for a reasonable time * * * and until the steamship company should decide whether to accept said offer."

(3) Again set forth the same state of facts, but alleged that when, before May 31st, defendant below was apprised of the government's offer, it "professed itself dissatisfied therewith," although intending to accept said offer after May 31st, but "professed dissatisfaction and its intention to reject the [offer] for the wrongful and fraudulent purpose of depriving" Allaun of his commission.

Allaun had a verdict, and the steamship company brought this writ.

Duncan & Mount, of New York City (Courtland Palmer, of New York City, of counsel), for plaintiff in error.

Abraham Benedict, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). We do not consider the weight of the evidence. The jury's verdict requires us to accept Allaun's story as above outlined, and that verdict must be upheld, unless some prejudicial error can be shown.

In form this action is, as the complaint conclusively demonstrates, the ordinary suit for the commission ordinarily claimed by a broker who discovers and brings a purchaser to a willing seller; therefore

plaintiff pleaded in usual phrase that he was employed to "procure the government of the United States to purchase the steamship Druid" on or before May 31, 1917.

The contention on this writ rests on an exception to refusal to dismiss the complaint on the merits at the close of the whole case; i. e., defendant below thinks itself entitled to a directed verdict. We think it true that there was no evidence at all to support the second cause of action; i. e., to show any extension of the period to end May 31st. But no specific motion to dismiss that part of the complaint was made, and we decline to consider so technical a point without technical accuracy of procedure.

The first and third causes of action are but different ways of stating the same contention; for, if defendant below uttered words of refusal only as a trick to tide over the contractual period, there must have been a mental and actual acceptance—otherwise, there would have been nothing to conceal by the pretense. Whether there had been this mental acceptance, hidden under a pretense of refusal, in order to deprive Allaun of his commission, was the question very fairly put to the jury in a charge to which no exception was taken. The verdict has negatived any honest change of purpose or new intent to accept between May 31st and June 2d; therefore the sole inquiry for us is whether there was any evidence supporting the jury's conclusion. This inquiry is in two parts: (1) What facts justify the finding? and (2) assuming the facts as contended for by plaintiff below, does the law justify judgment for a broker's commission?

[1] 1. The diligence of counsel has not furnished any reported and similar state of facts. Admittedly mere refusal on the part of a vendor to perfect a sale does not prevent a broker, who has produced a ready, able, and willing vendee, from earning and receiving his commission. Watson v. Brooks (C. C.) 13 Fed. 540, and cases cited. The same case points out that conveyance is no part of a sale, so that a mere refusal to convey on the part of a vendor does not in the least affect the broker's rights. Nor is it necessary, in order to fix the vendor with a broker's commission, that the refusal to perfect the transaction should be either dishonest, arbitrary, or capricious. Home, etc., Co. v. Baum, 85 Conn. 383, 82 Atl. 970.

But a vendor's consent to the offered price is, of course, necessary, and here the only possible termination of Allaun's agency was by efflux of time without such consent. Instances are numerous of attempts to terminate a broker's employment and then to utilize his uncompleted labors. This can be done, but only with good faith on the vendor's part, and the question of bona fides is for the jury. Sibbald v. Bethlehem Iron Co., 83 N. Y. at page 390, 38 Am. Rep. 441.

Whatever difference exists between terminating a broker's agency before success and alleging unsuccess as a reason, but doing so in bad faith, and permitting such agency to expire by lapse of time after complete success on the broker's part by merely refusing a consent which is subsequently accorded direct to the vendors, is plainly not one of substance. We hold in this instance that from the prompt acceptance after May 31st of exactly the standing offer of more than

a month previous, coupled with the falsehood uttered to Allaun regarding the sum accepted, the jury were empowered to find that the uttered refusal was a subterfuge covering an intent ultimately to accept, and such conduct is bad faith.

[2] 2. If the written contract between the parties had evidenced the usual agreement between seller and broker, we should have no doubt; it would then have corresponded with the complaint. The burden would have lain on Allaun to show that he procured the government as a purchaser, and on failure to show such procurement he would have failed in the first duty of plaintiff under such a pleading.

It is entirely clear from the record that Allaun never procured the United States to purchase. The government at the time, just after declaration of war with Germany, was openly and notoriously in the market for all vessels tendered and able to pass naval survey. The defendant below had already tendered its steamer, though at a very high price. We do not know why Allaun was hired. There is no evidence of what preceded the writing of April 14th, and we cannot indulge in suspicion; but certain it is that, after learning of the official valuation of the Druid, Allaun did nothing but tell her owners that they had better take $90,000, because they would get no more. This was not earning a broker's commission in the usual way; and if such variance between allegata and probata injuriously affected defendant below, it was entitled at least to a dismissal, not on the merits.

But the written contract proved is not a broker's hiring, at least of the usual kind; it does not require Allaun to procure a purchaser at all; its condition is single and simple that, if the United States buys, then Allaun is to get a percentage for "commission and legal advice," and the rewards of many agents other than brokers are commonly called commissions. Both parties have maintained silence throughout the case as to the nature of this "legal advice," and we must accept it as a valuable consideration for a lawful contract.

Thus the proposition of plaintiff in error becomes this: That since Allaun alleged something that he never performed, i. e., procurement of the United States as a purchaser, but which on the evidence he was not in the least required to do, therefore he should have had a verdict directed against him. This is much too technical, unless injurious error is shown, and there is no injury on the construction of the contract of April 14th now contended for. This contract (we quote from plaintiff in error's brief)—

"was not a contract to go out and find a purchaser, but to sell the Druid to the United States before May 31st at a purchase price in the neighborhood of $175,000. The plaintiff was hired to get from the government a price acceptable to the defendant, and has failed to prove that he got such a price."

This is a proper interpretation, except as it predicates Allaun's right to recover on a price of about $175,000; no such limitation can be found in the contract words, and no such defense was ever pleaded, nor was any offer of evidence made to vary or explain the seemingly simple and plain words of bargain.

It results that under plaintiff in error's own construction of its admitted contract, the only question for the jury was rightfully put to

that body; and $90,000 has been declared a price "acceptable" to the owner of Druid, in the sense that it was intended to be accepted, and such intention existed before May 31st. It may be said that the argument in support of this writ hinges on the suggestion that "acceptable" means something that one accepts with satisfaction. It often does, but if the Druid Company's officers expected to have Allaun's right depend on their gratification or pleasure at the government's only price for their steamer, the contract should have been drawn differently.

Since, therefore, the too careful language of the complaint worked no injury to plaintiff below, we find no reversible error in the record, and affirm the judgment, with costs.

MUIR v. CHATFIELD, District Judge.

(Circuit Court of Appeals, Second Circuit. December 7, 1918.)

COURTS ⊂=404—CIRCUIT COURTS OF APPEALS—ISSUANCE OF REMEDIAL WRITS.

The power of federal courts to issue writs is statutory, and under Judicial Code, § 262 (Comp. St. § 1239), a Circuit Court of Appeals has power to issue a writ of prohibition or mandamus only when necessary for the exercise of its appellate jurisdiction.

Petition for Writ of Mandamus to the District Court of the United States for the Eastern District of New York.

In the matter of the petition of James Thomson Muir, master of the British Admiralty transport Gleneden, for writs of prohibition and mandamus against Thomas I. Chatfield, United States District Judge for the Eastern District of New York. Petition denied.

Kirlin, Woolsey & Hickox, of New York City (John M. Woolsey, of New York City, and D. M. Tibbetts, of Guthrie, Okl., of counsel), for petitioner.

Butler, Wycoff & Campbell, of New York City (Walter C. Noyes, Homer L. Loomis, and Joseph A. Barrett, all of New York City, of counsel), for respondent.

Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, amici curiæ, for British Embassy.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an original proceeding in this court for a writ of prohibition and a writ of mandamus against the Honorable Thomas Ives Chatfield, Judge of the United States District Court for the Eastern District of New York, on the ground that he has wrongfully refused to release from arrest in a proceeding in rem for collision the British Admiralty transport Gleneden in a libel there pending. We quote from the brief on behalf of the British Embassy in support of the petition, as follows:

"An admiralty suit in rem was brought in the Eastern District of New York by an Italian corporation, owning the Giuseppe Verdi, against the Gleneden, to

recover damages for a collision which occurred in the Mediterranean, and the Gleneden was arrested therein. The Gleneden is a British vessel, belonging to a private owner, but requisitioned by the British government, and in its service as an Admiralty transport. She is loaded with a cargo of grain belonging to the British government and is under Admiralty orders to sail forthwith. Under instructions from the British Embassy, its counsel intervened in the admiralty suit by leave of court as amici curiæ and presented a suggestion that the Gleneden was immune from judicial process as a vessel in the public service of the British government, and should be released from arrest and permitted to perform her government service without further interference.

"Judge Chatfield, to whom the suggestion was presented, handed down an opinion in which he said that 'the court will not retain possession unless that possession can be acquired without interfering with the rights of the British government,' but nevertheless required, as a condition of turning the vessel over to the representatives of the British government, that a bond be given by the private owner, although the private owner had not become a party to the cause and was not before the court. As recited in the order, a representative of the firm of Kirlin, Woolsey & Hickox, who had appeared as proctors for the owner of the Gleneden in an admiralty suit in another district, was physically present in court pursuant to an 'order of court' to that effect, but there was no warrant in law for this extraordinary procedure, nor could it be effective to confer jurisdiction in personam.

"Judge Chatfield's order was thus without jurisdiction in two aspects: It was an interference with an instrumentality of a cobelligerent foreign government, and an attempt thereby to bring pressure to bear upon a party not before the court to compel the giving of security. Nevertheless, the order could not be ignored without the possibility of an unseemly conflict with the actual custody of the marshal over the vessel, incompatible with the courtesy due from the British government to the officer of a court of the United States.

"Counsel for the Embassy, being in the case as amici curiæ only, could take no further steps by way of appeal. It is not deemed desirable that the Embassy should come into court as a party, or intervene except for the purpose of informing the court of official facts of which the court may take judicial notice, and upon which it may then act in conformity with settled principles of international law and comity. If a bond were given by the owner as required by Judge Chatfield's order, the question of immunity would become academic, since the vessel would be no longer under restraint.

"The only recourse available was an application to a court exercising appellate jurisdiction over the District Court, to prevent it from attempting to exercise a jurisdiction which it does not possess over the instrumentality of a foreign government. Such an application has accordingly been made by the master of the Gleneden, as the bailee of the vessel, and upon such application counsel for the British Embassy ask leave again to intervene as amici curiæ, and suggest the immunity of the vessel."

We will not inquire whether the order of Judge Chatfield was right or wrong, because we are without power to grant the prayer of the petition in an original proceeding. The power of the federal courts to issue writs is statutory. Section 234 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. § 1211]), formerly section 688, U. S. Rev. Stat., confers power upon the Supreme Court as follows:

"The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a state, or an ambassador, or other public minister, or a consul, or vice consul is a party."

This section confers original jurisdiction in the two specific instances mentioned; i. e., the Supreme Court may issue writs of prohibition to the District Courts when they are proceeding as courts of admiralty and writs of mandamus to any federal court when a state or an ambassador or other public minister or a consul or a vice consul is a party. This power is without reference to appellate jurisdiction.

The power of the Supreme Court is briefly and clearly discussed by Chief Justice Fuller in Re Commonwealth of Massachusetts, 197 U. S. 482, 25 Sup. Ct. 512, 49 L. Ed. 845. See, also, Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667.

Note that in the cases of Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373, Ex parte Gordon, 104 U. S. 515, 26 L. Ed. 814, Ex parte Ferry Co., 104 U. S. 519, 26 L. Ed. 815, Ex parte Hagar, 104 U. S. 520, 26 L. Ed. 816, and Ex parte Pennsylvania, 109 U. S. 175, 3 Sup. Ct. 84, 27 L. Ed. 894, the writs of prohibition were denied, not because the Supreme Court had no appellate jurisdiction (it being then limited to $2,000, exclusive of costs [U. S. Rev. Stat. §§ 691, 692]), but because the District Court had not acted without, or had not exceeded, its jurisdiction.

The power to issue writs in other cases is conferred by section 262 of the Judicial Code, formerly section 716, U. S. Rev. Stat., which is as follows:

"Sec. 262. The Supreme Court and the District Courts shall have power to issue writs of scire facias. The Supreme Court, the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Comp. St. § 1239.

The subject was originally regulated by section 14, c. 20, Laws of 1789, 1 Stat. 81, which so far as relevant reads:

"Sec. 14. And be it further enacted, that all the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

But the first sentence of section 262 covers one complete proposition, and is not connected with the second, as was the case in the act of 1789. It gives original jurisdiction to the Supreme Court and District Courts to issue writs of scire facias, which is an original writ and civil action. Winder v. Caldwell, 14 How. 434, 14 L. Ed. 487; United States v. Payne, 147 U. S. 687, 13 Sup. Ct. 442, 37 L. Ed. 332; Hollister v. United States, 145 Fed. at 779, 76 C. C. A. 337. The remainder of the section clearly confers power upon the Supreme Court and Circuit Courts of Appeals to issue writs when necessary to their appellate jurisdiction. The jurisdiction of the Circuit Court of Appeals, unlike that of the Supreme Court, is solely appellate. In most of the decided cases writs of mandamus and prohibition were necessary to the appellate jurisdiction after jurisdiction had been acquired by writ of error or appeal. But they may be necessary to the jurisdiction of the court before that, as, for instance, where the lower

court refuses to proceed with a cause pending there, and so may deprive the Circuit Court of Appeals of its appellate jurisdiction, or is proceeding contrary to its mandate, and so interfering with its jurisdiction. The following cases, relied upon by counsel, granting the writ, are of this nature: Our own decision, In re Watts, 214 Fed. 80, 130 C. C. A. 520; Barber Asphalt Pav. Co. v. Morris (8 Cir.) 132 Fed. 947, 66 C. C. A. 55, 67 L. R. A. 761; In re Beckwith (7 Cir.) 203 Fed. 45, 121 C. C. A. 381; In re Dennett (9 Cir.) 215 Fed. 673, 131 C. C. A. 607.

The Supreme Court in McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762, directed the Circuit Court of Appeals to issue a writ of mandamus to the District Judge to compel him to try a cause pending before him which he was staying in order to give the state of South Dakota an opportunity to try out the same question first in a state court; and in United States v. Mayer, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129, the Supreme Court held that the Circuit Court of Appeals had power to issue a writ of prohibition restraining the District Judge from granting a new trial after a writ of error had been taken to the Circuit Court of Appeals. We regard ourselves as without power to grant the prayer of the petition because there has been no appeal from Judge Chatfield's order, and because that order, whether right or wrong, does not interfere in any way with the jurisdiction of this court. He has refused to discharge the vessel, except upon the owner's giving a bond, so that the jurisdiction of the District Court is maintained, and the appellate jurisdiction of this court is in no manner interfered with.

The cause being obviously one of great importance, we have decided it practically upon the hearing, so that no time may be lost to the parties interested in taking any other course they may be advised.

Reference to analogous legislation in respect to the writ of habeas corpus confirms the foregoing views. Section 751, U. S. Rev. Stat. (Comp. St. § 1279), confers the right to issue the writ ad subjiciendum upon the Supreme Court and the District Courts. But the Circuit Court of Appeals, having only appellate jurisdiction, is without power to grant the writ in this form (Whitney v. Dick, 202 U. S. 132, 26 Sup. Ct. 584, 50 L. Ed. 963), though it may in other forms, as ad testificandum or ad respondendum, necessary to the exercise of its appellate jurisdiction.

The petition is denied.

FRAINA et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 19.

1. CRIMINAL LAW ⊂⊃1090(19)—APPEAL—BILL OF EXCEPTIONS—TRANSCRIPT.
Consent of both government and defendants to call transcript of stenographer's minutes by name of bill of exceptions was worthless, and Circuit Court of Appeals of grace only considers the points argued.

2. CRIMINAL LAW ⊂⊃1129(5)—APPEAL—ADDITIONAL ASSIGNMENTS.
Additional and supplemental assignments of error, so called, filed without any leave of court, are worthless to present error in the Circuit Court of Appeals.

3. CRIMINAL LAW ⊂⊃1048, 1129(1)—APPEAL—ASSIGNMENTS RESTING ON NO EXCEPTIONS.
Additional and supplemental assignments of error, so called, resting on no exceptions, are worthless to raise errors in the Circuit Court of Appeals, though the court may under the familiar rule notice a plain error not assigned.

4. CRIMINAL LAW ⊂⊃834(2)—INSTRUCTIONS—LANGUAGE OF REQUEST.
When the law has once been fairly presented to the jury, neither party has a right to complain because the trial judge preferred his own language to that of counsel.

5. CONSPIRACY ⊂⊃43(6)—CONSPIRACY TO EVADE SELECTIVE SERVICE LAW.
Count of indictment charging conspiracy by defendants, in that they agreed to commit offense against United States by aiding, abetting, counseling, etc., persons unknown unlawfully to evade and to aid others to evade the requirements of Selective Service Act, § 6 (Comp. St. 1918, § 2044f), *held* to state an offense under Criminal Code, §§ 37, 332 (Comp. St. §§ 10201, 10506).

6. CRIMINAL LAW ⊂⊃1153(3)—REVIEW.
In prosecution for conspiring to evade and to aid other persons unknown to evade Selective Service Act, § 6 (Comp. St. 1918, § 2044f), act of trial judge in permitting proof of acts and declarations of conspirators before act of combining was made to appear, which was only a question of order of proof, *held* reviewable only when abuse of discretion injurious to defendants is shown.

7. CONSPIRACY ⊂⊃24—TO EVADE SELECTIVE SERVICE LAW—COMBINATION BY CONDUCTORS OF MEETING.
Defendants, charged with conspiracy to evade and to help others in evading Selective Service Act, § 6 (Comp. St. 1918, § 2044f), who called mass meeting on matter by advertisement, and one of whom called meeting to order by announcing object of gathering as per advertisement, *held* to have combined or conspired in thought.

8. CRIMINAL LAW ⊂⊃1159(1)—REVIEW—PROVINCE OF JURY.
Appellate courts, unless given power by statute, do not sit to correct possible errors of jury, but only those of court, and jury's supremacy as to facts, including inferences, is unquestioned; conviction being assailable only by demonstrating reasonable men could not as matter of law be convinced beyond reasonable doubt.

9. CONSPIRACY ⊂⊃43(12)—EVIDENCE—OVERT ACT.
In prosecution for conspiracy to evade and to aid others in evading Selective Service Act, § 6 (Comp. St. 1918, § 2044f), prosecution can prove what might have been laid as overt act, but is not so charged, not being confined to overt acts charged, as there can be no legal complaint of testimony tending to show object of conspiracy, which evidence one may call overt act.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

10. CONSTITUTIONAL LAW ⊂=90—RIGHT OF FREE SPEECH—CONSPIRACY TO EVADE SELECTIVE SERVICE LAW.

Conviction of having conspired to evade and to aid others in evading Selective Service Act, § 6 (Comp. St. 1918, § 2044f), by having made certain speeches at a mass meeting and distributed a pamphlet there, *held* not an invasion of the constitutional right of free speech.

11. ARMY AND NAVY ⊂=40—INTERFERENCE WITH DRAFT—CONSCIENTIOUS OBJECTION.

If speeches at mass meeting of defendants charged with having conspired to evade or aid others in evading Selective Service Act, § 6 (Comp. St. 1918, § 2044f), furnished evidence of intent and effort to procure listeners to evade their military duties, such speeches would support conviction, though emphasizing defendants' conscientious objection to war and warfare on other than religious grounds.

In Error to the District Court of the United States for the Southern District of New York.

Louis C. Fraina and Edward Ralph Cheyney were convicted of conspiring to commit an offense against the United States by aiding and abetting, etc., unknown persons unlawfully to evade the requirements of the Selective Service Act, and they bring error. Affirmed.

The indictment in two counts rests upon sections 37 and 332 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096, 1152 [Comp. St. §§ 10201, 10506]) and section 6 of the Selective Service Act of May 18, 1917, c. 15, 40 Stat. 80 (Comp. St. 1918, § 2044f).

Both counts charged a conspiracy on the part of the plaintiffs in error and others to the grand jurors unknown. The object of the conspiracy described in the first count is stated as an agreement to commit an offense against the United States, viz. that they (plaintiffs in error and the persons unknown) "should fail and neglect fully to perform duties required of them in the execution of" the said Selective Service Act.

The second count similarly charges an agreement to commit an offense against the United States, viz. that they (plaintiffs in error and the persons unknown) "should aid, abet, counsel, command, induce and procure divers persons whose names are to the grand jurors unknown, unlawfully to evade and to aid others to evade the requirements of" the Selective Service Act, and further that they "should aid, abet, counsel, command, induce and procure divers persons whose names are to the grand jurors unknown, unlawfully to fail and neglect fully to perform duties required of them in the execution of" the said Selective Service Act.

The overt acts enumerated in respect of both counts all consisted of sundry alleged doings of one or both of the plaintiffs in error at what is described as "a mass meeting of so-called conscientious objectors held" within the Southern district of New York. Said overt acts may be summarized thus: Cheyney was chairman of said mass meeting; both plaintiffs in error and other persons, whose names are unknown, distributed certain pamphlets entitled "Conscientious Objectors" at the said meeting, Fraina being the author of said pamphlet, the same purporting to be issued by the "League of Conscientious Objectors," and that Fraina at the said meeting and in a speech there delivered uttered certain words set forth at length.

The applicable language of section 37 is that, "if two or more persons conspire either to commit any offence against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties" shall be fined or imprisoned.

Section 332 provides: "Whoever * * * aids, abets, counsels, commands, induces or procures" the commission of "any act constituting an offence in any law of the United States" is a principal.

Section 6 of the Selective Service Act contains these material words: "Any person who * * * evades or aids another to evade the requirements of

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

this act, * * * or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act," shall be guilty of a misdemeanor.

Plaintiffs in error were acquitted upon the first count and convicted on the second, and, sentence having been passed upon them, they took this writ.

Winter Russell, of New York City (Horace L. Cheyney, of New York City, of counsel), for plaintiff in error Cheyney.

Boudin & Liebman, of New York City (Louis B. Boudin, of New York City, of counsel), for plaintiff in error Fraina.

Francis G. Caffey, U. S. Atty., of New York City (Vincent H. Rothwell, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). This record presents several most substantial defects in practice:

[1] 1. There is no bill of exceptions. Both parties have agreed to call what is probably a transcript of the stenographer's minutes by that name; but giving it the requisite name does not make it the lawful thing. The consent was worthless, and it is of grace only that we consider the points argued. On this matter we spoke plainly in Linn v. United States, 251 Fed. 476, —— C. C. A. ——.

[2, 3] 2. The record is also incumbered with what are called "Additional and Supplemental Assignments of Error." Certain errors were assigned, and presented with the application for writ and citation, as required by rule. Thereafter it seems certain, from the internal evidence of the transcript, that counsel combed through the minutes, specified anything they did not like, whether excepted to cotemporaneously or not, called the result of their labors "additional and supplemental assignments of error," and filed the document without any leave of court, so far as shown. It also is worthless, first, wholly, because no leave is shown; and second, in so far as the assignment rests on no exceptions, even if leave had been obtained.

We may, under the familiar rule of court, notice "a plain error not assigned"; but these additional assignments do not per se require us to notice them at all, except to disapprove their existence.

[4] 3. A number of the exceptions and following assignments rest on the refusal of the trial judge to repeat to the jury, when rephrased in a request, what he had already correctly stated in substance. When the law has once been fairly presented to the jury, "neither party has a right to complain because the trial judge preferred his own language to that of counsel." Green v. United States, 240 Fed. 949, 153 C. C. A. 635. To such assignments no further attention need be paid.

The facts shown at trial were few, and substantially uncontradicted. Outside a building was a poster announcing a meeting within; inside a large audience and a platform, on which sat defendant Cheyney who presided, defendant Fraina, and one Sonnenschein. Of those present very many were obviously of the age rendering them liable to conscription. Men moved through the audience, distributing gratis a printed speech by Fraina, obtaining the same from the platform on which defendants sat.

Cheyney opened the proceedings with a speech. Most of the sentences began with "I object," and his objections extended to the war with Germany and every step taken to make it effective, also to all war, because "you cannot achieve anything by force." He also denied "the right of any individual to compel me to do anything against my will," and exhorted his hearers "not [to] go across the seas in order to fight a foreign fight" but to fight autocracy "through industrial and economic means," and closed with the following peroration:

"Those are the grounds upon which I am a conscientious objector: On the ground that it is immoral to fight at all; on the ground that it is each individual is the master of his own mind, the captain of his own soul; that it is his to say as to whether he should do a thing or not do it. Those are the grounds on which I am a conscientious objector.

"Now, I won't take your time any longer, because there is a man to follow me, a man you all know, a man much more eloquent than I, who can point home in words more eloquent than I can the tyranny of big business in this country. I have the pleasure of introducing to you Mr. Louis Fraina, the New Internationalist."

Fraina then spoke at greater length, though not differing in universal objection from Cheyney. He said inter alia:

"We find they are going to conscript the conscientious objector. The conscientious objector refuses to be conscripted. It is against his principle, it is against his conscience, to serve in the army, and to perform military service, * * * but we are told in a measure if we persist in our objection, in the measure we cling to our principles, we are hampering the process of war, that we are helping to kill our own boys at the front.

"In the first place, that is a dastardly lie. In the second place, it is immaterial to me what happens at the front; it is immaterial to me what happens in a war which is imposed upon me, because in this case one must exercise a sense of proportion. * * * The government in this conscription law recognizes only those conscientious objectors that are affiliated with some recognized religious association, cult, or creed, such as the Quakers, for instance. Now, the other conscientious objectors are not recognized by the conscription law. * * * But since when must a man necessarily belong to a church, belong to a creed, a recognized creed, before he can have a conscience? * * * The government, in making conscientious objection to war a part of religion or creed, is placing a premium upon religion. It is placing a premium upon the superstitions of religion, it is placing a premium upon the passive attitude of the religion of the Quakers. * * *

"Now, the nonreligious conscientious objector is a distinctly different type. The nonreligious conscientious objector is one of the people, a social being, and as such has an objection to war. I do not object to war because my father was a Quaker and I inherited his religion. I object to war because I have acquired my conscientious convictions, I have acquired the objection by experience, by thinking, action, and I have felt it flow into my conscience and my life.

"The government is perfectly content in placing a premium upon religious conscientious objection, and penalizing the nonreligious ones, because the system of things that this government represents, the infamous system of capitalism, has nothing to fear from the religious conscientious objector; * * * but it has everything to fear from the nonreligious, from the social, conscientious objector, because the nonreligious conscientious objector is not interested in his conscience alone, but interested in his social principle that his conscience represents, and is trying to overthrow a system of things that produces war and produces other evils. * * *

"We are not going to be trampled on; we are not going to take fear. We are not going to be exempted. We are going to be penalized; we are going to be compelled, if they can compel us. I say right now that they cannot con-

script a conscientious objector. They cannot do it, because we have made up our minds we are not going to be conscripted."

The Frania pamphlet, distributed as above shown, declares:

"* * * The conscientious objector refuses *any* participation in this war, and his refusal is based, not alone upon the objections of his individual conscience, but upon the general social necessity of striking at war and at the reactionary purposes that war promotes. Alternative service is as necessary a factor in war as actual military service at the front. They are inseparable. They are equally objectionable. * * *

"* * * The Red Cross is as necessary a factor in war as munitions and soldiers. It heals men and then sends them to the front to continue the horrible business. The Red Cross, fundamentally and essentially, is neither sentimental nor humanitarian—its purposes are strictly military. Under these circumstances the conscientious objector will have nothing to do with the Red Cross or similar organizations. * * *

"The conscientious objector opposed the Conscription Law, and after it was passed agitated for its repeal. But conscription has been put through, and it now remains for the conscientious objector *as an individual* to emphasize his objections and his principles by individual action."

This closed for the prosecution. Defendants showed that Sonnenschein organized the meeting, was the "organizer" of what he called "the League of Conscientious Objectors," and on behalf of and in the name of the League had telegraphically demanded of the Secretary of War as follows:

"Representatives of 3,500 conscientious objectors in New York whose idealism compels them to decline all forms of military service, we ask: What of the conscientious objector?"

This was done to get, if possible, the Secretary's view, in order to advise the meeting at which, by arrangement with Sonnenschein, Cheyney and Fraina were to speak. They both knew about this telegram; and both testified, declaring that they had personally registered in obedience to the Service Act, and considered the meeting as one only to "determine the status of the conscientious objector, and to gain as good a status as possible from the government."

The issue thus raised was put to the jury by the trial judge as follows:

"Now these defendants say that this meeting was held for the purpose of establishing a better status for the conscientious objector; that this telegram was sent and these speeches were made at the meeting for that purpose. The government says that was not the purpose. * * *

"Therefore you will look to the speeches as uttered and see what they said, and see from what they said whether those speeches were delivered in an effort to get a better status established, or whether they were delivered in a violent protest against the law, and in order to induce other people to refuse to be bound, or refuse to act or accept the law, and refuse to do their duty which is required by this law, and that is exclusively within your province."

The verdict plainly imports that defendants were not guilty of conspiring to evade their own military duties, probably for the simple reason that they had with commendable prudence performed them up to date, but were guilty of unitedly attempting to counsel, or procure by counsel, others to defy conscription for any form of war work, and to justify such defiance by proclaiming themselves "nonreligious conscientious objectors."

The contentions in this court justifying notice are: (1) The second count charges no crime; (2) the crime sought to be charged was not proved; (3) the trial court erred (a) in admitting evidence, (b) in practically permitting the jury to infer guilt from the character of defendant's speeches, and thereby (c) invading the right of free speech.

[5] (1) The contention that the count on which plaintiffs in error were convicted states no offense rests (in so far as it requires notice) on the interpretation and application of section 332, Criminal Code. The history of that section is sufficiently summarized in Rooney v. United States, 203 Fed. 932, 122 C. C. A. 230.

What the count under consideration seeks to charge is plain enough, viz. it is an offense against the United States to evade the requirements of the Selective Service Act, therefore it is another offense under section 37 to conspire so to evade; but every one who evades being a criminal, every one who counsels evasion is also a criminal, under section 332, and those who unite for the purposes of so counseling are conspirators, and as such liable to the pains and penalties of section 37, though the wrongdoing is only reached by combining sections 37 and 332 to define the nature of the crime and pointing to the Service Act to discover the offense, which is the object of the criminal conspiracy.

It is said that this goes beyond the law, and charges the accused with "conspiring to do something which is not made a crime by" the sixth section of the Service Act. Upon reason, we perceive no ground for the assertion that the offense which is the ultimate object of the conspiracy must be found in a single enactment; all conspiracies, whether to effect directly or by a procuration the most devious the commission of an offense against the nation, are essentially alike, and the very object of section 332 was to make a principal offender out of (inter alios) one who contrived to have another commit a crime which the contriver was not intending himself to run the danger of. If the contrivance takes the form of that mental combination for a common purpose which is conspiracy at common law, and is accompanied by the necessary overt act, it makes (under sections 37 and 332) no difference whether the object is to be attained directly or through others; and to say that the object is not, e. g., to evade the Service Act, but to procure or counsel others so to evade, is no more than juggling with words.

As for authority it is sufficient to say that the indictment in Goldman v. United States, 245 U. S. 474, 38 Sup. Ct. 166, 62 L. Ed. 410, was the legal equivalent of the one here complained of, and was duly sustained over similar objection.

[6, 7] (2) It is asserted that, assuming all the evidence to be competent and relevant, there was not proof, measured by the standard of criminal causes, of a conspiracy. This proposition seems to separate into two parts—one, that the proper course of trial in conspiracy cases was not pursued; the other, that no reasonable jury could have found such a verdict. Wherefore another trial should be granted.

The essence of a conspiracy is the combination, and the act of combining should ordinarily be first made to appear, before proving the acts and declarations of the coconspirators, including oftentimes those of persons not indicted—usually the "persons to the grand jury unknown." Yet even this is but order of proof, and within the discretion of the trial judge; it is only reviewable when abuse of discretion injurious to the accused is shown upon the review.[1] The law (as distinguished from discretionary trial practice) of conspiracy has been too lately summarized to need more than mention. United States v. Rabinowich, 238 U. S. 86, 35 Sup. Ct. 682, 59 L. Ed. 1211. This case is one of the simplest instances of proper proof in limine of combination ever brought to a court's attention. If, as per advertisement, an audience is gathered before a platform containing intending speakers, and is called to order by a chairman, who announces the object of the gathering, again, as per advertisement, it is impossible not to infer a combination in thought among the platform occupiers and their helpers. Sonnenschein and the pamphlet distributors were plainly proved, and with unusual simplicity and accuracy, as conspiring—i. e. combining—about something with the plaintiffs in error, who certainly have no cause of complaint on this head.

Considering the language by which the object of the combiners in calling the meeting was illuminated, the suggestion that an American jury of intelligence could not reasonably come to the conclusion announced would require nothing but summary dissent, did not the contention and the earnestness of the contenders excellently illustrate an erroneous view of criminal appeals, and explain the modern inclination to disguise a stenographer's transcript as a bill of exceptions.

[8] Plaintiffs in error are really objecting to the weight of the evidence, and appealing to this court to override the jury's verdict, and therefore they print every word of the trial. We are not permitted to be concerned with that matter. Appellate courts, unless given power by statute, do not sit to correct the possible errors of the jury, but those of the court. While it is the jury's duty to take the law from the court, and to apply that law to the facts as they find them (Sparf v. United States, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343), and it is the court's duty to see that there is some evidence tending to prove every element of the crime alleged (Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726), the jury's supremacy as to facts, including the inferences of fact drawn from proven phenomena, is unquestioned. Indeed, even as to matters of law, Story, J., who is credited with establishing our present doctrine, instead of the theory that in criminal causes the jury judges both the law and the facts, admits the jury's "physical power," though not the "moral right," to disregard the court's law. United States v. Battiste, Fed. Cas. No. 14,545, 2 Sumn. 240. If a verdict of acquittal in the teeth

[1] This is well summarized in Bishop's New Criminal Procedure, vol. 2, § 227 et seq. The court's discretion should ordinarily be exercised in repression of the prosecutor's tendency to prove what he subsequently calls "overt acts," and then ask the jury to infer the conspiracy from the acts. But no hard and fast rule can be laid down beforehand.

of the law be rendered, it must stand unreversed and unpunished, since Bushell's Case, Vaughn, 135; and a verdict of conviction, though resting on inferences of fact that the judges would not draw, is assailable in an appellate court, only by demonstrating that reasonable men could not, as matter of law, be convinced beyond a reasonable doubt. The feat is always difficult, and we are far from finding it possible in this instance.

[9] (3a) The objections to admission of evidence, certainly fundamental, if well founded, are that Cheyney's speech, the Fraina pamphlet, and all of Fraina's oration (not merely the words specified as an overt act) were put before the jury.

The argument is based on a wholly inadmissible reading of Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, viz. that because it was there pointed out that an overt act is "more than evidence of conspiracy," and is a part of the crime, therefore nothing can be proven, that might have been laid as an overt act, that is not so charged. No such doctrine is supported by the decision cited; on the other hand, the prosecution is not confined to the overt acts charged (Houston v. United States, 217 Fed. 858, 133 C. C. A. 562); and a fortiori there can be no legal complaint of testimony tending to show the object of the conspiracy, which evidence one may call an overt act, if so minded.

[10] (3b and 3c) The mental attitude evident throughout the conduct of defense below, and argument here, is suggested rather than plainly stated by the points that it was error to permit the jury to infer guilt from the speeches, that in so doing defendants were tried for their words, and such procedure invades the right of free speech.

We think the contention may be thus summed up: If there was a meeting of minds, it was not actually productive of any breach of peace; no one was shown to have refused physical obedience to the law; it was all words; and men cannot constitutionally and lawfully be punished for words, especially when the language relates to rights based on the moral sense—i. e., the "idealism"—of the "nonreligious conscientious objector."

The matter at bottom is political, not legal. Men can be punished for words, if the Legislature so decrees, within constitutional limits. Men commit crimes when they counsel or procure others to sin against the statute law, and they also commit crimes when they confederate to effect that object, and yet it is difficult to imagine any more suitable or usual method of procuring or counseling than by speech. In this inaccurate sense men have very often been punished for words by statutory enactment.

The free speech secured federally by the First Amendment means complete immunity for the publication by speech or print of whatever is not harmful in character, when tested by such standards as the law affords. For these standards we must look to the common-law rules in force when the constitutional guaranties were established and in reference to which they were adopted.[2] By legislative action the

[2] This definition by Judge Cooley (Const. Limitations [7th Ed.] p. 605) has been often adopted, most lately perhaps in People ex rel. Atty. Gen. v. News-Times, 35 Colo. 253, 84 Pac. 912.

boundaries of unpunishable speech have doubtless and often been much enlarged; but the constitutional limit remains unchanged, and what the Legislature has done it can undo. Legal talk-liberty never has meant, however, "the unrestricted right to say what one pleases at all times and under all circumstances." Warren v. United States, 183 Fed. at 721, 106 C. C. A. 156, 33 L. R. A. (N. S.) 800. Nothing said to the jury by the court below in this case went beyond the limits thus stated, and there was no error.

Complaint as to inferring guilt from speeches, or letting men be found guilty therefore, when or if the speeches only expressed moral principles and social aspirations, is really objecting to the statutes. The statutes in question here, like most others, are of general application; they must be so unless exceptions of equal authority are also statutory. They operate alike on the religious, the atheist, and the unthinking.

While "religion is not defined in the Constitution" (Reynolds v. United States, 98 U. S. 162, 25 L. Ed. 244), and the "law knows no religion and is committed to no dogma" (Watson v. Jones, 13 Wall. 728, 20 L. Ed. 666), yet "directly or by clear implication" every American Constitution "recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community" (Holy Trinity Church v. United States, 143 U. S. 465, 12 Sup. Ct. 511, 36 L. Ed. 226). Nevertheless the most profound religious conviction that compliance with statute is wrong will not by law save any one from conviction by a petty jury for violating that statute. Cf. Reynolds v. United States, supra; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637.

The regulations promulgated under the Service Act fully recognized the spirit of the above quotations, although the executive was under no legal compulsion so to frame them. Rule 14 reserved for noncombatant service members of any "well-recognized religious sect or organization," and no others, and after that the court as such was concerned only with the law as it stood, not as some persons thought it should be.

If one moved by religion—i. e., by his "recognition of God as an object of worship, love and obedience" (People v. Board of Education, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. [N. S.] 442, 19 Ann. Cas. 220) —can decline or refuse service only secundum regulum, certainly no one else can do otherwise. "Idealism" must mean a self-created standard of conduct or desire, and is therefore subject to instant change or destruction by its creator. Idealism "compels" its possessor only as does any other appetite or desire. Nor can conscience —said to be "that moral sense which dictates right and wrong" (Miller v. Miller, 187 Pa. 572, 41 Atl. 277)—claim any higher rights than religion.

[11] Measured by these rules, if the speeches of plaintiffs in error furnished evidence of an intent and an effort to induce and procure those who listened to violate the law, i. e., to evade or neglect their military duties, then those speeches alone might carry to the jury conviction beyond reasonable doubt; and if religion, and a conscience pre-

sumably begotten of religion, afforded no legal excuse for evasion or neglect, it is certain that irreligion and idealism are upon no higher plane of privilege.

Indeed, to say that one who speaks, and does nothing else, cannot be or should not be convicted *for* his speech, is inaccurate, and evades the point. These men on this record were quite possibly convicted *by* their speeches, as evidence of their criminal intent to procure violations of statute; but that is a very different thing from conviction *for* speaking.

It has often been urged by the preacher that man is judged by every word that proceedeth out of his mouth; human law usually treats speech only as evidence; if as such these speeches persuaded the jury of guilt, nothing happened which is either surprising or assignable as legal error.

Judgments affirmed.

THE ROBERT R.

THE PRINZ FREDERICK HENDRIK.

(Circuit Court of Appeals, Second Circuit. December 12, 1918.)

No. 100.

1. SHIPPING ⊂=126—LIABILITY OF VESSEL—NEGLIGENCE IN DISCHARGING.
   A steamship contracting to deliver cargo at a wharf is liable under its contract to the cargo owner for loss due to negligence in discharging from the ship into a lighter.
2. SHIPPING ⊂=126—CONTRACT WITH STEVEDORES FOR DISCHARGING—LIABILITY FOR NEGLIGENCE.
   Stevedores contracting with a steamship to discharge ore into a lighter, although not including trimming the cargo, *held* primarily liable for loss by dumping because of failure to trim, where they continued loading after danger of capsizing was apparent, over protest of the master of the lighter, and without notifying the ship.
3. SHIPPING ⊂=126—CONTRACT WITH STEVEDORES FOR DISCHARGING—NEGLIGENCE IN PERFORMANCE.
   A contract by a steamship with stevedores to discharge cargo into a lighter contemplated exercise by the stevedores of ordinary care, and, if conditions showed that continuance of discharging was unsafe they were bound to stop until the danger was removed.
4. MASTER AND SERVANT ⊂=319—INDEPENDENT CONTRACTOR—REQUIREMENT OF CARE.
   Only the clearest requirement of a contract to do something which is dangerous can relieve the contractors from the exercise of ordinary prudence and impose liability on the owner.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by H. D. Boret against the lighter Robert R., Jacob Rice, claimant; the steamship Prinz Frederick Hendrik, Royal Dutch West India Mail Company, claimant; Angelo Pellegrino and Carmelo Pellegrino, and Johnson Lighterage Company, incorporated, impleaded. Decree for libelant against the steamship alone, and her claimant appeals. Modified.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This is an appeal from a decree whereby the libelant recovered from the steamship Prinz Frederick Hendrik and her claimant, Royal Dutch West India Mail Company, the sum of $10,372.27, and the libel and petitions against the lighter Robert R., Angelo Pellegrino and Carmelo Pellegrino, stevedores, and the Johnson Lighterage Company, charterers of the lighter Robert R., were dismissed.

The steamship, on September 29, 1914, was docked at Pier 3, Bush Terminal, Brooklyn. Part of the cargo consisted of copper ore which belonged to the libelant and was to be delivered at Chrome, N. J. Messrs. Funch, Edye & Co., the agents of the steamship, arranged with the Johnson Lighterage Company, who were charterers of the lighter Robert R., to transport the ore from the steamship to its destination at the rate of 22 cents a ton. They had been informed that, if trimming of the ore when loaded on the lighter was necessary, the rate would be 25 cents a ton. The District Court, therefore, found that no trimming was contracted for (Record, fol. 478) and that there was an extension of the contract of carriage to Chrome. Funch, Edye & Co., through its subsidiary company, employed the stevedores to unload the ore and place it on the lighter, but did not so far as appears contract with them to do any trimming (Record, fol. 268). The lighter was loaded by the stevedores, so that there was but little more weight of ore on one side than the other; but the ore was not spread, and the center of gravity apparently became so high, because of the deep pile of ore along the center of the deck, that finally a single bucket of ore, weighing about half a ton, tilted the lighter, the stern corner hit the steamship, and caused the load to shift and the lighter to dump a part of the ore. The District Court found, on abundant evidence, that the loss of a part of the cargo was caused by the failure to trim. The libel was filed against the lighter. The owner, by petition, brought in the steamship and the stevedores, Angelo Pellegrino and Carmelo Pellegrino, under the Fifty-Ninth Admiralty Rule (29 Sup. Ct. xlvi), and the Royal Dutch West India Mail Company, the owners of the steamship, and the Pellegrinos filed a cross-petition against the lighter Robert R. and the Johnson Lighterage Company, her charterers. The court granted a decree for damages against the steamship and her owners, on the ground that the vessel improperly discharged her cargo. It dismissed the libel against the lighter on the ground that she was not bound to trim, and the intervening petition against the Pellegrinos for the same reason. Decree modified.

Kirlin, Woolsey & Hickox, of New York City (J. Parker Kirlin and Robert S. Erskine, both of New York City, of counsel), for appellant.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers, of New York City, of counsel), for libelant.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellee Jacob Rice.

Herbert Green, of New York City, for appellee Johnson Lighterage Company.

Haight, Sandford & Smith, of New York City (Henry M. Hewitt, of New York City, of counsel), for appellees Angelo Pellegrino and Carmelo Pellegrino.

Before ROGERS and MANTON, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

AUGUSTUS N. HAND, District Judge (after stating the facts as above). [1, 2] There can be no doubt that the steamship under the contract of carriage is liable in any event for the damage suffered. In spite of the fact that the Pellegrinos were independent contractors, it is contended that the steamship is liable in tort on the ground that

a contract to discharge a vessel of a cargo like copper ore, without adequate provision for trimming, was dangerous in itself because large lumps of ore would not spread by mere dumping. This theory will hardly bear analysis. Other vessels were safely loaded with ore at Pier 3 without trimming, and trimming was apparently required, if at all, under circumstances which could only develop as the work proceeded. It therefore is unreasonable to regard the contract as in itself negligent and improper. It was one in which circumstances might arise during the performance where the stevedores should call on the steamship to trim, and their failure to do this, and persistence in dangerous loading, rather than the making of a contract which did not call for trimming, were the negligent acts that caused the damage. Indeed, the fact that the stevedores did not contract to trim seems to us in no way to relieve the latter from liability. They undertook to discharge the cargo, and were bound to do this in a prudent manner. If it became unsafe to load the barge without trimming, as proved to be the fact, it was the plain duty of the stevedores to stop work and call upon the steamship to trim. Instead of doing this, they continued to pile the ore on the deck of the lighter, without seeing that it was spread by some one, until the center of gravity of the lighter became so high that she dumped her load.

[3] It is argued that because the vessel did not do the trimming when it was bound to do so, and had not provided other means, the damages should either be placed on her alone, or be divided. We cannot say, however, that under the circumstances shown the ship in a legal sense was liable in tort. If the stevedores had ceased loading and called for trimming and secured assistance, the accident would not have happened. Their continuance in loading when danger was imminent was the proximate cause of the damage, and they only are liable in tort. It was the dumping of the last buckets of ore on the lighter that caused the injury. The M. E. Luckenbach, 214 Fed. 571, 131 C. C. A. 177; The Satilla, 235 Fed. 58, 148 C. C. A. 552.

Cases are cited where owners of merchandise consented to place it on deck and were not allowed to recover for any damage suffered by a jettison of the cargo which became necessary by reason of this method of stowage. Lawrence v. Minturn, 17 How. 100, 15 L. Ed. 58.

[4] Cases are also cited where a specific contract has been made to do something which from its very nature resulted in loss. MacKnight F. Stone Co. v. City of New York, 160 N. Y. 72, 54 N. E. 661; Penn Bridge Co. v. City of New Orleans, 222 Fed. 737, 138 C. C. A. 191. The contracts involved in these cases are entirely different from the one under consideration. Here the shipowner never contracted that the stevedores should discharge the steamer in a dangerous manner and cause the lighter to dump the cargo by piling on more ore until she lost her equilibrium. He did not contract that the steamer should be discharged, at all events, without trimming of the cargo, but only that the stevedores should discharge her subject to the ordinary standard of care. If conditions showed that continuance in discharging was unsafe, the stevedores, like any one else, were bound to cease discharging. Only an express contract, or consent, to do dangerous acts, can shift the lia-

bility for these acts, and no such situation appears here. The whole question turns on what the contract called for. Only the clearest requirement to do something which is dangerous can relieve the contractors from the exercise of ordinary prudence. The contract in question is very different from a specific consent to stow all the cargo in a place where it is likely to have to be jettisoned in a storm, or a contract to build a bridge according to specifications furnished by the owner which would result in a weak structure.

It is contended that the master of the lighter should have warned the stevedores of the danger. We think the District Court was correct in holding that the contract with the lighterage company was only for carriage and that a price was made which expressly did not include trimming by the lighter. The master of the lighter, as found by the court below, protested repeatedly at what was being done. This protest was made both to the foreman of the stevedores, and on the second day to one of the Pellegrinos. The statement of the trial judge that in all probability the protests did not get any further than an Italian, who did not understand English, seems to have been inadvertent, for both of these men testified in English at the trial and would certainly have understood words used every day in their business. We think the master of the lighter did all that could be reasonably expected of him under the circumstances.

The decree should be modified so as to hold the stevedores primarily liable.

PERE MARQUETTE RY. CO. v. CHICAGO & E. I. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. December 10, 1918.)

No. 2642.

INDEMNITY ⊂=13(1)—IMPLIED CONTRACT—CONNECTING CARRIER—WRONGFUL DELIVERY OF GOODS.

Where official classification provided for two standard forms of bills of lading to be issued, one "Straight Bill of Lading," which was not required to be surrendered before delivery of goods, the other "Order Bill of Lading," containing the provision "Consigned to order of ———," and required to be surrendered before delivery, a waybill issued by an initial carrier stating the consignee to be "order of" a person named, although other than the shipper, *held* sufficient to advise a connecting carrier that an order bill of lading was outstanding and to render it liable to initial carrier against which judgment had been rendered for delivery without surrender of the bill.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Claim of the Pere Marquette Railway Company against the Chicago & Eastern Illinois Railroad Company and Thomas D. Heed, its receiver. From a decree disallowing its claim, petitioner appeals. Reversed.

F. Harold Schmitt, of Chicago, Ill., for appellant.

Homer T. Dick, of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ALSCHULER, Circuit Judge. This appeal involves the right of appellant, the initial carrier, to recover from appellee, the connecting and delivering carrier, for alleged wrongful delivery by appellee of two shipments of beans consigned by the respective shippers in Michigan to "order of A. J. Thompson & Co., Evansville, Ind.," as recited in the bills of lading which appellant issued to the shippers. Upon the written order of the consignee, appellee delivered the shipments without requiring surrender of the bills of lading, whereby loss accrued to the shippers, and suits were brought in the state court of Michigan which resulted in judgments in favor of the shippers against appellant; the right of recovery having been sustained by the Supreme Court of Michigan, in Thomas et al. v. Blair et al., Receivers Pere Marquette R. R. Co., 185 Mich. 422, 151 N. W. 1041.

The action was by appellant to recover from the delivering carrier the loss which the initial carrier thus sustained. There is no question here of the right of recovery against the initial carrier. The only bar urged against recovery by appellant is that the initial carrier negligently failed to notify the connecting carrier that the bills of lading were of the kind that required surrender before delivery of the shipments. The special master, to whom the petition against the appellee receiver was referred, found that the initial carrier negligently failed to inform appellee that the bills of lading were such as required surrender before delivery, and he reported against appellant's right of recovery. In this, the District Court concurred, and decreed against appellant, dismissing the petition.

The official classification in force at the time of these transactions made provision for two standard forms of bills of lading to be issued by the railroad carriers on receipt of such freight. These forms are alike save in one particular. The first is printed under the title "Straight Bill of Lading—Original—Not Negotiable," and the other under the title "Order Bill of Lading," and it contains this provision, not found in the first, and printed in larger type than the body of the instrument, viz.:

"The surrender of this original order bill of lading, properly indorsed, shall be required before delivery of the property."

The first form contains the line, "Consigned to ———," and the second the line, "Consigned to order of ———." To distinguish further between the two, the straight bill of lading is required to be printed on white paper, and the order bill of lading on yellow paper. No other forms, applicable to such shipments, were provided or in use, and these were the forms employed by the railroads in question; those issued for these shipments being the "order" bills of lading.

The bill of lading is delivered to the shipper, and in practice the initial carrier makes out a waybill which accompanies the shipment; and the waybill is all which the delivering carrier has to indicate the nature of the original bills of lading.

With the straight bills of lading, the delivering carrier, being informed by the waybill who is the consignee, needs concern itself only with the identity of the person to whom it delivers the goods; sur-

render of the bills of lading not being required. If therefore the waybill, which comes to the delivering carrier, indicates that it was a straight bill of lading which the initial carrier issued, the delivering carrier need only assure itself that the person to whom the delivery of the shipment is made is the consignee himself, or some one in his right. The waybills here in question showed the names of the shippers, L. P. Thomas in one, and Doty & Doty in the other, and in both of them the consignee is stated to be "Order of A. J. Thompson & Co., Evansville." It is claimed that these waybills did not inform the connecting carrier that the bills of lading issued were "order" bills which would require their surrender before delivery of the shipment was authorized.

Appellee's general freight agent at Evansville testified that in practice the order bill of lading was generally employed where the shipment was to the order of the shipper, and that it was very unusual to receive at that station shipments billed to the order of the consignee; that such as had been so received had at times been delivered without requiring surrender of the bills of lading; that sometimes such waybills had the further notation "do not deliver without surrender of original bill of lading." Being asked on cross-examination whether the information on these waybills was sufficient to apprise a railroad man of the nature of the bill of lading which was issued, he replied:

"Because of the peculiar manner in which this shipment was billed, I could not judge what kind of a bill of lading was issued for the shipment."

Another witness for appellees, familiar for many years on its road with handling waybills and bills of lading, testified as to waybills like those here in question, "I should say it was peculiar and unusual." A number of witnesses from other railroads, experienced in freight matters, testified that a shipment as shown by these waybills was not unusual, and would in practice be treated as though an order bill of lading had been issued for the shipment requiring surrender before delivery.

If the truth is as stated by appellees' freight agent that from these waybills one familiar with such matters could not judge whether a straight or an order bill of lading was outstanding for the shipments, it would certainly suggest that, before treating them as straight bills of lading at the risk of entailing loss on the shipper or the initial carrier, he make inquiry for the purpose of resolving the doubt according to the readily ascertainable facts. The rights of the parties here do not of necessity turn on the effect to be given to the evidence of the frequency or infrequency of such transactions, nor on the construction placed thereon by those in the habit of dealing with such matters. There is nothing in the official classification to suggest that such transactions were not contemplated. On the contrary, it would seem from the prescribed and adopted form of the order bill of lading that the person to whose order it is issued may be some one other than the shipper. If it were contemplated that in all cases it would be to shipper's order, there would have been no purpose in leaving the blank for filling in a name after the words, "Consigned to order of." The

word "shipper" or "consignor" or similar designation would likely have been in the place of the blank if it were contemplated that in all cases it would be the shipper or consignor to whose order the bills of lading would be made.

We are concerned only with the question whether, as between these two carriers, the loss which the initial carrier has had to bear was caused through its own neglect in failing to duly notify appellees that these were order bills of lading, or—what here amounts to the same—whether the delivering carrier knew or by the exercise of ordinary care ought to have known that the bills of lading for these shipments were order bills specifically prohibiting delivery of the shipments without surrender of the bills of lading properly indorsed. We are of opinion that these waybills sufficiently apprised appellees that there were outstanding against these shipments order bills of lading which should have been surrendered before delivery of the shipments.

It follows that the decree of the District Court disallowing and dismissing appellant's claim should be, and it accordingly is, reversed, and the cause remanded with direction for further proceedings on the petition in accordance with the foregoing views.

HOLLOWAY et al. v. COLEE et al.

(Circuit Court of Appeals, Fifth Circuit. January 17, 1919.)

No. 3254.

WILLS ⊂519—CONSTRUCTION—DESIGNATION OF BENEFICIARIES.

A will which, after naming the wife and children of testator as equal beneficiaries of his residuary estate, provided that "the surviving consort and issue of any of my children dying before my death taking, share and share alike, the share my child would have taken if alive," *held* to exclude from any share a granddaughter whose mother, testator's daughter, had died many years before the will was made.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit in equity by Beatrice H. Holloway and others against Louis A. Colee and others. Decree for defendants (247 Fed. 598), and complainants appeal. Affirmed.

George C. Bedell, of Jacksonville, Fla., for appellants.

John C. Cooper, of Jacksonville, Fla. (W. A. MacWilliams, of St. Augustine, Fla., on the brief), for appellees.

Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This is an appeal from a decree which was adverse to the asserted claim of the appellant Beatrice H. Holloway that she, in her own right and as the assignee of her father, was entitled, under the will of her grandfather, James L. Colee, to a

⊂For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

share in his estate. The will was made in December, 1903, and the testator died in January, 1912. Succeeding clauses revoking former wills, naming an executor, bequeathing a gold watch to one of the testator's sons, and household furniture and utensils to his wife, the will contained the following provisions:

Fifth. All the rest and residue of my estate real, personal, and mixed, in esse and in futuro, wherever the same may be at the time of my death, I devise and bequeath unto my children, Louis A. Colee, James R. Colee, Joseph B. Colee, George B. Colee, Raymond J. Colee, Arthur P. Colee, Otis M. Colee, Mamie J. Colee, Edna I. Colee, and my wife, Georgia V. Colee, share and share alike, the surviving consort and issue of any of my children dying before my death taking share and share alike the share my child would have taken if alive.

Seventh. It being my desire that all of my children shall share equally in my estate, should any child of mine be born after the execution of this will or after my death, I desire that it shall share equally with my other children and my wife above named, each devisee contributing ratably to make up the share of such child.

The testator was twice married, his second wife being the one mentioned in the will. The appellants' mother, who died many years before the will was made, was a daughter of the testator by his first wife, who died long before the will was made. Until the marriage of appellant, which occurred several years before the will was made, she was a member of the household of her father, who had a second wife and several children by the latter, and lived in the country about nine miles from St. Augustine. For several years during the appellant's childhood she attended school in St. Augustine, there being no school in the country to which she could be conveniently sent from her father's home. During the school terms she stayed at the home of the testator in St. Augustine. After her marriage she did not reside in or near St. Augustine, but lived with and was supported by her husband; their home being in another state. She made occasional visits to St. Augustine after her marriage. During such visits she did not stay at the home of her grandfather, but made calls there, and occasionally took meals or spent the day with him and his family. The relations between her and her grandfather were always affectionate. So far as appears, she was never dependent on him for support, and he did not contribute to her support or education, further than by having her as an inmate of his home while she was attending school in St. Augustine. Her father was a man whose means and circumstances were such that it reasonably could have been anticipated that at his death she would inherit property worth as much as what would have been the share of her father and herself in her grandfather's estate, if they were embraced in the provisions of the fifth clause of the latter's will. The will was drawn by a lawyer to whom the testator gave instructions as to the disposition of his property he desired to make.

The claim asserted is based upon the following language contained in the fifth clause of the will:

"The surviving consort and issue of any of my children dying before my death taking share and share alike the share my child would have taken if alive."

In the connection in which this language was used it manifests an intention to provide for the contingency of the death, after the will was made, of a child to whom the will gave a share of the residue of the testator's estate. The preceding part of the clause in which this language is found stated the name of each of the testator's children to whom such share was to go if that child survived the testator. The will does not show that the appellant's mother would have taken a share if alive. There is an absence of any indication of an intention to provide for the consort or issue of a child who already was dead when the will was made. The testator identified the persons intended to be described by the words "my children" by setting out their names. The last quoted provision had the effect of substituting the surviving consort and issue in the place of any previously named beneficiary who might die during the testator's lifetime. To say the least, the language used is inappropriate to describe the surviving husband and issue of one for whom the will made no provision in any event. That the words "my children," as used in the last-quoted provision, were intended to include only the previously named children who were living at the time the will was made is further indicated by the terms of the seventh paragraph of the will, which made provision for any child of the testator that might be born after the execution of the will or after the testator's death. That clause provides that such subsequently born child should "share equally with my other children and my wife above named, each devisee contributing ratably to make up the share of such child." This plainly indicates the testator's understanding that only his previously named children and wife were to be the devisees of the residue of his estate, if they survived him and no other child was born after the will was made.

For the reasons above indicated the conclusion is that the language of the will is not fairly susceptible of the construction contended for in behalf of the appellant. Even if it was capable of a construction that would permit the appellant to share in the estate, it is questionable whether, on the ground that there was an absence of any reason or explanation of the testator's exclusion of his granddaughter from sharing in his estate, such a construction should be preferred to one more consistent with what the language employed indicates was the testator's intention. The circumstances existing when the will was made were such that it well might be inferred that the testator did not give the appellant a share in his estate, because he thought that she otherwise would be adequately provided for.

Affirmed.

MOORE & McCORMACK CO., Inc., v. HESSLEIN et al.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 26.

SHIPPING ⊂=104—CONTRACT OF AFFREIGHTMENT—SUBSTITUTION OF VESSELS.

Under a contract by managers of a steamer line to carry cargo by one of its steamers, "or by a steamer or steamers to be named later," the shipper was entitled to carriage by a steamer of such line, and not required to accept as a substitute a naval transport of a foreign government on which the managers, as brokers, had engaged cargo space.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Moore & McCormack Company, Incorporated, against Edgar J. Hesslein and another. Decree for libelant, and respondents appeal. Reversed.

Gustave Lange, Jr., and Frederick R. Graves, both of New York City, for appellants.

Kirlin, Woolsey & Hickox, of New York City (Mark W. Maclay, Jr., and John M. Woolsey, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. Moore & McCormack Company, Incorporated, managing agents of the Commercial South American Line, which was the trade-name for a line of steamers owned or operated by them, filed this libel against Neuss, Hesslein & Co., to recover damages for breach of a contract, the material provisions of which are as follows:

Moore & McCormack Co., Inc., Managers.

Commercial South American Line Brazilian Ports, River Plate Ports. (Flag bearing initials 'M. & McC'.). West Indies, Mexican-Cuban ports. Central American and North Coast South American Ports.

Managing Agents: Clinchfield Navigation Co., Inc., U. S. Atlantic and Gulf Service. Notice—The company assumes no responsibility for any refusals given that are not issued on this refusal form, and that are not signed by one of the company's officers.

New York, April 10, 1916.

Messrs. Neuss, Hesslein & Company, 43 White Street, New York, N. Y.—Dear Sirs: We confirm contract for freight room under deck cargo as stated below, for shipment on the steamer Mooremack, or by a steamer or steamers to be named later, shipment in whole or part cargo, via port or ports in or out of customary order, at steamer's option.

Cargo as follows:

One thousand (1,000) compressed bales cotton at four and one-quarter cents (4¼ c.) lb. landed. New York Rio Janeiro

It is expressly understood and agreed that all shipments are made subject to the terms and conditions of the Moore & McCormack Company, Incorporated, form of shipping receipt and bill of lading, and the conditions contained therein are made a part of this contract. All lighterage at risk and expense of the cargo. Freight to be prepaid on the signing of bills of lading, at New York and earned, steamer and/or goods lost or not lost at any stage of the transit. * * *

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Lay days, if required by shippers, not to count before April 29, 1916. Shippers option of canceling, if steamer not ready to receive cargo by 6 p. m. on May 31, 1916. The Moore & McCormack Company, Incorporated, has the option of designating loading and/or discharging berths. If the Moore & McCormack Company, Incorporated, does not avail itself of this option, the consignor and/or consignee to supply berths, immediately upon the readiness of steamer to load and/or discharge.

Yours very truly, Moore & McCormack Company, Inc.,
By A. V. Moore, Pres.

We accept and confirm the contract.
Neuss, Hesslein & Co., per M. J. Cuffe.
New York, April 10th, 1916.

May 10, 1916, as the steamer Mooremack could not arrive in time to load before May 31, the libelant designated the steamer Sargento Albuquerque as a substitute. This steamer was loading general cargo, and was not one of the Commercial South American Line, nor owned nor operated by Moore & McCormack Company, Incorporated. May 11, the respondents declined to ship on her.

It is contended that the only reason given by the respondents was that the Sargento Albuquerque did not have the requisite rating, and therefore that this is the only defense upon which they have a right to stand. But the answer alleged, among other things, that she was not a proper steamship in accordance with the terms of the agreement, which said nothing about ratings. Besides, at the trial, the respondents testified that they had objected to the steamer because they were dealing with the Moore & McCormack Line, and also produced testimony of custom that under such a line contract a substituted vessel must be one of the same line. We think they have a right to rely upon this defense also.

The first question, therefore, is whether under this contract the tender of freight room on a steamer loading general cargo, not one of the Commercial South American Line, and not owned or operated by the Moore & McCormack Company, was good. What the Moore & McCormack Company did was to get, as brokers, an option for shipping the respondents' cargo on the Sargento Albuquerque; that steamer being liable to them for brokerage if the goods were shipped. We think the tender was not good. The Moore & McCormack Company were acting, not as brokers, with Neuss, Hesslein & Co., but as principals. The contract executed is on the printed form of their line, and provides that the shipment is to be subject to the terms and conditions of the Moore & McCormack Company form of bill of lading and shipping receipt, which are made a part of it. The bill of lading describes it as a "regular line of steamers for Brazilian ports," and refers to "all vessels of this line" and to the "customary ports of this line." We have no doubt that the contract is to be construed as one for shipment on a steamer of the line. If it had been made with either the American, French, Cunard, White Star, or any other regular well-known line of steamers, no one would have pretended that such company would fulfill it by engaging freight room on a general ship not owned or operated by it.

But if it were to be held that such a vessel could be substituted, we think that the particular steamer Sargento Albuquerque should not

be considered a proper tender. She was a transport of the Brazilian navy, commanded by a lieutenant of that navy. The shipment, if made, would have been in the possession of the Brazilian government, and if it had been damaged or lost the respondents could not have proceeded against the Brazilian government, it being a sovereign, in personam, nor against its steamer, in rem. The fact, also, that the steamer was getting very much lower rates of freight than the market rates may very well have reflected to some extent the views of commercial people on this point. We need not consider the questions discussed in respect to the measure of damages.

The decree is reversed.

In re BITNER.

KEEL v. LIGHTBODY.

(Circuit Court of Appeals, Seventh Circuit. September 3, 1918.)

No. 2559.

1. BANKRUPTCY ⊂⊃396(1)—EXEMPTION—STATE LAW.
State law controls as to nature and amount of exemption.

2. HOMESTEAD ⊂⊃128—EXEMPTION.
Where an Illinois homestead was worth less than $1,000 over and above incumbrances, there is no question of setting off the whole or any, preliminary to sale on execution, and no valid sale can be made under execution; but the owner, despite sale or judgment, may dispose of his interest free from judgment liens, etc.

3. BANKRUPTCY ⊂⊃396(5)—TRUSTEE—RIGHTS OF HOMESTEAD.
Where, under the state laws, the bankrupt's equity in a homestead was completely exempt, no interest passed to the trustee.

4. BANKRUPTCY ⊂⊃400(1)—SETTING ASIDE EXEMPTIONS—CLAIM.
Where, under the state laws, the bankrupt's equity in a homestead was wholly exempt, so no title passed to the trustee, *held*, that title passed to the mortgagee, to whom the bankrupt conveyed his interest, and, the bankrupt having later conveyed to the trustee, the mortgagee was not required to assert his title; General Order No. 17 (89 Fed. viii, 32 C. C. A. xix), relating to setting aside exemptions, being inapplicable.

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois.

In the matter of Charles Bitner, bankrupt. George W. Keel appeals from orders of the District Court, affirming orders of the referee granting the petition of Leslie Lightbody, trustee in bankruptcy, for the sale of real estate, and denying appellant's petition to set the order aside. Reversed and remanded.

Robert H. Lovett, of Peoria, Ill., for appellant.

Ira J. Covey, of Peoria, Ill., for appellee.

Before MACK and EVANS, Circuit Judges.

MACK, Circuit Judge. The question raised on this appeal is a very narrow one. What rights, if any, has a trustee in bankruptcy in and to the equity of a bankrupt in an Illinois homestead estate, concededly

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

worth less than $1,000. over and above the incumbrances, at the time that the voluntary petition in bankruptcy was filed, homestead exemption having been claimed in the schedule filed by the bankrupt?

Title to the property in question stood in the bankrupt at the date of the filing of the petition. Subsequently he and his wife conveyed the property to the mortgagee, and some months later they again conveyed it to the trustee in bankruptcy.

[1, 2] The state law controls as to the nature and amount of exemption, and in Illinois it is clearly settled, not merely that a homestead to the extent of $1,000 is exempt, but that, if the homestead premises are worth, over and above incumbrances, less than $1,000, the property itself is absolutely free from claims of creditors. In such a case there is no question of setting off the whole or any part of the property on account of the homestead interest preliminary to a sale on execution. No valid sale can be made; if made, it is a nullity, and no title whatsoever passes thereunder. Despite such a sale, despite any judgments, the owner may dispose of such homestead interest as he pleases free of judgment liens. Brokaw v. Ogle, 170 Ill. 121, 48 N. E. 394; Garwood v. Garwood, 244 Ill. 582, 91 N. E. 672; Sheahan v. Madigan, 275 Ill. 379, 114 N. E. 135.

[3] It follows, therefore, that, as the equity was exempt from creditors' claims, no interest therein passed to the trustee by virtue of the bankruptcy proceedings. The title remained in the bankrupt. His right to dispose of it was unrestricted. Whether he sold it, or gave it away, or granted it to one or more of his creditors, with or without a consideration, was a matter that did not in the slightest degree concern the trustee in bankruptcy or any creditor, inasmuch as under no circumstances had they or any of them any interest therein.

No question arises here as to the jurisdiction of a court of bankruptcy to determine whether or not the equity equaled or exceeded $1,000. When it was expressly determined that, as stated in the schedules and as found by the appraisers, the value of the equity was less than $1,000, the court should have decreed that the trustee had no interest therein by virtue of the bankruptcy proceedings; and inasmuch as the conveyance by the bankrupt and his wife vested title in appellant, the mortgagee, the later conveyance to the trustee was ineffective for any purpose whatsoever.

[4] The trustee's report, rendered some nine months after the petition in bankruptcy was filed, and shortly after the second deed was executed, that thereby the bankrupt had waived his claim of exemption, imposed no duty upon appellant, the real owner of the legal title, to assert that title in the bankruptcy court. General Order No. 17 (89 Fed. viii, 32 C. C. A. xix), which requires a trustee to set off exempt articles within 20 days, and creditors to take exceptions to the trustee's report within 20 days, has no application, because here there were no exemptions to be set off by the trustee. The trustee merely made an ex parte erroneous report and claim of title; appellant, as owner, was under no obligation to except thereto.

This case is totally unlike the cases cited by appellee, involving claims of homestead rights as distinguished from homestead estates, or claims

to exemption out of a larger mass, or a homestead estate in property worth more than $1,000. Here the entire real estate in question was the homestead; the entire piece of property, the equity of which was worth less than $1,000 was exempt, and no act of any kind by the trustee was necessary to secure this exemption to the bankrupt.

The petition of the trustee for the sale of the real estate, subject only to the lien of the mortgage incumbrances, should have been denied, and the petition of appellant to set aside the order of sale of the equity should have been granted.

The order of the District Court, affirming the orders of the referee for the sale of the equity, and dismissing appellant's petition to set this order aside, will therefore be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

NOTE.—Judge KOHLSAAT concurred in these conclusions, but died before the opinion was prepared.

THE ADA.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 109.

1. ADMIRALTY ⟸119—COSTS—DECREE ON MANDATE.
   Where the mandate of the appellate court in an admiralty case contains no direction as to costs of the lower court, their allowance remains discretionary with the court.
2. COURTS ⟸405(5)—APPELLATE JURISDICTION OF CIRCUIT COURT OF APPEALS—QUESTION OF JURISDICTION OF LOWER COURT.
   An appeal does not lie to the Circuit Court of Appeals, where the sole question is whether a court of admiralty has jurisdictional power to grant costs on dismissal of a libel for lack of jurisdiction over the subject-matter; the question being one of jurisdiction of the lower court as a federal court and reviewable only by the Supreme Court under Jud. Code, § 238 (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1215]).

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Universal Transportation Company, Incorporated, against the steamship Ada; Rederiaktiebo Laget Amie, claimant. Appeal by claimant from decree disallowing costs. Appeal dismissed.

See, also, 250 Fed. 194, —— C. C. A. ——.

Engel Bros., of New York City, Conlen, Brinton & Acker, of Philadelphia, Pa. (William J. Conlen, of Philadelphia, Pa., and Joseph G. Engel, of New York City, of counsel; J. Thurston Manning, Jr., of Philadelphia, Pa., on the brief), for appellant.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter and John M. Woolsey, both of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

HOUGH, Circuit Judge. The decree appealed from was entered upon the mandate of this court issued in The Ada, 250 Fed. 194, — C. C. A. —.

Our decision disposed of the case upon a single point, viz. that the so-called charter party, for breach of which the libel was brought, was in substance and legal effect no more than a contract of sale, was not of a maritime nature, did not give rise to a maritime lien, and that therefore admiralty had no jurisdiction over the subject-matter of the suit.

This left nothing for the District Court to do but enter a final decree upon our mandate. On the settlement of such decree claimant applied for an award of the costs of the District Court. The application was denied (as is expressed in the decree appealed from) on the ground of lack of jurisdiction in the court to give the costs applied for; thereupon this appeal was taken, which raises no question but the propriety of the holding as to jurisdiction above stated.

[1] The matter is unaffected by the fact that we directed the District Court to dismiss the libel, for our mandate contained no direction as to the costs of the lower court, and since in admiralty, as in equity, costs are discretionary, the matter remained for the lower court's determination under Romeike v. Romeike, 251 Fed. 273, — C. C. A. —.

[2] Therefore this appeal asks us to consider the question whether a court of admiralty organized under the Constitution and laws of the United States possesses jurisdictional power to grant costs when dismissing a libel for lack of jurisdiction over the subject-matter. The inquiry is exactly what it would have been had the decree complained of been entered by the District Court of its own volition instead of in obedience to our mandate.

We are compelled to hold that this court lacks jurisdiction to entertain this appeal. It is plain that an appeal direct to the Supreme Court would have lain upon certificate as to jurisdiction. The Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907; The Ira M. Hedges, 218 U. S. 264, 31 Sup. Ct. 17, 54 L. Ed. 1039, 20 Ann. Cas. 1235. There are some questions of jurisdiction that may be brought to this court "along with other questions arising upon the trial of the merits of the case." Boston & Maine R. R. v. Gokey, 210 U. S. at 161, 28 Sup. Ct. 658 (52 L. Ed. 1002). But where the sole question on appeal is of jurisdiction in the sense that one challenges the "power of the District Court as a federal court to take jurisdiction of the subject-matter of suit," this court is without jurisdiction—the remedy is solely in the Supreme Court. Great Northern Ry. Co. v. Blaine, 252 Fed. at 550, — C. C. A. —. It is otherwise where the objection to power rests on want of territorial jurisdiction or the like. Davis v. Anderson, 252 Fed. 683, — C. C. A. —, and cases cited.

Since, therefore, no question is presented to us except one of jurisdiction in the lower court over the subject-matter of litigation, the appeal must be dismissed. It does not advance the matter to assert that the question is one of jurisdiction as to costs. If there had been jurisdiction over the subject-matter, jurisdiction as to costs is not doubt-

ed. In legal effect the money question involved is not even a variant of the fundamental jurisdiction point.

If this appeal pertained to costs alone, it should be dismissed for another reason. Du Bois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895; City Bank v. Hunter, 152 U. S. 512, 14 Sup. Ct. 675, 38 L. Ed. 534.

Appeal dismissed, without costs.

EAGLE OIL TRANSPORT CO., Limited, v. BOWERS SOUTHERN DREDGING CO.

THE SAN VALERIO.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1919.)

No. 3259.

SHIPPING ⊂⊃81(1)—LIABILITY OF VESSEL—FOULING ANCHOR LINE OF DREDGE PONTOONS.

A ship *held* in fault for injury to the pipe line and supporting pontoons of a dredge working in an adjoining slip, caused by striking the anchor line of the pontoons in backing out of the slip, where it was in the same position when she safely passed in the day before, and no request was made of the dredge to move it.

Appeal from the District Court of the United States for the Southern District of Texas; J. C. Hutcheson, Jr., Judge.

Suit in admiralty by the Bowers Southern Dredging Company against the steamship San Valerio; the Eagle Oil Transport Company, Limited, claimant. Decree for libelant, and claimant appeals. Affirmed.

Wm. B. Lockhart, of Galveston, Tex., and J. Parker Kirlin, of New York City (Kirlin, Woolsey & Hickox, of New York City, on the brief), for appellant.

John Neethe, of Galveston, Tex. (Williams & Neethe, of Galveston, Tex., on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. On November 24 and 25, 1916, the appellee was engaged in dredging in a slip between two docks in the port of Galveston, and had a dredge located in that slip, to which dredge was attached a line of floating pipe, supported by pontoons, extending around the pier immediately west of that slip to the next pier in that direction. At the turn or elbow of the pipe line it was anchored. On the morning of November 25th the steamship San Valerio, while it was being backed out of its berth alongside the pier immediately east of the slip, collided with the line of the anchor mentioned, and caused damage to the pipe line and some of the pontoons, which the libel

attributed to negligence in the management and control of the ship in attempting to back it out of the slip.

When the ship went to its berth on the day before—November 24th—the floating pipe line, the pontoons, and the anchor mentioned were located just where they were when the ship backed out. When the ship entered the slip, those in charge of its navigation were apprised of the location of the anchor to the pipe line by a buoy, which was afloat and seen at that time, and got the ship in without colliding with the anchor line and without its being moved. There was evidence in behalf of the ship that, when it backed out the next morning, that buoy was submerged and could not then be seen. But the evidence without dispute showed that those in charge of the navigation of the ship as it was backed out knew of the presence of the anchor line, if not of its exact location. The pilot in charge of the ship as it backed out testified in its behalf. He admitted that he knew the pontoon line was fastened either by an oversea wire or a submerged wire, and that he did not look out for that wire, because, without having any knowledge at all of the length of the anchor line, he guessed that it was shorter than it was in fact.

There was no contradiction in the evidence to the effect that those in charge of the dredge, the pipe line, and pontoons opened the line whenever it was desired to let a ship through, and moved the buoy and anchor when notified that it was in the way of a passing ship. The danger of contact with the anchor line could have been avoided by slacking it down. Those in charge of the ship did not signal or ask that this be done. There was nothing to indicate that the pipe line was wrongfully at the place at which it was anchored. The ship having gone to its berth with full knowledge of the location of the pipe line and its anchor, those in charge of the latter were not, the situation remaining the same, and in the absence of any signal or request to do so, called upon to move the anchor or to slacken its line to get it out of the way of the ship when it was leaving its berth. It was not shown that it was disclosed to them that that precaution was any more needed in the one case than it had been in the other.

The collision in question being one between a moving vessel and an anchored pipe line, the location of which was known, there is a presumption of fault on the part of the moving vessel. The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The Charles Hubbard, 229 Fed. 352, 143 C. C. A. 472. To say the least, the evidence adduced was not such as to rebut that presumption, or to show that the collision was attributable, in whole or in part, to any fault of those in charge of the pipe and pontoon line and its anchor. The court did not err in rendering the decree against the ship. The amount of the award is not complained of.

The decree is affirmed.

NICHOLSON et al. v. ERIE R. CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 76.

1. SHIPPING ⊂=54—INJURY TO VESSEL—NEGLIGENCE OF CHARTERER.
Charterer of a barge *held* liable for her injury, resulting from her being left at the exposed end of a pier at a time when storm signals were shown, and the placing by charterer of another barge beside her, so that when the wind rose they pounded together, and where, although notified, it did not send assistance for two hours.

2. TOWAGE ⊂=11(9)—INJURY TO TOW—DISREGARD OF STORM SIGNALS.
It is the duty of tug masters, engaged in moving boats around New York Harbor, to observe and give weight to the Weather Bureau's warning signals.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Martha Nicholson and others, owners of the barge Nicholson, against the Erie Railroad Company. Decree for libelants, and respondent appeals. Affirmed.

Libelants own the barge Nicholson, which they chartered to respondent. While in the possession of the charterer the barge was left by one of the railroad company's tugs at the end of Pier 39, Brooklyn, outside of two other barges. This occurred shortly after midnight of February 26–27, at which time the weather was calm. By noon of February 28 the wind had arisen, and before that time lighter 262–F, belonging to the Erie Company, was moored at the same pier end, and to and alongside of the Nicholson, by a tug not belonging to the railroad company.

When the wind arose the 262–F and the Nicholson began to pound, and the situation became dangerous for both. Before 2 p. m. of the 27th the master of the Nicholson by telephone applied for assistance to the Erie office from which he was accustomed to receive orders. No help arrived until about 4 p. m., before which time the Nicholson had received considerable injury by pounding against No. 262–F.

Pier 39, Brooklyn, is much exposed to northwesterly winds, and on February 26th the United States Weather Bureau had displayed in all the usual places around the harbor warning against a northwest storm. This action was brought to recover for the injuries received as above stated, and two tug masters in the service of respondent railroad company were examined concerning the movements of the barges above named. Neither of them seem to have observed the storm warning, and one of them (the master whose tug had left the Nicholson at Pier 39) deposed that he did not take "storm warnings into consideration when [putting] boats at piers in the harbor, unless it [was] blowing at the time"; and when asked, "Don't you rely on those storm warnings?" answered, "Not always." The District Court granted a decree for libelant; respondent brings this appeal.

Herbert Green, of New York City, for appellant.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. While entertaining no doubt that the charter, by virtue of which respondent was in possession of the Nicholson, amounted to a demise, we do not ground decision on the relation

thus established. The libel does not require consideration of this point, but charges in common form negligence in mooring and leaving the barge in "an exposed, unsafe, and dangerous position." We agree with the trial court that this charge is sustained by the joint effect of the following considerations:

[1, 2] 1. It was some evidence of negligence that the navigators of respondent paid no attention to the official warnings of the northwest storm, which was the principal cause of libelants' damages. It is not held that mere failure to observe storm warnings or to obey them is conclusive proof of negligence; but it is evidence of a failure in that ordinary care and skill which is a master mariner's duty. In substance we agree with the remarks on this subject contained in The Salutation (D. C.) 239 Fed. at page 423. The evidence herein shows that the testifying masters considered it no part of their duty either to observe or give weight to the Weather Bureau's advice. This was an error; we think such duty exists.

2. Probably the proximate cause of the Nicholson's damage was the placing outside of her of the Erie lighter 262–F. When this was done, the weather was apparently getting worse and the storm about to burst. The mooring of this lighter against the Nicholson was not done by respondent, but by another tug, apparently acting under the orders of the agent for a steamship loading near by, to whom, however, respondent had intrusted the charge of its lighter 262–F. Plainly the owner of that lighter does not escape responsibility to third parties by employing or permitting another person to handle and move said lighter. For the purposes of this case it is respondent that placed the 262–F against the Nicholson and left her there, whatever may be the rights and remedies of the Erie Company over and against the persons performing this piece of carelessness.

3. It was further evidence of negligence that at a time when the danger was imminent, if some damage had not already been done, the railroad company did not more swiftly furnish assistance to any boat in its charge. A delay of two hours in sending a tug to South Brooklyn, when a high northwest wind was known to be injuring vessels in such an exposed position as is here shown, cannot be excused by anything in the present record.

For the foregoing reasons, the decree appealed from is affirmed, with interest and costs.

THE NIGRETIA.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 47.

SEAMEN ⊂=21—DESERTION—WHAT CONSTITUTES.

Where the master of a British vessel dropped overboard the original shipping articles which libelants signed in a British port and on arriving in United States libelants refused to sign new articles or to return to the vessel as directed by the master, *held*, that the master was justified in treating libelants as deserters who had forfeited their wages and effects under the British law, and libelants could not recover because the master refused their demand for half wages made thereafter pursuant to Rev. St. 4530 (Comp. St. § 8322).

Appeal from the District Court of the United States for the Southern District of New York.

Libel by Hassan Abdu and others against the steamship Nigretia, her engines, etc., claimed by the Limerick Steamship Company, Limited. From a decree for claimant, libelants appeal. Affirmed.

See, also, 161 C. C. A. 356, 249 Fed. 348.

Silas B. Axtell, of New York City (Vernon Sims Jones, of New York City, of counsel), for appellants.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a libel by six Arabians, members of the crew of the British steamer Nigretia, to recover wages, one month's extra pay, the value of their effects left on board, and damages. The claimant of the steamer defends on the ground that the libelants were deserters and as such had forfeited their wages and effects under the British law.

April 16, 1916, the libelants signed articles at Cardiff, Wales, for a period of two years. The master, while boarding his ship in the harbor of St. Nazaire, just before sailing for New York on the voyage ending December 1, 1916, dropped the shipping articles and some other papers into the sea. The British Consul at New York instructed him as a precautionary measure to draw up a substitute copy of the original articles and have the crew sign on again before him.

On the morning of December 13th, the day before the vessel sailed, the master took the crew to the Consul's office, where all signed on again except the libelants, who refused to do so unless paid their wages in full to date. The relation of master and seamen continued notwithstanding the loss of the original articles, and the master refused this demand and ordered the libelants to return to the steamer. Instead of doing this, they went to counsel, who advised them to demand half wages under section 4530, U. S. Rev. Stat. (Comp. St. § 8322), which reads:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of

the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: Provided further, that notwithstanding any release signed by any seaman under section forty-five hundred and fifty-two of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

Later on the afternoon of the same day the libelants, accompanied by an interpreter, met the master as he was leaving the Custom House after clearing the vessel. There is a dispute as to what occurred; the libelants saying that they demanded half wages, and the master saying that they simply demanded their money and he told them to return to the ship and he would take the matter up and straighten it out. The libelants did not return to the ship but immediately filed this libel and the ship, which was ready to sail, having been released on stipulation, sailed down to the anchorage grounds in the lower harbor of New York, and proceeded on her voyage at 6 o'clock on the morning of the following day.

Judge Manton adopted the account given by the master held that the libelants were deserters, British Merchant Shipping Act of 1894, 57 and 58 Vic. c. 60, pt. II, § 221, and as such had forfeited their claims to wages and to their effects left on board. We concur in this conclusion. It is quite plain that the master was not obliged to waive, and did not waive, his right to treat the libelants as deserters who had terminated all relations with him and the ship by their previous conduct, whichever of the accounts he adopted.

The decree is affirmed, with costs.

SCOTT, Internal Revenue Collector, v. SCHWAB.

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

No. 3130.

INTERNAL REVENUE ⊂⊃9—EXCISE TAX ON CORPORATIONS—NET INCOME—"GAIN OR PROFIT."

Under Corporation Tax Act Aug. 5, 1909, where property is sold by a corporation at an advance over the original purchase price, the amount of such advance is a gain or profit received during the year, for the purpose of computing its net income.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin and William C. Van Fleet, Judges.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action by Edwin Schwab against Joseph J. Scott, as Collector of Internal Revenue. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Annette Abbott Adams, U. S. Atty., and Frank M. Silva, Asst. U. S. Atty., both of San Francisco, Cal., for plaintiff in error.

Morrison, Dunne & Brobeck and R. L. McWilliams, all of San Francisco, Cal. (H. W. Clark, of San Francisco, Cal., of counsel), for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error, as assignee of the National Ice & Cold Storage Company, brought this action to recover $1,897.97, alleged to have been wrongfully collected by the plaintiff in error as corporation excise tax for the year ending December 31, 1913. The corporation was organized in 1911 to carry on the business of the manufacture, purchase, and sale of ice, and the manufacture, purchase, sale, management, and operation of ice works, refrigerating plants, and cold storage houses. In February, 1913, it sold all of its property and assets. The selling price exceeded by $189,797.04 the cost price incurred in 1911. The tax on this gain, which was treated as income received during the year 1913, was paid under protest. A demurrer to the complaint was overruled, and judgment was entered for the defendant in error.

The court below, in overruling the demurrer and entering judgment, relied upon Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, a case involving the construction of the Revenue Act of March 2, 1867 (14 Stat. 471, c. 169) and followed Gauley Mountain Coal Co. v. Hays, 230 Fed. 110, 144 C. C. A. 408. The Supreme Court in a recent decision reversed the Gauley Mountain Coal Co. Case (Hays, Collector, v. Gauley Mountain Coal Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. 1061), and therein distinguished the Corporation Excise Tax Act of August 5, 1909 (36 Stat. 11, c. 6), from the Act of March 2, 1867, under which Gray v. Darlington was decided, and held that, where property is sold by a corporation at an advance over the original purchase price, the amount of the advance must be deemed a gain or profit for the purpose of computing income for taxation under the present law. That ruling is decisive of the present case, and it results that the judgment of the court below must be reversed.

It is unnecessary to consider the other ground of demurrer which is presented in this court, but which was not suggested to the court below, that under section 3477, Rev. Stats. (Comp. St. § 6383), the cause of action is not assignable.

The judgment is reversed, and the cause is remanded, with instructions to sustain the demurrer.

CENTRAL DIST. PRINTING & TELEGRAPH CO. v. FARMERS' & PRODUCERS' NAT. BANK OF SISTERSVILLE, W. VA. SAME v. JACKSON. JACKSON v. PARKERSBURG & O. V. ELECTRIC RY. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

Nos. 1625, 1626.

1. COURTS ⊂=385(4)—CIRCUIT COURT OF APPEALS—JURISDICTION.
The question, arising in a federal District Court, whether that court or a state court, by reason of priority of possession or control, has the right to dispose of property which is the subject-matter of litigation, is not one of jurisdiction, within the meaning of Judicial Code, § 238 (Comp. St. § 1215), but is reviewable by the Circuit Court of Appeals.

2. COURTS ⊂=493(2)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.
By an equity suit in a state court of West Virginia by a judgment creditor to subject property of the debtor to the judgment and such other liens as may be proved as provided by statute, although no receiver is appointed, the court acquires exclusive possession or control of the property necessary to effectuate its decree as against a federal court in which a suit for a receiver is subsequently brought by a bondholder of defendant who is a party to the state suit or represented therein by the mortgage trustee.

Appeals from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Suits in equity by Henry M. Jackson against the Parkersburg & Ohio Valley Electric Railway Company, and by the Farmers' & Producers' National Bank of Sistersville, W. Va., against Henry M. Jackson and others. From orders granting an injunction and directing a sale of defendant's property, the Central District Printing & Telegraph Company, otherwise known as the Central District Telephone Company, appeals. Reversed.

M. H. Willis, of New Martinsville, W. Va., for appellant.

Arthur S. Dayton, of Philippi, W. Va., and V. B. Archer, of Parkersburg, W. Va., for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. The transcript filed in this court discloses the following facts:

The Parkersburg & Ohio Valley Electric Railway Company, hereinafter referred to as the Railway Company, was incorporated under the laws of West Virginia for the purpose of constructing an electric railroad from Parkersburg to the Pennsylvania state line. It began the construction of the road during the fall months of 1904, constructing five miles, at the cost of over $50,000.

On November 1, 1905, the Railway Company executed to the Union Trust & Deposit Company, hereinafter referred to as the Trust and Deposit Company, a mortgage upon its property for the purpose of securing the payment of a bond issue of $100,000, of which $75,000

were issued and sold—the proceeds being used in construction work. The remainder, $25,000, was deposited as collateral to secure a loan of $13,000 by the bank.

The Railway Company entered into a contract with an electric company to operate its road when completed, but became financially embarrassed before its completion, and defaulted in the payment of interest on its bonds.

On December 3, 1907, appellant, hereinafter called the Telephone Company, recovered a judgment in the circuit court of Tyler county, W. Va., against the Railway Company for $3,004.40 and costs.

At the November rules, 1907, of the circuit court of Tyler county, the Telephone Company, pursuant to the provisions of section 7, c. 139, of the Code of West Virginia (sec. 5099), filed its bill against the Railway Company and one Hamilton, who had filed a mechanic's lien on the property, setting forth the rendition of the judgment and other facts relevant and appropriate to the relief demanded, praying that the lien established by the judgment be enforced—that other parties holding liens be notified, and the property of the Railway Company be sold for the payment of the judgment and such other liens as should be established.

At the January rules, 1910, the Telephone Company, by leave of the court, amended its bill by making the Trust and Deposit Company mortgagee, and one John Schrader, holder of a portion of the bonds secured by the mortgage, parties. In its amended bill, the Telephone Company averred the execution of the mortgage, filing a copy thereof as an exhibit, to be read as a part of the amended bill. It appears that another mortgage, or deed in trust, was executed by the Railway Company to the Trust and Deposit Company on the same day, to secure a bond issue of $3,000,000, but none of the bonds have been issued or sold. Summons was issued and served upon the Trust Company and Schrader.

At February rules an order was made referring the cause to K. S. Boreman, commissioner in chancery, to ascertain and report the amount of property owned by the Railway Company, the liens existing against the property, and their order of priority. He was directed to give notice, as provided by the statute, to all persons holding liens against the property of the Railway Company. No further action was taken in this cause until June 27, 1913.

On May 8, 1911, appellee, Henry M. Jackson, a citizen of Pennsylvania, filed his bill in the District Court of West Virginia, against the Railway Company and the Union Trust & Deposit Company, mortgagee, in which he alleged that he was the owner of $52,000 of the bonds secured by the mortgage of November 1, 1905, and of coupons for overdue interest thereon, to the amount of $8,580.

He set forth the embarrassed and unfinished condition of the road and the necessity for its completion, and that when completed it could be operated under its contract with the Electric Company. He set out the execution of the mortgages, and alleged that the property of the Railway Company, in its present condition, would not bring its value, and that a sale would result in a great sacrifice. He further alleged:

"That the property can be saved for the company, and all loss prevented, so far as the first preferred mortgaged bondholders are concerned, by the appointment of a receiver, and the issue and sale of receiver's certificates, and with the proceeds of the certificates the railroad can be completed, such coupons as must be retired can be paid, the road put into operation, and in this way the property can be saved from sacrifice and all parties' interests promoted."

It was further alleged that a receiver could sell $30,000 of certificates, which should be declared a first lien on the property of the Railway Company. Complainant prayed the court to appoint a receiver for all of the property of the Railway Company, with direction to take immediate possession and to issue and sell certificates, and from the proceeds pay the overdue interest coupons and to complete the road, and put same into operation by having the cars of the electric company operated thereon, and for such other and further relief as might seem meet in the premises. Process was issued and served on the officers of both defendants. No answers were filed.

On May 11, 1911, a decree was made appointing a receiver for the property of the Railway Company, and directing him to take immediate possession of said property and operate same. He was further directed—

"to institute and prosecute all such suits as may be necessary, in his judgment, to the protection of the property and likewise to defend all actions or suits now pending in any court against the said company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights now placed in his charge."

The receiver was further directed to make a full report to the court of the present condition of the property of the Railroad Company, specifying the amount estimated to be necessary to be expended in order to complete said road, etc.

On May 24, 1911, upon the report of the receiver, he was authorized to issue certificates not exceeding $30,000, which he was directed to hypothecate or sell, etc. He was further directed, with the proceeds of the certificates, to complete the construction of the road and cause it to be operated under the provisions of the contract made with the Union Traction Company. The order contained the usual provisions found in such decrees, providing for the discharge of duties by the receiver, filing bond, etc. Thereafter other certificates were authorized and issued, aggregating in all $60,000. Pursuant to the provisions of these orders, the receiver took into his possession all of the property of the Railway Company, issued and disposed of the certificates, and with the proceeds completed the construction of the road and put it into operation, making reports of his proceedings to the court. Other proceedings were had in the cause which are not material or relevant to the question presented upon this appeal.

Recurring to the proceedings in the cause pending the circuit court of Tyler county, it appears that, on June 27, 1913, an order was made reciting that K. S. Boreman, the commissioner theretofore appointed, had retired from his office without executing said order. O. C. Carter was appointed commissioner, with direction to proceed with the execution of the order. Pursuant to this order, the commissioner, on

July 3, 1913, published in the Tyler County Star a notice to all persons having liens on the property to file them at his office, on a day named in said notice; he also notified the parties to the suit.

On August 16, 1913, the commissioner filed his report, which, after stating that the Railway Company appeared and denied that process was served upon it, reported the execution of the mortgages to the Trust and Deposit Company, but "that none of the defendants to this suit offered to prove the issuing of bonds provided for in said trusts, or offered to show the ownership of such, if any were issued."

He reported that, in addition to the judgment of the Telephone Company, there were several small claims proven. He also reported the character of the property owned by the Railway Company, and that the rents and profits from said property would not, in five years, pay off and discharge the liens thereon. Thereafter, and on the 13th day of September, 1913, the report of O. C. Carter, Esq., commissioner, was confirmed, and a decree rendered directing that the property of the Railway Company be sold by M. H. Willis, Esq., special commissioner, at public auction for the purpose of paying the liens as reported by the commissioner. Thereafter a motion was lodged by the Railway Company to vacate the decree, for that no service of process was made upon it. This motion was refused, and, upon appeal, the Supreme Court affirmed the judgment. 76 W. Va. 120, 85 S. E. 65. This phase of the case has no relevancy to this appeal.

On October 13, 1913, the Farmers' & Producers' National Bank of Sistersville, W. Va., filed its petition in the District Court of the United States, setting forth the facts herein recited, and, further averring that it held, by deposit of John F. Schrader, as collateral security for loans negotiated by him, a portion of the receiver's certificates issued under, and pursuant to the decrees of the court, aggregating $10,000, exclusive of accrued interest; that, relying upon the proceedings had in the District Court, various persons, to petitioners unknown, had purchased practically all of the certificates issued by said receiver; that M. H. Willis, special commissioner, has given notice that he will sell the property of the Railway Company pursuant to the provisions of the decree of the circuit court of Tyler county. Petitioner prayed that the court enjoin the commissioner from selling the property, or otherwise executing the said decree, and that the Telephone Company, by mandatory injunction, be directed to procure the dismissal of its suit in said circuit court, etc.

Upon notice of this motion, the Telephone Company filed its answer to the petition, in which the material allegations of fact were admitted, but denied that petitioner was entitled to the relief demanded. The District Judge, after careful examination of the facts and the authorities, enjoined the receiver of the state court from proceeding with the sale of the property, and the Telephone Company from prosecuting its suit in said court.

From this decree the Telephone Company appealed. This appeal is docketed as No. 1625.

In the case of H. M. Jackson against the Railway Company, the receiver, C. L. Williams, in his report to the court on October 18, 1917,

stated that the income received from the operation of the railroad had ceased to cover the operating expenses and recommended that the property be immediately sold. The court, on January 16, 1918, being the same day upon which the order enjoining the receiver appointed by the state court was made, entered a decree appointing V. B. Archer, Esq., special commissioner to make sale of all the property of the Railway Company and report to the court.

From this decree the Telephone Company appealed. This appeal is docketed No. 1626. The appeals are heard together and will be disposed of accordingly.

[1] Before proceeding to discuss the questions presented by the assignments of error, a motion, lodged by the Farmers' & Producers' National Bank, to dismiss the appeal in No. 1625, should be disposed of. This motion is based upon the ground that the question involved is the jurisdiction of the District Court, and that it should have been certified directly to the Supreme Court of the United States, as prescribed by section 238 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1215]). Counsel for the movant frankly concedes that the decision of the Supreme Court in Louisville Trust Co. v. Knott, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159, "bears against" his position. He suggests that the more recent case of Merriam v. Saalfield, 241 U. S. 22, 36 Sup. Ct. 477, 60 L. Ed. 868, "modifies and, in effect, supersedes" the former case. We are unable to concur in this suggestion. The instant case comes clearly within the construction of section 238, made in the Knott Case. In this connection, because pertinent at this time, it may be appropriate to note that, while in many cases the conflict is referred to as one of jurisdiction, whereas it comes in respect to the right of possession of, or control over, the property to be appropriated to the satisfaction of the decree, or judgment. This is not very important, but illustrates the distinction between this case and those coming within the provisions of section 238 of the Judicial Code.

[2] For the purpose of clarifying the situation it is proper to note that, under the laws of West Virginia, the Telephone Company was permitted, after the return of the writ of fieri facias, unsatisfied, to file a bill in a court of equity, in which, after appropriate proceedings, the court may order the property of the judgment debtor, or any part thereof, to be sold and the proceeds applied to the discharge of the judgment. The Code provides that—

"In every such suit, all persons having liens on the real estate, sought to be subjected by judgment or otherwise, shall be parties plaintiff or defendant. * * * And whether the suit be so brought or not, every such lien holder, whether he be named as a party to the suit so brought or not, or whether he be served with process therein, or not, may present, prove and have allowed any claim he may have against the judgment debtor, which is a lien on such real estate."

It appears that the Supreme Court of West Virginia has uniformly held that, in suits to enforce judgment liens under this section of the Code, a receiver will not be appointed unless allegations are made showing the necessity therefor, with a specific prayer for such ap-

pointment. No such averment is made in the bill filed by the Telephone Company, nor is there any prayer for the appointment of a receiver. While no judgment in personam is sought, the only relief demanded being the sale of the specific property described in the bill, the suit comes within those classed as proceedings quasi in rem or "in the nature of a proceeding in rem." The suit may be likened to a bill to foreclose a mortgage, or a judgment creditor's bill.

A careful examination of the decisions discussed in the opinion of the learned District Judge, and others cited by counsel in their briefs, discloses the difficulty experienced in "running the line" which courts must observe to avoid conflict in dealing with property which other courts have taken into their possession, or assumed control over, by means of process appropriate for that purpose.

As said by Mr. Justice Matthews in Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 295, 5 Sup. Ct. 135, 28 L. Ed. 729, the rule by which the courts are guided—

"has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity, and, therefore, of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction."

In that case the property was seized by the marshal under a libel, followed by a judgment of condemnation for violation of the internal revenue law—a proceeding in rem. Subsequent to the seizure, the sheriff levied upon and sold the property to satisfy a mechanic's lien. The court held that the purchaser, under the marshal's sale, acquired title.

In Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470, the property in controversy had been levied upon by the sheriff, a forthcoming bond given by the defendant in the execution, and possession retained by him. A second officer levied another execution. The court held the second levy invalid, saying:

"The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other."

In Wabash R. R. Co. v. Adelbert College, 208 U. S. 54, 28 Sup. Ct. 187, 52 L. Ed. 379, Judge Moody says:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it."

In that case the court had taken possession, by its receiver, and sold the property, but in its decree confirming the sale, had retained control for the purpose of adjudicating claims, etc. The court held that, under the clause retaining the control, the property in the possession of the purchaser could not be seized by a receiver appointed in a subsequent suit.

In Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322, a suit was instituted in equity February 7, 1843. A receiver was appointed June 27, 1845. The property was sold under a decree by the master March 1, 1847. An execution was levied on the property February 24, 1845, and sale made thereunder July 7, 1845. It will be observed that the levy was made prior to the appointment of the receiver, but the sale was subsequent to the sale by the receiver. It was held that the purchaser at the sale by the receiver took the title as against the purchaser at the sheriff's sale. Judge Nelson said that the sheriff could not disturb the possession of the receiver by selling the property, although the levy was prior to his appointment. He should have come into the court having the custody of the property and set up his claim. It is suggested that, upon the authority of this decision, the Telephone Company should have filed a transcript of its judgment and decree rendered by the state court in the suit pending in the District Court, and asserted its claims to have priority in the distribution of the proceeds of the property when sold by the commissioner. There is much force in the suggestion, and unless the state court acquired jurisdiction of, or control over, the property by the institution of the suit, is the correct view. In Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028, this course was approved. There a vessel was seized under foreign attachment, issuing out of the state court. Thereafter libels in admiralty were levied for the recovery of seamen's wages, admitted to be prior liens upon the property. The court held that the marshal was not entitled to take the property from the possession of the sheriff, who should proceed to sell. The libelants were entitled to assert in the state court their claims upon the funds. While the question presented here is not presented in Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660, the discussion by Mr. Justice Brewer is pertinent. The federal court, in a suit in equity, appointed a receiver of the property of a railroad company. The defendant filed a bond securing such claims as might be adjudged to be liens on the property, the receiver was discharged, and the property returned to the possession of the defendant. The suit remained on the docket for final disposition. After the discharge of the receiver and the return of the property, a suit was brought in the court of chancery of the state of Tennessee, and a receiver appointed, who took the property into his possession. Subsequently, upon a motion in the federal court, another receiver was appointed. He took the property from the receiver appointed by the state court. He was directed by the court to apply to the federal court for the restoration of the property. This being refused, he appealed. Mr. Justice Brewer thus states the question before the court:

"Had the Circuit Court of the United States, when this property was in the possession of the receiver appointed by the state court, the power to appoint another receiver and take the property out of the former's hands? We are of opinion that it had not."

Referring to a class of cases somewhat analogous to this, the learned justice says:

"Of course, the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express

object, is the appointment of a receiver, and where possession by such officer is necessary for the full accomplishment of the other purposes named therein. The mere fact that, in the progress of an attachment or other like action, an exigency may arise which calls for the appointment of a receiver, does not make the jurisdiction of the court, in that respect, relate back to the commencement of the action."

Applying this language to the instant case, he says:

"While the validity of the appointment made by the Circuit Court on June 6, 1892, cannot be doubted, yet, when that court thereafter accepted a bond in lieu of the property, discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching that property. * * * The property ceased to be in custodia legis. It was subject to any rightful disposition by the owner or to seizure under process of any court of competent jurisdiction."

There is a class of cases in which it is held that the test of jurisdiction is found, not in the possession of the property, but in the character and purpose of the suit, the relief demanded, and the necessity for acquiring control of the property to enforce the final decree.

In Farmers' Loan & Trust Co. v. Lake St. R. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, Judge Shiras, after stating the general rule, that the possession of the res vests in the court which has first acquired jurisdiction the power to hear and determine all questions relating thereto, and for the time being disables all other courts from exercising a like power, says:

"This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted * * * to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

In Palmer v. Texas, 212 U. S. 129, 29 Sup. Ct. 234, 53 L. Ed. 435, Mr. Justice Day, quoting with approval the foregoing language, says:

"If this rule is not applied, a court of competent jurisdiction, which by the law of its own procedure has acquired jurisdiction of property, may find itself, as in this case, after final judgment maintaining its right over the property, at the conclusion of the litigation deprived of the subject-matter of the suit."

In Powers v. Grass B. & L. A. (C. C.) 86 Fed. 705, it appeared that the directors of a solvent corporation, without consulting or obtaining the approval of the stockholders, executed a deed of assignment conveying its entire property. The assignee filed a bill in the state court, asking for directions in the execution of his trust and the settlement of his accounts. Pending that suit, several of the stockholders, being citizens of another state, filed their bill in the Circuit Court of the United States, praying that the deed of assignment be declared void, and that pendente lite a receiver of the property of the corporation be

appointed. Judge Lurton held that the deed of assignment was made without authority and void. Upon the motion for the appointment of a temporary receiver it was argued that the state court, by virtue of the suit by the assignee, acquired exclusive control over the property. The judge was of the opinion that the suit by the assignee did not bring the property within the jurisdiction, nor control, of the state court; that the relief sought in the two suits was entirely different.

In regard to the question of power or jurisdiction to appoint a receiver the learned judge said:

"The principle that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be interfered with by process out of another court, is well settled. * * * There are two classes of cases in which the court first obtaining jurisdiction should be suffered to proceed without any interference by process from another court of concurrent jurisdiction. The first class consists of those cases in which the exercise of jurisdiction by one court will interfere with the prior possession of the res by another court of competent and concurrent jurisdiction. * * * The second class is where there are two suits pending in different courts of concurrent jurisdiction, in which the parties are the same, and which involve and affect the same subject-matter, and where the jurisdiction of neither is complete nor effectual unless it may, if necessary or proper, exercise exclusive dominion over the res in litigation," citing cases falling in both classes. "The conflict exists in such instances because the suits are in the nature of suits in rem. * * * To make a case of conflict, the two concurrent suits must involve relief against the same res. * * * If the parties are the same, and the issues the same, and the relief sought involves dominion over the same res, and cannot be effectually granted if dominion over the res be taken by process from another court, it is a case where the second court should regard the jurisdiction of the first as exclusive, and hold its hands until the court first obtaining jurisdiction has terminated the case then pending," quoting the language used in Buck v. Coldbath, 3 Wall. 334, 18 L. Ed. 257.

In Knott v. Evening Post Co., 124 Fed. 342 (C. C. W. D. Ky.), Judge Evans gave the question very careful consideration. His opinion exhibits intelligent labor and affords a valuable mine of learning. Complainant Knott, a citizen of Missouri, having recovered judgment against the Evening Post Company, upon the return of an execution unsatisfied, filed a bill in the nature of a creditors' bill, for the enforcement of his judgment, and to that end asked that a receiver of the property of the company be appointed. The court appointed a receiver, who took the property into his possession. A reference was made to a master to ascertain the assets and liabilities of the company.

Prior to the institution of the suit by Knott, the executors of a stockholder in the company began an action in the state courts pursuant to the provisions of a statute, demanding an inspection of the books of the company. In this suit, about one month after the appointment by the federal court, the state court appointed a receiver of the same property, who obtained permission to intervene and demand possession of the property in the hands of the receiver of the federal court. Upon this motion Judge Evans held that the purpose of, and relief demanded by, the plaintiff in the suit in the state court did not bring into the custody of the court the property of the company; that the averments of the bill, assumed to be true, did not state facts which would authorize a court of equity to seize the corporate assets at the instance of a stock-

holder, nor did the pendency of that suit per se create a lien thereon, nor was anything done, or attempted to be done, in the state court which brought the assets of the company within the grasp of the law, either actually or potentially.

Discussing the question of conflicting jurisdiction of courts over property in custodia legis, and citing the authorities, the learned judge reaches the conclusion that—

"Wherever suits are pending in two or more courts of concurrent powers, in each of which, at the instance of different plaintiffs, it is sought to control or subject to the demands of creditors the same property, that court alone has the right to do so which first gets the property within its grasp by some recognized mode of judicial seizure, and that, too, without regard to the question of which suit was first commenced. The mere priority of commencement of litigation is not, but the priority of judicial seizure is, the test of jurisdiction over the res when property is the subject of the contention. This test is simple, direct, and practical, and draws a line which is palpable. It is easy of solution and cannot be open to serious mistake."

While the learned judge strongly maintains his opinion, he concludes:

"I, by no means, intend to say that the rule as to first acquirement of jurisdiction over the res depends, in all cases, upon actual seizure, as in admiralty, or under the internal revenue or custom laws, or by replevin, or under an execution or attachment, or through a receivership. The judicial custody to which I refer may sometimes be acquired in a somewhat less positive way. For example, it may, in some cases and as to certain parties, be accomplished by a lis pendens, or as against parties to the suit there may be an equitable levy by virtue of the suit itself, where equitable assets are sought to be subjected by means of a creditors' bill, though in all such cases there must be a suit upon a judgment and a return of nulla bona. * * * But while in these cases the property is only potentially—that is, constructively—in custodia legis, it is nevertheless so under a certain form of judicial stress, and by virtue of a judicial proceeding, the nature of which must be appropriate to that result."

In Sullivan v. Algrem, 160 Fed. 366, 87 C. C. A. 318 (C. C. A., 8th Cir.), Judge Sanborn recognizes, as among the cases in which the court first obtaining jurisdiction over property, retains it, as when—

"the due commencement of a suit in that court, from which it appears that it is, or will become, necessary to a complete determination of the controversy involved, or to the enforcement of the judgment or decree therein, to seize, charge with a lien, sell, or exercise other like dominion over it."

In Mound City Co. v. Castleman (C. C.) 177 Fed. 510, it appeared that a suit had been instituted in a state court of competent jurisdiction to secure partition of real estate. Pending that suit one of the parties sold his interest in the land and thereafter a suit was instituted in the name of his grantee, in the federal court for partition of the same land. District Judge Philips, after stating the facts, said:

"Jurisdiction, therefore, in partition, over the land in question, had vested in the said Cooper county circuit court, before Ben. T. Castleman conveyed his interest in the land to the complainant company, and, of course, prior to the institution of the suit in this jurisdiction. It is a well-settled rule of law that the jurisdiction of the state court over the res, i. e., the subject-matter of the partition of this land, was exclusive of that of every other court subsequently undertaking to exercise such jurisdiction; this for the obvious reason that, as the judgment to be rendered by the court, first in time, to be effective,

must operate on the land itself, the control and possession of which is essential to accomplish the very ends of the proceeding."

The decree dismissing the bill was affirmed. 187 Fed. 921, 110 C. C. A. 55. Judge Sanborn adds to the reasons assigned by the District Judge:

"The jurisdiction of a court over the subject-matter or (in) a cause once lawfully acquired includes the power to enforce its judgment or decree and to protect the titles of those holding under it from any attempt to avoid or annul them. * * * The fact clearly appeared from the petition as soon as it was filed in the suit in the state court that it would become necessary to a complete determination of the issues tendered and to the enforcement of the decree sought for that court to exercise its dominion over the specific land described in the petition and to divide or sell it. The commencement of that suit, therefore, withdrew that land from the jurisdiction of the federal court below and from the jurisdiction of every other court, so far as necessary to give effect to the final decision and decree in the state court and gave to that court the power to retain the control over it, requisite to protect the titles of those who should hold under its decree."

In McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 226 (C. C. A., 8th Cir.), Judge Hook, after stating the general rule, says:

"It is essential to the dignity and authority of every judicial tribunal and is especially valuable for the prevention of * * * conflicts between federal courts and the courts of the states. As between them it is reciprocally operative—mutually protective and prohibitive. The most difficulty arises in determining when possession of property has been taken, when jurisdiction has attached to the exclusion or postponement of that of other courts. It is settled, however, that actual seizure or possession is not essential, but that jurisdiction may be acquired by acts which, according to established procedure, stand for dominion and in effect subject the property to judicial control. It may be that by the mere commencement of an action, the object, or one of the objects, of which is to control, affect, or direct its disposition."

B. & O. R. R. Co. v. Wabash R. R. Co., 119 Fed. 678, 57 C. C. A. 322, Williams v. Neely, 134 Fed. 2, 67 C. C. A. 171, Hardin v. Union Trust Co., 191 Fed. 152, 111 C. C. A. 632, Hirsch v. Independent Steel Co. (C. C.) 196 Fed. 104, and Smith v. Jennings, 238 Fed. 48, 151 C. C. A. 124, are illustrative of the rules by which courts are guided in similar cases.

We have discussed and quoted from a larger number of cases than is usual or perhaps necessary, for the reason that, while the decisions are not contradictory, many of them fall within different classes, and language is used apparently conflicting, until the distinguishing facts are observed.

After careful consideration and anxious concern to place the instant case in the class to which it belongs, we reach the conclusion that, certainly as between the parties to the two suits who were, for the purpose of dealing with the property the same, by the institution of the suit by the Telephone Company to enforce its judgment lien and bring in all other lienholders and bring the property to sale for their satisfaction, the circuit court of Tyler county acquired exclusive jurisdiction over the property of the Railroad Company and that the retention of such jurisdiction was necessary to enable that court to enforce its decree and administer the remedy to which the parties were entitled.

It is suggested that H. M. Jackson was not a party to the record

in the state court. The Trust & Deposit Company held the title to the property in trust to secure the bonds held by him—it was made a party before he filed his bill. Schrader, one of the bondholders, was also made a party. This was in accordance with the rules of practice in chancery.

The judgment creditor was not required to ascertain and bring into the record all of the bondholders. They were, for the purposes of the suit, represented by the trustee. It was its duty, upon the notice by the commissioner, to protect the interest of the holders of the bonds, or to furnish a list of them, and notify them of the proceedings. To the suggestion that, upon the allegations of the bill, the court had no power to appoint a receiver, it may be said that jurisdiction of the property was not dependent upon the appointment of a receiver. If, however, the interest of the lienholders required that one be appointed, an amendment of the bill by any lienholder, setting forth the essential facts with an appropriate prayer, would have met the conditions. The court had ample power to protect the property. The sole purpose of the suit was to bring to sale, after bringing in all lienholders, the specific property described in the bill, upon which the Telephone Company held a judgment constituting a lien. To enforce the only decree which the court had the power to render a sale was necessary, and to effectuate the sale, the court had the power and it would have been its duty by proper process to put the purchaser in possession. The case comes within the reason upon which, as held in the cases cited, the state court should have been permitted to retain control of the property. That court, in the exercise of its equitable powers, could have rendered full and adequate relief to all persons interested in the title to, and disposition of, the property. There is evidence in the record that the president of the Railway Company filed the bill as attorney for H. M. Jackson and was attorney for the receiver in the suit pending in the federal court. We confine our decision to the single question presented upon the transcript before us—the decrees of the District Judge enjoining the receiver of the state court from selling the property, and the Telephone Company from further prosecuting its suit in the state court, and directing the receiver of the federal court to proceed with the sale.

Appellee insists that, conceding the state court acquired jurisdiction, the plaintiff in that suit, by its failure to prosecute it from October, 1909, until May 8, 1911, when Jackson filed his bill, abandoned the suit. This position cannot be sustained. The state court had control of the suit, and in it alone was vested the power to dismiss the suit for failure to prosecute. It is further insisted that, by its failure to prosecute the suit until June 27, 1913, during which period the federal court, by its receiver, took possession of the property, and by the sale of receiver's certificates, now held by the bank, petitioner herein and other bona fide purchasers completed the road, the Telephone Company is estopped to interfere with the sale of the property. This unfortunate delay is explained by the correspondence set out in the record between the attorney for the receiver and the Telephone Company. It appears that, immediately upon receiving notice of

the institution of the suit by Jackson, the attorney for the Telephone Company wrote the receiver, calling his attention to the suit in the state court, and asking for information. The attorney for Jackson, who, it appears, is also president of the Railway Company, answered the letter, explaining the reasons for the suit, and promising to secure a second issue of certificates with which to pay the judgment. After further correspondence and the failure to pay the judgment, the prosecution of the suit in the state court was pressed to a decree. The learned District Judge did not rest his opinion upon the alleged estoppel.

We fail to find any conduct, or representation, on the part of the Telephone Company, or its officers, which estops it from asserting its legal and equitable rights. It is proper to say that it is admitted in the record that the pending of the suit in the state court was first brought to the attention of the District Court by the filing of the petition by the bank for the injunction against the receiver of the state court. While we hold that there is error in the decrees appealed from, we are of the opinion that the District Court had jurisdiction of the parties and of the subject-matter, and that, except in so far as its proceedings interfered with the procedure of the state court, its action is not before us for review. Whether the holders of the bonds will be permitted by the circuit court of Tyler county to file the bonds and assert their rights under the mortgage is a question for that court to decide. Other questions respecting the status of the receiver's certificates are suggested in the transcript which are not before us. If the judgment of the Telephone Company and the other small claims found by the report of the commissioner and adjudged by the decree to be the only liens on the property and the costs are discharged, we perceive no valid reason why the District Court may not proceed to dispose of the property, pursuant to its decree. These questions, however, are not before us, and the parties will proceed as they may be advised. This opinion will be certified to the District Court, to the end that further proceedings may be had in accordance therewith.

Reversed.

SWAYNE & HOYT, Inc., v. EVERETT.

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

No. 3032.

1. AMBASSADORS AND CONSULS ⊜6—UNITED STATES COURT FOR CHINA—JURISDICTION.

Under Act June 30, 1906, § 1 (Comp. St. § 7687), giving the United States Court for China exclusive jurisdiction of all cases and judicial proceedings which had previously been exercised by consuls and ministers, except as qualified by section 2 (section 7688), that court has jurisdiction of suits between citizens of the United States in controversies which arose in China.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. CARRIERS ⊂⊃45—REFUSAL TO ACCEPT SHIPMENT—DEFENSES.
A common carrier has the burden of affirmatively pleading and proving any fact which will exonerate it from liability for refusing to receive and carry goods tendered to it for shipment.

3. SHIPPING ⊂⊃105—REFUSAL TO ACCEPT SHIPMENT—LIABILITY.
An American shipowner, operating a vessel between Chinese and American ports when England and Germany were at war, but the United States was neutral, was not exonerated from liability for refusing to accept lawful goods tendered by an American citizen for shipment to a German consignee at an American port, because its Shanghai agent was a British subject, and forbidden by his government to receive such shipments, nor because it did not know of such regulation.

In Error to the District Court of the United States for China; Charles S. Lobingier, Judge.

Action at law by Leonard Everett against Swayne & Hoyt, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., and Jernigan & Fessenden, of Shanghai, China, for plaintiff in error.

Fleming & Davies, of Shanghai, China, and Garret W. McEnerney, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This case comes here from the United States Court for China. It is a writ of error sued out by the defendant to an action there brought by the present defendant in error to recover damages for the refusal of the plaintiff in error, a common carrier, to receive, without lawful excuse, certain cargo offered it by the plaintiff to the action for shipment from Shanghai by the steamer Yucatan, which had been advertised to be on the berth at Shanghai for freight to San Francisco. The facts are practically undisputed, and are, briefly, these:

Swayne & Hoyt was a California corporation having its principal place of business at San Francisco, and was therefore an American citizen, and was a common carrier of freight between the Orient and that among other places. It had as its agent at Shanghai a British corporation, styled Jardine, Matheson & Co., Limited, and had under charter the said steamship for a voyage from San Francisco to China and Japan and return to San Francisco and other Pacific coast ports of the United States.

Prior to the arrival of the Yucatan at Shanghai, the plaintiff in the case applied to the agent of the defendant thereto for space in the ship in which to ship certain goods, in response to which application, after one denial of it, the agent agreed to provide the requested space upon condition that the application be approved by the British consul at Shanghai. That conditional acceptance was refused. The cargo offered for shipment by the plaintiff was being handled by him for German subjects, by reason of which fact he was blacklisted by the British government, and all British subjects, including the agent

of the defendant corporation, inhibited from dealing with the plaintiff respecting this particular shipment as well as all other such shipments. The defendant through its British agent having refused to accept the cargo offered by Everett, the action was brought, resulting in the judgment of the court below in his favor for $2,720.20, with costs.

But two questions of law are involved: First, whether the court below had jurisdiction of the subject-matter of the action; and, if so, then, secondly, its merits.

[1] By section 1 of the Act of June 30, 1906, creating the court below (34 Stat. 814, c. 3934 [Comp. St. § 7687]), that court is given "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by section 2 of this act." The qualification specified in section 2 of the act (section 7688) has no bearing upon the present case, and therefore no further mention of it need be made.

At the time of the passage of the Act of June 30, 1906, there were in force the provisions of sections 4083, 4084, and 4085 of the Revised Statutes (Comp. St. §§ 7633–7635), by which certain judicial authority was conferred upon United States ministers and consuls in certain countries, including China, which jurisdiction embraced all controversies between citizens of the United States or others, provided for by its treaties. The treaty with China bearing upon the present question was that of June 18, 1858 (12 Stat. 1029), and conferred upon the United States the right to appoint consuls in various parts of China. Its 27th article is as follows:

"All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own government; and all controversies occurring in China between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China."

It is the contention of the plaintiff in error that the words "in China," in the foregoing article, qualify the word "citizens," and not the word "arising"; in other words, that a residence of the parties in China is essential to the existence of any jurisdiction in the court. We think it obvious that such a construction of the provision is wholly inadmissible, for the subject-matter thereby dealt with is controversies arising in China. The first clause of the provision relates to controversies in regard to rights, whether of property or person, there arising between citizens of the United States, and declares that they shall be subject to the jurisdiction and be regulated by the authorities of their own government; and by its second clause it is declared that all such controversies there arising between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing between the United States and such governments, respectively—in each instance without interference on the part of China. We regard it as clear that this is the very plain meaning of the article in question. As said by counsel for the defendant in error,

the bare reading of its second clause is all that is necessary to show that the words "in China," there used, fixes, as the basis of the jurisdiction of the court, the place of the origin of the controversy, and not the residence of the parties thereto. No sound reason is suggested why a like construction should not be placed upon the first clause. To adopt the view urged by the plaintiff in error would be, in effect, to hold a consular court in China vested with jurisdiction of a controversy between American citizens arising in the United States if they happened to be residents of China.

[2] Upon the merits we think the case equally clear. It does not admit of doubt that a common carrier, with certain well-established exceptions, is under legal obligation to carry the goods of any member of the public who may tender them for carriage. That such a carrier, subject to such legal obligation, may show that it was prevented from performing it by act of God or a public enemy, or by some other cause over which it had no control, is readily conceded, but in all such cases the defense is an affirmative one, and the burden is upon the carrier to both plead and prove it. 1 Michie on Carriers, § 381; Chicago, etc., R. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

[3] At the time of the occurrences in question, England and Germany were at war, but the United States was not; on the contrary, this country was then observing strict neutrality beween those belligerents. How, then, can it be properly held that the performance of the clear legal duty of an American carrier to receive and transport goods tendered for carriage by an American citizen is excused on the ground that the British government had forbidden its citizens and corporations, one of which happened to be the agent of the American carrier, from receiving the tendered freight and providing for its transportation? Such is not the law as we understand it. See Richards & Co., Inc., v. Wreschner, 174 App. Div. 484, 156 N. Y. Supp. 1054, 158 N. Y. Supp. 1129, and the numerous cases there cited.

It is contended on behalf of the carrier that there was no evidence to show that it knew that its agent at Shanghai was inhibited by the British government from shipping the goods of the plaintiff in time to have employed an agent not under such disability. Whether or not the carrier knew of the inhibition at all, or was apprised of it in time to have employed another agent, the fact remains that the agent it did appoint, acting within the scope of his employment, deprived the plaintiff of his legal right. For that wrong we think the carrier was properly adjudged liable, even assuming that it was ignorant of its agent's disability. See Chesapeake & Ohio R. Co. v. Francisco, 149 Ky. 307, 148 S. W. 46, 42 L. R. A. (N. S.) 83.

The judgment is affirmed.

VILLERS v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1650.

CONSPIRACY ⊂=47—TO VIOLATE INTERNAL REVENUE LAW—SALE OF LIQUOR THROUGH GO-BETWEEN.

Evidence that defendant had whisky for sale, although he had not paid special tax as a retail liquor dealer, and sold whisky to a third person through an acquaintance, who brought the orders, *held* sufficient to sustain a verdict for conspiracy with the acquaintance to violate the statute.

In Error to the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

Criminal prosecution by the United States against Victor Villers. Judgment of conviction, and defendant brings error. Affirmed.

Lafayette C. Crile, of Clarksburg, W. Va., for plaintiff in error.

Stuart W. Walker, U. S. Atty., and Charles N. Campbell, Asst. U. S. Atty., both of Martinsburg, W. Va., and Harry H. Byrer, Asst. U. S. Atty., of Philippi, W. Va., for the United States.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. Villers, plaintiff in error, and one Klacko, indicted jointly with him, were convicted of conspiring to carry on the business of a retail liquor dealer without having paid the special tax required by law. It is here urged in his behalf that there was no proof to sustain the charge of conspiracy, and therefore the trial court erred in refusing to direct a verdict for the defendant.

At the time of his arrest, in March, 1918, Villers was the assistant postmaster of Clarksburg, W. Va., and Klacko the clerk or manager of a store in that city. They had become acquainted not long before, and Klacko had learned in some way that whisky could be procured from Villers. Called as a witness for the government, Klacko testified to buying whisky from Villers for himself, and also for one Lazovich, a fellow countryman, whose acquaintance he made about that time. Lazovich was an agent of the Department of Justice, and happened to be in Clarksburg on other business. Learning from Klacko, with whom he became friendly, that whisky could be bought from Villers, he set about getting evidence that would convict him of the offense. Accordingly, he arranged with Klacko, who appears to have been unaware of his purpose, to buy whisky for him from Villers, and four such purchases were made during the next eight or ten days. Lazovich furnished the money, Klacko took the order to Villers, and the latter delivered the liquor at Klacko's store. On the last occasion, and while in the act of handing over a couple of quarts of whisky, Villers was arrested.

These facts, wholly undenied by Villers, were quite sufficient to show that he was engaged in the illegal sale of liquor, and to warrant

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the inference of that understanding and relationship with Klacko which the law regards as a conspiracy. Villers had a quantity of whisky for sale, where or how procured does not appear, and Klacko was not unwilling to help him dispose of it. Each aided the other, and their mutual co-operation effected the criminal result; and what they repeatedly united in doing, both knowing it to be unlawful, the jury might well believe they had in effect conspired to do, and nothing more needs be said in defense of the refusal to direct a verdict. The question was clearly one of fact, and the finding of the jury is conclusive.

The conspiracy having been established, as the jury found, the statement made by Klacko to Lazovich, when Villers was not present, that Villers was the man who supplied him with whisky, was competent evidence against them both, under a familiar and well-recognized rule of law.

We have examined the other questions argued in the brief of counsel, but find none of sufficient merit to require discussion.

Affirmed.

In re MODEL INCUBATOR CO.

Appeal of QUEEN CITY FOUNDRY CO., Inc.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 101.

BANKRUPTCY ⊂⊃467—REVIEW ON APPEAL—FINDINGS OF FACT.

A finding of facts by a referee, concurred in by the District Court, will not be disturbed by the appellate court.

Appeal from the District Court of the United States for the Western District of New York.

In the matter of the bankruptcy of the Model Incubator Company. From an order of the District Court, the Queen City Foundry Company, Incorporated, appeals. Affirmed.

Gibbons & Pottle, of Buffalo, N. Y. (Frank Gibbons, of Buffalo, N. Y., of counsel), for appellant.

Paul Sheehan, of Buffalo, N. Y., for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. This record shows that on a vital question of fact, viz. whether assuming fraudulent representation on the bankrupt's part the petitioner was in the least misled or influenced thereby, both the referee and the District Court found the fact to be against petitioner's contention. As we remarked in a somewhat similar case, the trial court "had the advantage of seeing and hearing the witnesses, and his finding upon the facts should not be disturbed." In re K. Marks & Co., 218 Fed. 455, 134 C. C. A. 255.

In this instance we are in entire accord with the finding below, and therefore affirm the order appealed from, with costs.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

McDOWELL MFG. CO. et al. v. ELECTRIC WATER STERILIZER CO. et al.

(Circuit Court of Appeals, Third Circuit. December 27, 1918.)

No. 2381.

PATENTS ⇐328—CONSTRUCTION—INFRINGEMENT.

Patents Nos. 943,188, 951,311, 951,312, 951,313, relating to methods and apparatus for the electrolytic purification of water, *held* not infringed by defendants' device.

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Bill by the McDowell Manufacturing Company and the Electric Water Purifying Machine Company against the Electric Water Sterilizer Company and another. From the decree, complainants appeal. Affirmed.

Frederick W. Winter, of Pittsburgh, Pa., for appellants.

David P. Wolhaupter, of Washington, D. C. (E. C. Higbee, of Uniontown, Pa., of counsel), for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This action is double in character. By their bill, the plaintiffs first charge infringement of five patents granted the McDowell Manufacturing Company as assignee of Harry B. Hartman, one of the defendants, and then assert a right to an assignment of four patents granted Hartman, all relating to methods and apparatus for the electrolytic purification of water. The validity of the patents in suit granted on the assignment of Hartman, the defendant inventor, was, of course, not attacked at the trial, but infringement was denied, the plaintiffs' right to an assignment of patents granted Hartman and held by him was traversed, and a counter-claim by Hartman to an equitable title in the patents in suit was set up. At the trial, one of the patents in suit was withdrawn. By the decree which followed, the trial court held the remaining patents were not infringed, denied Hartman's counter-claim to an equitable title in them, and dismissed the plaintiffs' demand for an assignment of Hartman's patents. Out of these diverse findings, the one matter submitted for review on this appeal is the issue of infringement. A discussion of this issue together with the reasoning and findings of the trial court—with which in the main we agree—appears in the unreported opinion of Judge Thomson, of which we shall avail ourselves for an ample statement and discussion of the issues involved and decided:

"The bill in this case charges the defendants with infringement of five Hartman patents, involving the electrical purification of water, namely, Nos. 943,187, 943,188, 951,311, 951,312 and 951,313. * * *

"There are four patents to be considered, patent No. 943,187, sued upon, having been withdrawn at the trial. There is no direct attack on the validity of the patents in suit, and hence the question involved is one of infringement, or, in other words, the scope of the claims relied upon and the application of

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

those claims to the defendant's device. The subject in controversy is the purification of water by the action of electricity. This is effected by passing the water under its supply pressure between metal plates called 'electrodes' placed a short distance apart in a box known as an 'electrolyzer,' and connected to an electric circuit. The electric current passes through the water from the positive plate or 'cathode' to the negative plate or 'anode,' the water at the same time passing between the electrodes. The plates are usually iron or aluminum. The action of the electric current produces a certain amount of gas containing oxygen or ozone. It also produces salts from the plates, which are converted by the impure water into a coagulant material, and this material entrains the impurities and bacteria in the water, which may then be filtered out. The water passes from the electrolyzer into another chamber of such size as to decrease the velocity of the flow, there to be acted upon by the salts or gases. It then passes to a filter or filters, where the impurities are caught in a layer of coagulant which forms on the top of the filter-bed, and the clear water is drawn off at the bottom. To economize in the electricity used, the flow of the current is started and stopped with the starting and stopping of the flow of water through the apparatus.

"The general subject of electric purification of water is old in the art. This is conceded by the plaintiffs. The patents in suit are for methods and apparatus, which are improvements on this general subject-matter, and involve two features of novelty over the prior art: First, the reversal of the electric current through the electrolyzer periodically, so that substantially equal quantities of current are caused to flow in opposite directions between reversals, notwithstanding interruptions in liquid and current flow. The purpose of this periodical reversal of current is to keep the plates clean; that is, to prevent the formation of deposits by well-known electric action upon the electrode plates to such an extent as to prevent the salts from being thrown off the plates, and their efficiency reduced. This feature is involved in patent No. 943,188. The other novel feature consists in making and breaking the electric current with the starting and stopping of the flow of water, and in a manner to maintain the current flow appreciably longer than the liquid flow; the purpose being to insure the electric treatment of all water passing through the apparatus. This feature is involved in patents 951,311–951,313. Patent 951,311 covers the method of water purifying, including the particular step of maintaining the electric current after the flow of the water has ceased. Patent No. 951,312 is on the mechanical feature of the valve connection used for maintaining the flow of the electric current after the liquid flow has ceased; while patent No. 951,313 is for the combination of parts used for practicing the method of patent 951,311, comprising as one of its elements a valve similar to that of patent 951,312. The object in each case is to maintain the electric current somewhat longer than the flow of the liquid.

"The defendants, in answer to the charge of infringement, allege, first, that defendants' apparatus contains an entirely new organization of parts involving different processes of purification of water, from that carried out by the organization of parts provided for in the patents in suit; and second, that the state of the art prior to the application for the patents in suit requires such a limited construction of those patents as to exclude from the claims thereof the apparatus of the defendants. That otherwise, the state of the art would be anticipatory of such patents and invalidate the same.

"The structure and arrangement of defendants' apparatus, and its method of operation, have been stipulated in Plaintiffs' Exhibit No. 5. Inasmuch as this apparatus is manufactured in accordance with, and under the protection of, patents of the defendant Hartman, being Nos. 1,139,969 and 1,139,970, dated May 18, 1915, these patents establish a presumption of non-infringement and right in favor of the defendants. As was said by the Circuit Court in Powell v. Leicester Mills Co., 103 Fed. 476, 'Where a patent has been issued for the alleged infringement device, used by a defendant, he is entitled to the benefit of the presumption arising from such fact, that his device does not infringe the prior patent.' In determining whether defendants' apparatus embodies new and independent invention, not subject to the patents in suit, certain fundamental matters must be considered. The defendants' apparatus

in question relates to the art of purifying water by an electric current, particularly such as are inserted in the local supply line for a building, its action being intermittent as the water is drawn from time to time for drinking purposes. An example of this use of the apparatus of the defendant installed in the Western Theological Seminary of Pittsburgh, being the one upon which this charge of infringement is based.

"There is no doubt that the fundamental electric action in the defendants' apparatus is the same as that in the patents in suit, but this is equally true of every apparatus of the kind in the prior art. The evidence, particularly of Professor Ganz, elaborates the electrolytic methods of treating water. Very generally, it consists of passing the water between electrodes and passing an electric current through the water from one electrode to the other. In one method, not commercial, the electrodes are of some soluble material, such as carbon, which results in the production of gases only—oxygen and hydrogen, but no salts. There is also produced with the oxygen some ozone. The method depending upon the oxygen with the small amount of ozone present, destroying by oxidation the organic matter and bacteria in the water. Another, more practical, method is to use metallic, either aluminum, or iron, electrodes, which form upon electrolysis, salts, which are converted into coagulant material, entraining the impurities, which are then filtered out. In this method, in addition to the salts, some gas is produced, its amount, relative to the amount of salt produced, depending largely upon the voltage of the circuit, a relatively high voltage producing a large amount of gas, and a low voltage little gas and no salts. All the foregoing is fundamental to an electric water purifying apparatus, generally. No claim can be made thereto at this late day by any one, nor can any one infringe any existing patent by making use of such an electrolytic action; for instance, in the patent of Webster granted in 1889, No. 398,101, the single claim of the patent specified, 'The process herein described for purifying sewage and other impure water, which consists in passing the same in contact with electrically excited positive and negative electrodes of iron, whereby salts of iron are produced at the positive electrode, which, in re-acting with the alkalis produced at the negative electrode, form a flocculent, precipitate of ferrous hydrated oxide, which, together with the gases generated, effect the precipitation of the solid matter and the purification of the impurities held in solution.'

"Looking at defendants' apparatus with these principles in mind, we find a fundamental difference between the apparatus of the Hartman patents in suit and the defendants' apparatus. This is shown by the accompanying illustration comprising two views, one an interior view of the 'coagulation chamber' of the defendants' apparatus, which is the important feature in defendants' patents 1,139,969 and 1,139,970, under which they are operating. The other shows an interior view of the 'ozoning chamber,' or pipe, of the patents in suit. From the testimony of Hartman, it appears that he found the latter unsatisfactory and abandoned it, adopting the new and more efficient coagulation chamber of defendants' patents. The chamber in each case is that part of the apparatus which receives the electrically treated water directly from the electrode box. In the ozoning chamber the water enters at the bottom of the pipe and passes freely and unhindered through the pipe or chamber, and out at the top to the filter, giving little opportunity for the salts to form a coagulant, nor for any coagulant to be removed by sedimentation, because everything is carried over from the ozoning chamber to the filter. During the period when water is not being drawn, of course any suspended matter in the chamber when the waterflow ceases, will settle at the bottom of the chamber. But when water is drawn again, all of this temporarily arrested matter will again be carried along and deposited on the filter bed. It is quite the reverse in defendants' coagulation chamber, which comprises a long cylinder haxing a relatively large cross-section, compared with that of the supply pipe. There the treated water enters the chamber near the top. The outlet pipe enters the chamber from its top, and extends to a point about one-third away from the bottom of the chamber. As the treated water, with the entrained salts and gases, enters the chamber, the gases rise to the top and are drawn off with the water into the pipe to the first filter through a small

hole in the outlet pipe at the top, and within, the coagulation chamber. Thus the gases do not pass through the body of water in the chamber, as is the case in plaintiffs' apparatus. The salts coagulate any organic matter in the water, and owing to the quiescent state of the water the heavier parts of this material fall as a sediment to the bottom of the chamber, where it is removed periodically through an outlet controlled valve into a waste pipe. This avoids fouling and clogging of the filter, making it unnecessary to continually clean it, as was necessary in the apparatus using the ozoning pipe or chamber.

"In plaintiffs' patent 943,188, the claims relied on are 1, 2, 6, 7 and 8, and each of these includes as an indispensable part of the apparatus, means for periodically reversing the current; and in addition, claim 8 requires a chamber through which the liquid is passed in such manner that 'the entrained free oxygen is given time to act on the impurities of the liquid.' I have heretofore considered the construction of the defendants' 'coagulation chamber' as compared with the 'ozoning chamber' of the plaintiffs' apparatus, and the action of the gases in those chambers respectively. Neither of these features is included in defendants' apparatus. The evidence clearly shows in harmony with the wording of the patent, that the invention of the patents in suit is necessarily addressed solely to the use of the direct current, and it is direct current only that requires a reversing mechanism to carry out the purpose and intent of this patent, in order to keep the plates clean. An alternating current when used, requires no such mechanism. And although exceedingly inefficient, such current is used in the defendants' apparatus at the Western Theological Seminary. The evidence shows that in installations requiring a large machine, where alternating current only is available, the defendants supply their customers as a part of the equipment, a motor generator, set to convert the alternating current into a direct current. They also supply a hand reversing switch, such as is shown in Fig. 2 of the Lemp & Koedding patent, which antedates all the Hartman patents involved and is owned and controlled by the defendants. If the hand reversing switch is used in accordance with directions furnished, the switch would be thrown at definite periods of time, having no reference to the amount of the liquid flow, as, for instance, once every day or every other day, causing the current to flow successively in opposite directions. But clearly, this operation does not and cannot assure substantially equal quantities of current flow in opposite directions, as on one day much current may be used and on the next day little or perhaps none at all. I therefore conclude that the claims of the patent in question are definitely limited to a combination requiring an automatic current reversing mechanism within the apparatus as a part thereof, and which current reversing mechanism is of such construction and operation as 'to maintain the current in both directions for substantially equal periods of time during the flow of the liquid, thereby passing substantially equal quantities of current in each direction through the impure liquid.' That otherwise, these claims would be invalid, in view of the Lemp & Koedding patent showing both a hand switch for occasional reversing of current, and an automatic current reversing device; and in view of the patent to Boucher, No. 760,302, showing an automatic current reversing device, which is an embodiment of the invention of Hartman in the patent in question, with the exception of the provision of a definite means whereby the current may be maintained to flow in both directions for substantially equal periods of time during the liquid flow. Considering the fact that the defendants' apparatus in suit uses an alternating current, which requires no current reverser of any kind, and in view of the prior art and the limitations which that art imposes, I do not think any of the claims of patent No. 943,188 are infringed by the defendants' device.

"As to the second principal feature of plaintiffs' invention, namely, the delayed action in the opening of the electric switch in order to prolong the electrical treatment of the water after the flow is cut off, involved in patents Nos. 951,311, 951,312, and 951,313, while patent 951,311 relates to a method or process of purifying water, the same necessary element, namely, the delayed action of the electrical switch, is a requirement of the claims relied on in all three of said patents. All of the eight claims of 951,311 depend for their validity upon this specified feature and requirement of making and breaking the

electric circuit when starting and stopping the flow of liquid, and in a manner to maintain the current flow appreciably longer than the liquid flow.

"And so claims 1 to 8 inclusive, relied on in 951,313, are limited to the feature of retarding the breaking of the circuit until after the liquid flow ceases. The special means employed for carrying out that operation are covered specifically in claims 4, 6, 15 and 16, relied on in patent 951,312. This last named patent is for a control valve mechanism, comprising a valve and electric switch. The particular feature of construction for accomplishing the delayed action therein described, is the provision of a piston and a valve as separate members, which are connected to each other in such manner as to cause the valve to be set before the piston has completed its downward stroke and has opened the electric circuit. The limitations of these claims by the Patent Office were accepted by the patentee in order to secure the patent; and the owner of the patents is estopped from setting up any other construction that would not include such limitations. Hubbell v. United States, 179 U. S. 77, 21 Sup. Ct. 24, 45 L. Ed. 95. Claims 4, 6, 16 require a valve and a movable member or piston which are separate and distinct parts and have a connection between them for the purpose of obtaining the long delay in the opening of the switch, after the liquid flow ceases, as contemplated by the patent; while claim 15 is likewise limited to the feature of a valve 'and connections whereby said circuit controller maintains the circuit closed until after the valve is closed.' Thus it will be seen that an essential of this patent is a separate valve and a separate plunger and, as expressed in the claims involved, 'connections whereby the delayed action is made possible.' The defendants' apparatus does not have a separate valve and plunger, and has no provision for a delayed action or for a retarded movement, or means operative after the current flow ceases, for breaking the circuit. Defendants employ an electrical snap switch, which opens and closes as quickly as is practicable for a mechanical device of this character to operate, and is connected directly with the single piston or plunger of the valve mechanism, and commences to operate instantly when the faucet is turned off. A demonstration in open Court of the operation of the two devices showed that there was a time delay of about thirty seconds between the closing of the valve to cut off the water, and the opening of the electric switch to break the electrical circuit, in the plaintiffs' device; while in the defendants' device this delay was less than one second, and there appeared to be only the time element involved in the normal, mechanical movement of a snap switch.

"It is well established that it is not enough to support the charge of infringement that a defendant has accomplished the same purpose as the patentee, or that he has used some of the elements recited in the claims of the patent. He must have accomplished the same purpose by substantially the same means, and each element of the claim must be represented in the infringing device, performing substantially the same office in the same relationship. Under all the facts of the case, I think plaintiffs have failed to establish their charge of infringement, and the bill must therefore be dismissed at the plaintiffs' cost."

It will be observed from the opinion of the learned trial judge as well as from a careful reading of the claims of the patents that the only matters here seriously in dispute are the method for automatically and periodically reversing the electric current after a predetermined quantity of water has passed and the method and means for maintaining the flow of the current appreciably longer than the flow of the water. These constitute the essence of the several inventions; all other features are subsidiary and of minor importance.

The infringement charged to the defendants is twofold: First, the use of an alternating current, that is, a current that reverses from the negative to the positive electrode one hundred and twenty times a second; and, second, the use of a hand manipulated switch in an ap-

paratus in which direct current is employed. In the first method practiced by the defendants, current reversal is effected by the very character of current used, and, in the second, it is effected by a hand applied mechanism which is controlled not by the quantity of water that passes, but by the memory and hand of a human operator. Current reversal automatically controlled by water volume is the invention, and as the defendants do not employ this control, we think they do not infringe.

With respect to the delay in opening the electric switch and breaking the current after the waterflow has ceased, disclosed in the remaining method and apparatus patents, the patentee very clearly claims as an element of his invention that during this period of time electrolytic action is continued on the arrested water. "The method of purifying liquids consisting in causing the liquid to flow between electrodes containing aluminum and there subjecting the same to the action of an electric current and breaking the electric current when starting and stopping the flow of liquid and in a manner to maintain the current flow appreciably longer than the liquid flow" is the language of a typical claim. In a word, the lag is, as appears by the specification, purposely made and by appropriate mechanism is given a function, measured by seconds (15 to 27). By this function the electrolytic action on the water is allowed to continue after the flow of water has stopped, so that when the flow is resumed, the water which initially leaves the pipe will have been previously purified. In the defendants' apparatus, between the shutting off of the water and the breaking of the current, there is a delay, a lapse of time, or a lag, similarly measured by seconds, but reduced in number from 15 to 27 in the plaintiffs' apparatus to from 1 to 3 in the defendants.' No function is claimed for this delay or lag, so far as we have been shown, and none is performed during this very brief period, so far as we can conjecture from the teachings of the art set out in the briefs and elaborated in the argument. This delay, it is testified —and it so appears to us—is a mere unintentional and functionless incident which is as nearly instantaneous as mechanism involving the shutting off of the current by a snap switch will permit. Were the break in the current actually instantaneous with the break in the waterflow, there would be no lag, and hence no infringement. If the lag of one second, or of one and one-half seconds, in the defendants' apparatus permits nothing to be done different from that which would be done in an instantaneous breaking of the current, then the lag in the defendants' apparatus is functionless, and, manifestly, the defendants do not infringe. As the time delay in the defendants' apparatus appears to lack a duration that suggests any function, and being unable readily to find in the record evidence bearing on the presence or absence of a function in the lag of the defendants' mechanism similar to the function in the lag of the method and apparatus of the patents in suit, we asked counsel to file supplemental briefs on the subject, for, manifestly, if no function was shown, no infringement was proved. Supplemental briefs have been filed, and it is very plain, not only from what they show and fail to show, but from our

own very careful search of the record, that there is in the case no evidence indicating even remotely that in the lag of the defendants' apparatus there is the function of the lag in the plaintiffs', nor is there found in the lag of the defendants' apparatus any element of the theory involved in the lag of the invention of the patents. For lack of testimony on the subject, if for no other reason, we find that the defendants have not infringed.

The decree below is affirmed.

BUFFALO FORGE CO. v. CITY OF BUFFALO et al.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 54.

1. PATENTS ⟸328—ANTICIPATION OR APPROXIMATION—HEATING AND HUMIDIFYING AIR.

Neither anticipation of, nor close approximation to, plaintiff's method of heating and humidifying air, covered by Carrier patent, No. 854,270, claims 1, 3, 5, 6, and 7, *held* discoverable in the prior art.

2. PATENTS ⟸119—CLAIMS COVERING METHOD AND APPARATUS—DENIAL IN PART.

If Patent Office had granted claims both for a method of heating and humidifying air and apparatus to conduct the method, that fact would not have vitiated the patent, and, conversely, no more does the fact that it refused so to do, in the same patent at all events.

3. PATENTS ⟸328—METHOD OF HEATING AND HUMIDIFYING AIR—INFRINGEMENT.

Carrier patent, No. 854,270, covering a method of heating and humidifying air, *held* infringed by the heating and humidifying apparatus of schools erected by defendant company in defendant city.

4. PATENTS ⟸157(2)—CONSTRUCTION—FIRST CO-ORDINATION OF PROCESS.

Where an inventor was the first to co-ordinate and disclose a series of operations constituting a method to heat and humidify air, and air moistened by such method was a successful novelty, his patent is entitled to benevolent construction.

5. PATENTS ⟸328—MECHANICAL PROCESS—METHOD OF HEATING AND HUMIDIFYING AIR.

Method of heating and humidifying air covered by Carrier patent, No. 854,270, claims 1, 3, 5, 6, and 7, a process involving only mechanical and not chemical operations, *held* a patentable and meritorious mechanical process.

6. PATENTS ⟸7—PROCESSES.

That the means, and the only means, of applying the process, are strictly mechanical, is of no moment, so far as patentability of the process is concerned; but if the process, when distinguished from the means of performing it, is new, useful, and intellectually rises to the dignity of invention, it is patentable, if it falls within the meaning of the word "art" as used in the statute.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Western District of New York.

Suit by the Buffalo Forge Company against the City of Buffalo and Thomas & Smith, Incorporated. From decree for complainant, defendants appeal. Affirmed.

Action is on claims 1, 3, 5, 6, and 7 of patent to Willis M. Carrier No. 854,270, granted May 21, 1907, for a "method of heating and humidifying air."

The patentee's stated purpose is to automatically regulate the temperature and humidity of fresh air especially in textile mills, and to do so "regardless of external atmospheric conditions within limits," by introducing "into the air, water at properly regulated temperatures below the boiling point."

The specification, which remained substantially unchanged through Patent Office criticism, consists of two easily separable parts: (1) A description in general terms of the process; and (2) an explanation of how the apparatus embodying the process and shown in the patent drawings should and would function. On this disclosure Carrier originally rested both method and apparatus claims. The latter he was ordered to make the subject of a separate application. This patent accordingly issued on the method claims only, and whether Carrier ever sought or obtained a patent on his disclosed apparatus is not shown by this record.

The patentee's description of his process is as follows:

"In carrying out the method forming the subject-matter of this invention, warm or hot water at a temperature above that of the air and below the boiling point is intimately mixed with a current of air, preferably by discharging the water into the air in a very fine spray or mist. The water raises the temperature of the air, which will therefore vaporize and assimilate an amount of the water depending upon the rise in temperature of the air so that its humidity is increased. A thermostat subject to the influence of the heated and humidified air controls means in the water supply system, whereby the water is maintained at the proper temperature to raise the temperature of the air to the degree required for the air to become saturated with an amount of vapor sufficient to give the desired absolute humidity to the air when raised to the temperature at which it is to be utilized. The free water is separated from the air current and is preferably collected, reheated and returned in the form of spray to the air, the same water with such additional amount as is necessary to maintain a constant volume of water being thus repeatedly circulated and used. Incidentally the air is thoroughly washed and cleansed, as the water sprayed into the air collects the solid particles of dust and foreign matter, which adhere to the free particles of water and are separated with the latter from the air."

Of the claims in suit the first is most general, and is as follows:

"1. The herein described method of humidifying air, consisting in causing an intimate contact of the air with water heated to a temperature above that of the air and below the boiling point, and automatically regulating the temperature of the water to maintain a practically constant temperature of the air, substantially as set forth."

The infringement alleged is embodied in the humidifying apparatus which is a part of the heating plants of two public schools in the city of Buffalo. These plants having been supplied to the city by the intervening defendants, they have assumed the burden of defense.

The District Court after overruling several defenses (some not now insisted on) found the patent valid and infringed; whereupon defendants took this appeal, urging in this court:

(1) Claims in suit are invalid on patents of the prior art; but

(2) If invention is disclosed it must reside only in the apparatus, which is not covered by this patent; but further

(3) Assuming validity, infringement is not proved; but, through all these contentions runs appellants' principal point, viz.:

(4) Carrier's method or process is nothing more than a description of the

functioning or operation of the apparatus he discloses, and it is therefore unpatentable.

William N. Cromwell, Lewis T. Greist, and Franklin M. Warden, all of Chicago, Ill. (John Taylor Booz, of Chicago, Ill., and William S. Rann and Frederick C. Rupp, both of Buffalo, N. Y., of counsel), for appellants.

Wilhelm & Parker, of Buffalo, N. Y. (Arthur E. Parsons, of Syracuse, N. Y., of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] 1. Study of Carrier's plan of operation (without naming it as a process or method) clearly differentiates the prior art relied on by defendants.[1] In the patentee's practice, air tempered (i. e., warmed if necessary) to 40°–45° F. is drawn from without a building into a spraying chamber, and there saturated (i. e., loaded with all the humidity it can carry) with or by means of water warm enough to raise the temperature to approximately 60° F. It then passes over or through an apparatus, usually of baffle-plates, which removes the free water particles carried by the air, and then passes a thermostat of predetermined range, by means of which if the temperature falls below an approximate 60° water of greater heat is provided, while a rise above said temperature will by thermostatic actuation cut off the hot water. By entirely separate heaters, the saturated air is further warmed (to say 70° F.) before passing into the room for which it is destined; such rise in temperature expands the air, and leaves any given cubic unit thereof with the prearranged relative humidity—because the vapor of saturation or dewpoint is distributed throughout whatever is the increased volume of a cubic unit of air saturated at (say) 60° F., and heated to (say) 70° F.

Thus what Carrier automatically controls is the temperature of saturation, upon which can be predicated with reasonable accuracy (i. e., "within limits") the relative humidity of the air supplied to the room of destination. In so far as the few prior patents relate to anything more than machines for spraying or washing air, they depend on hygrometric control of and through humidity, not on thermostatic control through the temperature at which saturation is effected; much less is there any prior showing of using a rise of temperature above that of saturation, to effect the desired relation of absolute and relative humidities. We agree with the court below that neither anticipation, nor close approximation, is discoverable in the prior art, so far as shown in this record.

[2] 2. Whether Carrier's disclosed apparatus reveals invention is a question not before us—and immaterial. If the office had granted claims for both method and apparatus, that fact would not have vi-

[1] Bradford 222,234; Huck 476,274; Carrier 808,897; Cramer 813,083; Cramer 821,989.

tiated the patent (Steinmetz v. Allen, 192 U. S. 543, 24 Sup. Ct. 416, 48 L. Ed. 555), and, conversely, no more does the fact that it refused so to do, in the same patent at all events. Carrier had much the same experience in the office as the patentee in Jackson v. Birmingham, etc., Co., 79 Fed. at page 805, 25 C. C. A. 196, whose patent we sustained. No process patent is in theory either helped or harmed by the excellence or worthlessness of the disclosed apparatus by which it is illustrated.

[3] 3. As for infringement, it is uncontradicted that the heating and humidifying apparatus of these Buffalo schools was erected in accordance with specifications, which in our opinion might have been taken from Carrier's application. We think it proven that defendants' device operates on exactly the principle above summarized, and that, on every material point of difference asserted by defendants, the evidence in rebuttal is destructive. This question of fact is sufficiently elaborated in the opinion below.

[4, 5] 4. It cannot be doubted that Carrier discloses and claims a connected series of steps or operations for accomplishing a physical result, and this is often a fair definition of what is protected by a good process patent. Furthermore, he was the first to co-ordinate and disclose this series of operations, and while his result, humidified air, was in a sense not new, air moistened by that method was a successful novelty. Therefore this patent is entitled to a construction as benevolent as that given by us to the desiccated milk process. Merrell, etc., Co. v. Powdered Milk Co. (D. C.) 215 Fed. 922, affirmed 222 Fed. 911, 138 C. C. A. 391.

We do not, however, resort to construction in aid of the claims in suit; for assuming now, as proved, an intelligible statement of process, novelty, and thought of the grade of invention, this patent presents acutely the problem stated by Justice Brown, in declaring that "it may be still regarded as an open question whether the patentability of processes extends beyond," those involving "a chemical or other similar elemental action," or can cover those necessarily involving mechanical operations.[2]

This query has been answered, with a fullness sufficient for the purposes of this litigation, by Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034, holding that a process involving only mechanical operations might be within the protection of the statute.[3]

It is and always was true that the mere function or effect of the operation of a machine is not patentable; but, if a process be claimed

[2] Risdon, etc., Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899; Westinghouse v. Boyden, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136.

[3] See comment on this case in Macomber's Fixed Law of Patents (2d Ed.) p. 1011; and a full discussion of the effect of the Risdon and Westinghouse opinions in "Patentable Processes," Harvard Law Review, vol. 19, p. 30. For a good illustration of how meritorious processes were fitted to the Risdon Case, before the Expanded Metal decision, see Cameron, etc., Co. v. Saratoga, 159 Fed. at pages 462, 463, 86 C. C. A. 483.

as a patentable art, the inquiry is vital whether the important thing disclosed is the method of procedure, or the particular means by which it shall or may be practiced. Expanded Metal Case, 214 U. S. at page 381, 29 Sup. Ct. 652, 53 L. Ed. 1034.

If it is not reasonably possible to separate the alleged process from the disclosed means, the former can hardly be more than *the* function (or at least *a* function) of the latter. This is no more than applying the doctrine of Leeds v. Victor, etc., Co., 213 U. S. at page 318, 29 Sup. Ct. at page 500, 53 L. Ed. 805:

"A process and an apparatus by which it is performed are distinct things. They may be found in one patent; they may be made the subject of different patents."

If such difference cannot be discovered, they cannot be two things; therefore they must be one thing, i. e., one invention, and that one is usually the means.

[6] But that the means, and the only means of applying the process, are strictly mechanical, is a matter of no moment, so far as patentability is concerned. If the process, when distinguished from the means of performing it, is new, useful, and intellectually rises to the dignity of invention, it is patentable—if it falls within the meaning of the word "art" as used in the statute.

The patent in suit responds to these tests, and this litigation affords an excellent illustration of their propriety. If Carrier had and were suing on a patent for the apparatus pictured and described in his specification, it is very doubtful whether the humidifying plants of these Buffalo schools would infringe; mechanically there is but little similarity. But the series of steps by which "within limits" dry cold air is transformed into an automatically steady stream of humid warm air are, in our judgment and that of the trial court, identical. Where this is the case, it is plain that means and process are separable, and the important thing is the process.

For the foregoing reasons, we agree that Carrier's is a patentable and meritorious mechanical process, and direct that the decree appealed from be affirmed, with costs.

VULCAN SOOT CLEANER CO. v. AMOSKEAG MFG. CO. et al.

(Circuit Court of Appeals, First Circuit. November 6 and December 24, 1918.)

No. 1356.

1. PATENTS ⊜297(2)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
It is within the discretion of the court to deny a preliminary injunction in an infringement suit, although the validity of the patent has been previously adjudicated.

2. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—BOILER FLUE CLEANER.
Order denying a preliminary injunction against infringement of the Eichelberg and Hibner patent, No. 855,563, for a boiler flue cleaner, affirmed.

Appeal from the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Suit in equity by the Vulcan Soot Cleaner Company against the Amoskeag Manufacturing Company and others. Complainant appeals from order denying preliminary injunction. Appeal dismissed, and case remanded.

Thomas A. Connolly and Joseph B. Connolly, both of Washington, D. C. (Connolly Bros., of Washington, D. C., on the brief), for appellant.

Nathan Heard, of Boston, Mass., for appellees.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This is an appeal from a decree of the District Court denying a petition for preliminary injunction against infringement of letters patent No. 855,563, June 4, 1907, to Eichelberger & Hibner, assignors to appellant, for boiler flue cleaner.

The patent was held valid by the District Court for the Southern Division of the Eastern District of Michigan, as appears by its opinion printed in Vulcan Soot Cleaner Co. v. Diamond Power Specialty Co., 237 Fed. 818, 151 C. C. A. 60.

[1] One of the grounds assigned by the District Court for its refusal of a preliminary injunction is that the validity of the patent is at issue. The appellant upon its brief contends:

"In the case of an adjudicated patent, there is before the court the decree of a court which establishes the fact of the patent's validity, not only against the original defendant and his privies, but as against the world, and such decree is entitled to the same respect and consideration as it has in the court entering it, and where application is made in another court for a preliminary injunction, *such court has no discretion, but is bound to grant it.*"

With this statement we cannot agree.

While it is a rule of comity, convenience, and expediency that deference shall be paid to the judgment of a co-ordinate tribunal sustaining

the validity of a patent, its obligation is not imperative. "If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle." Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 489, 20 Sup. Ct. 708, 710 (44 L. Ed. 856). It is the primary duty of every court to dispose of cases according to the law and facts, and this requires that upon an application for the extraordinary remedy of a preliminary injunction a defendant shall have the right to ask for the independent judgment of the court upon a defense of invalidity. "It is only in cases where, in his [the judge's] own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law."

The extent to which patent questions already adjudicated inter alios will be reconsidered on petition for preliminary injunction must depend largely upon judicial discretion exercised according to the nature and complexity of the case, as well as according to the exigency of the situation.

The record of a judgment sustaining a patent in litigation with others gives rise to a presumption of validity, but does not preclude an examination of the grounds upon which the judgment was rendered, nor the right of a defendant to contend that such judgment is wrong in fact or in law. While a defendant may have to overcome the presumption that a judgment was right, it is in no sense binding upon him. It is argument from an authority which he may question.

[2] In the present case the defendant contends that the patent in suit is invalid because anticipated by other structures applied to horizontal boilers, and that the limitation of the claims to soot cleaners applied to vertical boilers does not avoid anticipation. Ordinarily a mere change in the location of parts co-operating in the same way does not constitute invention, and it is not apparent that the application of plaintiff's soot-cleaning device to a vertical boiler was substantially different from its application to a horizontal boiler. In fact, upon pages 125–127 of the record are illustrations from plaintiff's catalogue showing its soot-cleaner applied to both horizontal and vertical boilers.

In the opinion of the District Court for the Southern Division of the Eastern District of Michigan, printed in 237 Fed. 818, 151 C. C. A. 60, it was said of the prior art cited:

"Nowhere in the art, however, is shown a blower, either of the multiple jet or single jet type, mounted on a vertical flue boiler to discharge into the outlet ends."

So far as we are able to ascertain from this opinion, the prior art was held nonanticipatory because it did not disclose a blower mounted upon a vertical flue boiler as distinguished from a horizontal flue boiler.

The Prescott patent, No. 838,898, is referred to as showing a rotatable arm discharging into the outlet ends of horizontal flues against the draft.

The Alexander patent, No. 848,082, also is the same in principle of operation.

In view of the fact that the opinion in the former case fails to show that the limitation to vertical boilers was sufficient to avoid the defense of anticipation by horizontal constructions, we are of the opinion that although the District Court did not assign that as a ground of decision it would have been a sufficient reason for refusing to regard the validity of the patent as established on a motion for preliminary injunction, and the result reached being right, there is no occasion for our considering the grounds on which the motion was denied.

The defendant urges that the distinction between vertical and horizontal boilers is so obviously without merit, and that as every feature of the plaintiff's device appears in structures having horizontal tubes, we should apply the decision in Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 495, 20 Sup. Ct. 708, 44 L. Ed. 856, and dismiss the bill. See, also, Denver v. New York Trust Co., 229 U. S. 123, 136, 33 Sup. Ct. 657, 57 L. Ed. 1101.

Were the case before us upon a final record presenting no more than the present record, we should feel compelled to hold that the patent is anticipated by the prior art structures using horizontal tubes, and did not involve patentable novelty.

We are of the opinion that the appeal must be dismissed with costs to the appellee.

We are further of the opinion that, unless suggestion is made within 10 days that plaintiff desires to present in the District Court further and specified proofs to meet our present findings, our order should also direct the District Court to enter a final decree dismissing the bill, with costs to the defendant.

PER CURIAM. Upon consideration of appellant's suggestion that it desires to present in the District Court further proofs to meet the findings in our opinion, we are of the opinion that we should not direct the District Court to dismiss the bill, but that questions of the relevancy, weight, or sufficiency of the proofs suggested should be passed upon by that court in ordinary course.

The appeal is dismissed, with costs to the appellees, and the case is remanded to the District Court for further proceedings in accordance with law.

CROPP v. REED.

(Circuit Court of Appeals, Seventh Circuit. November 22, 1918.)

No. 2594.

PATENTS ⊂=328—INFRINGEMENT—CONCRETE MIXER.

The Reed patent, No. 939,629, for concrete mixer, claim 1, *held* infringed by a new machine made by defendant after decree adjudging infringement by prior structures. Claims 2 and 4 *held* not infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by Matthew Howard Reed against Andrew J. Cropp. From a decree adjudging him in contempt, defendant appeals. Modified and affirmed.

William N. Cromwell, of Chicago, Ill., for appellant.

George L. Wilkinson, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Pursuant to an opinion of this court (see 225 Fed. 764, 141 C. C. A. 90) a decree was entered holding claims 1, 2, and 4 of patent to Reed, No. 939,629, valid. Full discussion of the patent there appears.

After the decree was thus entered, appellant made other machines, resulting in this motion to punish him for contempt. Upon the hearing he was found guilty of contempt.

Appellant claims that the machine, the manufacture of which is alleged to constitute a violation of the decree aforementioned, does not in fact infringe claims 1, 2, or 4 of the patent. More precisely stated, appellant contends that claim 1 of the patent in suit should be restricted to a spring mechanism comprising a single spring and arc-shaped link. While conceding that, read literally, claim 1 is not so limited, appellant urges that to sustain its validity this court in its former opinion referred to and differentiated the McKelvey and Abel patent by construing the element:

"Having an operating lever, and spring mechanism connected with the drum and lever adapted to positively hold the lever, shaft, and deflecting element when thrown to the limit of movement in either direction, substantially as set forth"

—in such manner as to call for a particular mechanism such as was disclosed in drawings of the patent. With this contention we cannot agree. The opinion reads:

"If successful challenge of validity depended upon the inventor's selection of spring mechanisms found in other arts, e. g., those used for closing rainwater pipes, door hinges, cabinet file covers, box covers, mowing machines, the proofs here would sustain the decree. But if notice be taken of the state

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of the particular art involved, of the endeavors of others therein, or the advance made by the patented mechanism in suit, its conceded utility and efficiency in promoting expedition and economy in operation, we believe a different view must be entertained."

In other words, it was the use of a spring as an element in a combination producing the result and reducing the amount of labor required to secure it, that furnished the reasons for the conclusions which the court reached. We quote further:

"In view of the obvious and beneficially new result accomplished by Reed, the suggestion that Ransome did not 'detail a spring or yielding mechanism because he * * * knew that any mechanic having any skill in the art would understand how to put in a spring handle, or a spring dog, on to hold the handle in adjusted position,' * * * serve, not to detract from Reed's disclosure, but rather as criticisms of his predecessors in the art."

It is unnecessary to describe in detail appellant's structure. Adopting the views quoted above, and construing this element in this combination as we do, infringement clearly appears.

Appellee was not restricted to the particular kind or form of a spring mechanism disclosed in the drawings of the patent. One element of the combination was a spring mechanism—not necessarily the spring mechanism shown in the drawings—and this element as one of a combination must be given a fair construction. On the strength of the former opinion, and upon our present study of the patent, we conclude this claim should be construed so as to cover appellant's structure.

As to claims 2 and 4, both narrower claims, we are satisfied that no infringement is disclosed by appellant's machine. By providing specifically for "the drum having an arc-shaped terminal engaging the lever * * *" appellee secured a very narrow claim. Both are obviously narrower than claim 1, but they furnish added reasons for the construction given to the first claim.

The decree of the court is modified, by limiting the finding of infringement to claim 1 of the patent. As modified, it is affirmed. Appellee to recover his costs in this court.

MARTIN v. NEW TRINIDAD LAKE ASPHALT CO., Limited.

(District Court, D. New Jersey. January 2, 1919.)

1. PATENTS ⟸129—LICENSE CONTRACT—SUIT FOR ROYALTIES—ESTOPPEL.
A licensee under an apparently valid patent, when sued for royalties, may not set up its invalidity as a defense, unless prior to the period for which royalties are claimed he gave the licensor such unequivocal notice of repudiation as would render him liable for infringement thereafter if the patent is held valid.

2. PATENTS ⟸212(1)—LICENSE CONTRACT—CONSTRUCTION.
In the absence of an agreement by the licensor, in a contract granting a license under a patent to protect the licensee from infringements by others he is under no obligation to do so.

At Law. Action by William D. Martin against the New Trinidad Lake Asphalt Company, Limited. On motion to strike out parts of answer. Motion granted.

Condict, Condict & Boardman, of Jersey City, N. J., and Henry B. Johnson, of New York City, for plaintiff.

Edwin F. Smith, of Jersey City, N. J., and L. Laflin Kellogg, of New York City, for defendant.

HAIGHT, District Judge. Although the notice of the motion is addressed to the whole of defendant's second amended answer, I have considered that the motion is really to strike out only the seventh and eighth separate defenses, both because they were the only parts of the answer which were referred on the argument, and because a reply and a rejoinder have been filed to the other parts. In the seventh defense it is alleged that the patented processes, which were the subject-matter of the contract sued on, and of which the defendant was to have the exclusive use, were, subsequent to the making of the contract, used generally by others, whereby the defendant was deprived of the profits which it would otherwise have made, had such general use not been permitted; that it called upon the plaintiff to protect the defendant "in its right to exclusive use," but that the plaintiff failed to do so; that thereupon the defendant repudiated "all obligations under said contract and stood out from under the protection thereof, and refused to pay the royalties provided for therein, and so duly notified the plaintiff." In the eighth defense it is alleged that patents were invalid; that by reason thereof it repudiated all obligations under the contract, etc., and so duly notified the plaintiff. The notice of repudiation referred to in each defense is that alleged to be contained in the answer interposed by the present defendant in the suit instituted against it by the present plaintiff, in the Supreme Court of the State of New York based on the same contract as is this suit, which action will hereafter be referred to, as it has been by counsel, as action No. 1.

[1] The controlling question which is applicable to both defenses is whether that notice was sufficient. So far as the eighth defense is concerned, the rule pertinent to the question thus presented, which

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

may be deduced from the reported decisions and which is supported by reason, is this: A licensee under a license agreement, such as that upon which this suit is based, when sued for royalites payable under the agreement, where the patent which is the subject-matter of the license, is apparently valid and in force (where it has not been declared invalid by a court of competent jurisdiction or revoked by the Patent Office before the royalties have accrued), may not set up the supposed invalidity of the patent and the consequent failure of consideration of the agreement, unless, prior to the period for which the royalties are sought to be recovered, he has given to the licensor a distinct, definite, and unequivocal notice to the effect that he no longer recognizes the binding force of the agreement, and that he will thereafter manufacture or use the article covered by the patent under a claim of right, founded upon the alleged invalidity of the patent, and in hostility to and defiance of the authority of the patent and the license, so that the licensor can thereafter proceed against him for an infringement of the patent, if he choose so to do. Lawes v. Purser, 6 Ellis & Blackburn, 930; Martin v. New Trinidad Lake Asphalt Co., Ltd., 182 App. Div. 719, 170 N. Y. Supp. 234 (App. Div., 1st Dept. N. Y. Sup. Ct.); Skinner v. Walter A. Wood Mowing & Reaping Mach. Co., 140 N. Y. 217, 35 N. E. 491, 37 Am. St. Rep. 540; Hyatt v. Dale Tile Mfg. Co., 106 N. Y. 651, 12 N. E. 705 (quoted in full in 125 U. S. at 49, 8 Sup. Ct. 756, 31 L. Ed. 683; Marston v. Swett, 82 N. Y. 526; Skidmore v. Fahys Watch-Case Co., 28 App. Div. 94, 50 N. Y. Supp. 1016 (App. Div. N. Y. Sup. Ct., 1st Dept.); White v. Lee (C. C. Mass.) 3 Fed. 222; Brown v. Lapham (C. C. S. D. N. Y.) 27 Fed. 79; Mudgett v. Thomas (C. C. S. D. Ohio) 55 Fed. 645, 648; Holmes, etc., v. McGill, 108 Fed. 238, 244, 47 C. C. A. 296 (C. C. A. 2d Cir.); Macon Knitting Co. v. Leicester Mills Co., 65 N. J. Eq. 139, 152, 55 Atl. 401.

The decision of Judge Kirkpatrick in this district, in Moore v. National Water-Tube Boiler Co. (C. C.) 84 Fed. 346, did not deal with the question of notice, because, apparently, no notice of repudiation had been given, but it did hold, in the absence of notice, that in a suit for royalties the licensee cannot set up the invalidity of the patent as a defense. Lawes v. Purser, supra, and Marston v. Swett, 82 N. Y. 528, were cited as authorities for that proposition. See, also, American Street Car Advertising Co. v. Jones (C. C. N. D. N. Y.) 122 Fed. 803, 808.

While some of the above-cited cases define the character of the necessary notice more definitely than do the others, none differ as to the requirement of the notice or as to the fact that it must absolutely repudiate the license agreement, and all rights conferred and obligations imposed thereby, so that the licensee may thereafter be treated as an infringer at the option of the licensor. They are therefore all alike in principle. There is every reason for requiring such a notice to be a definite and unequivocal repudiation, for as was said in the Skinner Case:

"The licensor is not to be left in a doubtful or uncertain position. He must not be exposed to the double danger of being defeated in a suit for infringe-

ment by a plea of license never effectually or authoritatively renounced; or, if he sues for royalties, of being beaten because there was merely an infringement, if anything."

As it is within the power of the licensee to make his position clear and definite, every consideration of justice requires that he, not the licensor, should be held accountable for his failure to do so. It is necessary therefore to examine the notice relied upon by the defendants to support the defense in question. The defendant having failed to pay the royalties which accrued subsequent to January, 1903, the plaintiff, in August of that year, instituted action No. 1 against him in the Supreme Court of New York, to recover the royalties which had accrued for the first half of the year 1903, and some sums claimed to be due as royalties for prior years. An amended answer was filed in that action, verified on August 8, 1904. The answer thus interposed is the one relied upon as notice of repudiation in this action. When that case came on for trial, the court held (as appears by the allegations of the seventh and eighth separate defenses in this answer):

"That the evidence offered was insufficient to establish rescission or repudiation of the contract, and plaintiff recovered judgment against defendant upon the verdict of the jury for royalties under said contract, for the first six months of 1903, and certain prior royalties."

This judgment was affirmed by the Appellate Division of the Supreme Court, without opinion (Martin v. New Trinidad Lake Asphalt Co., Ltd., 167 App. Div. 927, 152 N. Y. Supp. 1126), and by the Court of Appeals, likewise without opinion (Martin v. New Trinidad Lake Asphalt Co., Ltd., 222 N. Y. 547, 118 N. E. 1067). The answer in that suit was signed by the attorneys for the defendant and verified by one of them. The pertinent allegations thereof, which were "upon information and belief," were that the patents which were the subject-matter of the license agreement were invalid "for want of invention and patentable novelty," and that because thereof, and "because the method of processes of refining asphalt referred to therein were in general use" by others than the licensor and licensee, the defendant "on or about the 1st day of January, 1903, repudiated all obligation under said contract and refused to pay the royalties provided for therein, and it has not since said date paid any royalties thereunder, or acknowledged its liability to the said Wilkinson & Upham, or to the plaintiff therefor." This, at the best, was but a recital, upon information and belief, by attorneys, retained to defend a lawsuit, of "past events" to support the legal proposition which they advanced. It was in no sense a declaration of the defendant's "future" intentions, either in respect to a continuance of the use of the processes covered by the patent or of the authority—whether by virtue of the license or of the invalidity of the patents—under which it intended to use them, if it did so intend. I am utterly unable to conceive how it could in any sense be considered such a definite and unequivocal notice as is required by the before-stated rule. If its alleged repudiation of all obligations under the contract may be considered as tantamount to a renunciation of the protection of the license, the notice of the repudiation was nothing more than a statement by

the attorneys as to the reason why the royalties for the period covered by the suit had not been paid. For all that appears the plaintiff might readily have understood, as the institution of the subsequent action seems to show that he did, that, if the repudiation referred to in the answer should not be established or held sufficient to justify the defendant in declining to pay the royalties, he would thereafter pay them.

Could the plaintiff, therefore, on such a notice, have safely assumed that he could treat the license agreement at an end and sue the defendant as an infringer? I think not. Any doubt regarding the sufficiency of the notice should be resolved against the defendant, because it was within its exclusive power to make the notice definite and certain. This conclusion makes it unnecessary to consider any of the other reasons advanced by the plantiff in support of the motion to strike out the eighth defense. It seems an all-sufficient answer to the defendant's complaint—that it has been unable up to this time to have the question of the validity of the patents determined, and has been compelled to pay the royalties on what it considers invalid patents, pursuant to a contract, which, because of such alleged invalidity, is without consideration—that it has no one but itself to blame, because it failed to give to the plaintiff the definite and unequivocal notice of repudiation, which the law and justice entitled him to, and which it could have given if it had been so disposed. If notice of repudiation is essential to sustain the seventh defense, as counsel for both parties have apparently, and I think correctly, assumed (Skidmore v. Fahys Watch-Case Co., supra), then it clearly follows that, for the reasons heretofore advanced, the notice set forth in the seventh defense (which is the same as that set up in the eighth defense) was not sufficient. If the defendant was entitled to repudiate the contract because the patented processes were being used by others subsequent to the date of the contract, in the absence of some provision in the contract to the contrary, it should, on principle, be required to give as explicit and definite a notice of repudiation as where its asserted right to repudiate is based on the invalidity of the patent. In both cases, the ground upon which it bases its right to repudiate is a failure of consideration. On the other hand, if the notice of repudiation is not an essential prerequisite of repudiation on the ground of such user, then the striking out of the seventh defense will not harm the defendant, because the same substantive matters, with the exception of the particular notice alleged in the seventh defense, are set forth in the first defense.

[2] But quite apart from the question of notice, the seventh defense fails to set up any matter which would bar the plaintiff's action. It at best merely alleges that others, during certain years, subsequent to the date of the license agreement, were infringing the patents, the exclusive use of which that agreement gave to the defendant. It does not allege, however, that such infringements were with the plaintiff's consent or license. The license agreement (a copy of which is annexed to the complaint) contains no provision that the licensor would protect the licensee from infringements by others. In the ab-

sence of such a provision, there was no obligation upon the part of the plaintiff to do so. Martin v. New Trinidad Lake Asphalt Co., Ltd., 182 App. Div. 719, 170 N. Y. Supp. 234; Skidmore v. Fahys Watch-Case Co., 28 App. Div. 94, 50 N. Y. Supp. 1016, 1020 (App. Div. N. Y. Sup. Ct., 1st Dept.); National Rubber Co. v. Boston Shoe Co. (C. C. Mass.) 41 Fed. 48, 50; McKay v. Smith (C. C. Mass.) 39 Fed. 556.

The motion to strike out the seventh and eighth defenses of the second amended answer will be accordingly granted, with costs.

NEUMANN v. MORSE DRY DOCK & REPAIR CO., Inc.

(District Court, E. D. New York. December 18, 1918.)

MASTER AND SERVANT ⊜351, 385(17)—WORKMEN'S COMPENSATION ACT—ACCEPTANCE OF COMPENSATION—EFFECT.

Though a stevedore presented a claim and accepted compensation under the state compensation law, *held* that, as the state Compensation Commission was without jurisdiction, the acceptance of compensation is not a bar to a libel in admiralty; the payments, if made by the employer, being deductible from the recovery, and, if made by the state, to be treated as gratuities.

In Admiralty. Libel by Carl F. Neumann against the Morse Dry Dock & Repair Company, Incorporated. On exceptions to answer. Exceptions sustained.

Nathaniel Phillips, of New York City (William Godnick and Louis R. Bick, both of Brooklyn, N. Y., of counsel), for libelant.

Henry C. Hunter, of New York City, for respondent.

CHATFIELD, District Judge. This action is in admiralty for personal injuries to a stevedore, who presented a claim and accepted compensation under the New York Compensation Law (Consol. Laws, c. 67) prior to the decision of the United States Supreme Court in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. After the decision in that case he began the present action.

The respondent interposed as one defense that the libelant made the application above stated and accepted compensation in full satisfaction of his claim. The libelant now moves to strike out this defense, upon the proposition that the moneys received under the Compensation Law were gratuities, or extrajurisdictional payments. This is opposed by the respondent on the authority of The Fred E. Sander (D. C.) 212 Fed. 545. On this theory it is urged that, although no common-law right of recovery exists, although the injured party must proceed in admiralty, and although the Employers' Liability or Workmen's Compensation Act of the various states gives no additional cause of action or right because of the exclusive admiralty jurisdiction under the United States Constitution (Southern Pac. Co. v. Jensen, supra), nevertheless the injured person may, by acts show-

ing an election or voluntary contract to accept compensation under the state law, estop himself, and thereby waive his rights in admiralty. It should be noted that the Sander Case was earlier than the Jensen Case, and that it presents an apparently anomalous situation on the present state of the law.

Thus a contract which could not be enforced, because the law creating it is unconstitutional, and as to which the courts have no jurisdiction, would, without conscious agreement on the part of the injured party, be left as the only protection of that injured party in collecting any future compensation, and valid as a defense to the employer.

It seems more difficult to sustain the authority of the state Compensation Commission in a matter where they have no jurisdiction, and where they would have apparently no right to act outside of their jurisdiction, as an agent for the injured individual, than to hold, as did the Appellate Division of the Third Department, in the case of Sullivan v. Hudson Navigation Co. (and other cases) 182 App. Div. 152, 169 N. Y. Supp. 645, that the payments received by the injured party were paid under a mistake of law and that the state Commission had no authority at all in the matter.

If this money was paid under mistake of law, there would seem to be no reason for holding that the libelant's right to sue in admiralty had been lost, nor to hold that the libelant must as a condition precedent restore the money paid before suing to recover in admiralty. The case is not one of rescission of contract with a tender of consideration received. Drobney v. Lukens Iron & Steel Co., 204 Fed. 11, 122 C. C. A. 325.

It is, however, a situation where the money paid under the Compensation Law was on account of the injuries, and in so far as this money came from or belonged to the employer it should be treated as a payment on account, and would, of course, be deductible from the ultimate recovery, if there be any. In so far as these moneys came from the funds of the state of New York, or were in the nature of a gratuity, the libelant would be entitled to keep them as against his employer. Those questions can be disposed of at the trial.

In the meantime the exceptions to the answer will be sustained.

UNITED STATES v. GRAY.

(District Court, E. D. New York. June 25, 1918.)

BANKRUPTCY ⇐486—OFFENSES—FALSE OATH.

A bankrupt, who on examination in a bankruptcy proceeding, in answer to a question requiring a statement of assets, willfully fails to state all of such assets, is guilty of making a false oath and punishable under Bankr. Act July 1, 1898, c. 541, § 29b (2), 30 Stat. 554 (Comp. St. § 9613).

Criminal prosecution by the United States against Malvina Gray. On motion to set aside verdict. Denied.

Melville J. France, U. S. Atty., of Brooklyn, for the United States.
Robert H. Elder, of New York City, for defendant.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

GARVIN, District Judge. Defendant has been convicted of willfully and corruptly swearing falsely before a special commissioner in a bankruptcy proceeding, and now moves to set aside the verdict and for a new trial, claiming that perjury has not been proved. In my opinion, when the witness undertook to answer a question by which it was sought to ascertain what other places she had, and when she failed to state those places, such failure was equivalent to swearing to a statement of assets which was incomplete. The latter is perjury. United States v. Nihols, 4 McLean, 23, Fed. Cas. No. 15,880.

Motion to set aside verdict denied.

COMMERCIAL CABLE CO. v. BURLESON et al.*

COMMERCIAL PACIFIC CABLE CO. v. SAME.

(District Court, S. D. New York. January 10, 1919.)

1. TELEGRAPHS AND TELEPHONES ⟸26¾ [New, vol. 7A Key-No. Series]—ASSUMPTION OF CONTROL OF CABLES BY GOVERNMENT—LEGALITY.
Under Joint Resolution July 16, 1918 (Comp. St. 1918, Append. § 3115¾x), authorizing the President during the continuance of the war, "whenever he shall deem it necessary for the national security or defense," to take possession and control of marine cables, the determination by the President that such necessity exists is not subject to judicial review.

2. TELEGRAPHS AND TELEPHONES ⟸26¾ [New, vol. 7A Key-No. Series]—ASSUMPTION OF CONTROL BY GOVERNMENT—LEGALITY.
Joint Resolution July 16, 1918 (Comp. St. 1918, Append. § 3115¾x), authorizing the President during the continuance of the war to take possession and control of telegraphs and marine cables, is within the constitutional powers of Congress, is not unconstitutional because compensation for their use is deferred and to be fixed initially by the President, and was an appropriate war measure, as placing in the President's control as chief executive and head of the army and navy an essential instrumentality both for military and naval operations and in negotiation of a peace treaty.

3. WAR ⟸33—CONCLUSION—"ARMISTICE."
An "armistice" is merely a suspension of military operations, and has no effect to terminate the war.

In Equity. Suits by the Commercial Cable Company and by the Commercial Pacific Cable Company against Albert S. Burleson and Newcomb Carlton. On motions to dismiss bills. Motions sustained.

These cases arise on motions to dismiss two bills in equity for lack of jurisdiction and for want of equity, and they therefore present cases based altogether upon the allegations contained in them. Each bill was similar, and the consideration of one may be taken as applicable to both. They prayed an injunction against the defendants from interfering with the plaintiffs' property or business of which they had claimed to take possession.

The Commercial Cable Company's bill alleges that it was a corporation of the state of New York, doing business in the city of New York, and engaged in the operation of a system of submarine cables in the Atlantic Ocean to Canada, Newfoundland, the Azores, United Kingdom, and France; that on the 16th of July, 1918, the Congress of the United States by joint resolution (Comp. St. 1918, Append. § 3115¾x) authorized the President during the con-

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*Reversed 250 U. S. 360, 39 Sup. Ct. 512, 63 L. Ed. —.

tinuation of the present war, whenever he should deem it necessary for the national security and defense, to take possession of any marine cable and operate the same for the duration of the war, and not beyond the date of the proclamation by the President of the exchange of the ratifications of the treaty of peace; that on the 11th day of November, 1918, an armistice was signed, suspending hostilities during the present war, and immediately thereafter the duration of the war, within the purpose of the resolution, terminated; that on the 16th of November, 1918, the defendant Burleson, assuming to act under a proclamation of the President, took possession of the plaintiff's cables, and also of the cables of the Commercial Pacific Cable Company, the other plaintiff, from San Francisco to China, Japan, and the Philippines, and to South America from the city of New York; that the proclamation of the President, on which the defendant Burleson acted, was dated November 2, 1918, a copy of which was annexed, and asserted that the President deemed it necessary for the national security and defense to take possession of all marine cable systems in the country; that the seizure was illegal and void, because the war had terminated within the meaning of the resolution, because Congress had no power to authorize possession to be taken under the circumstances existing at that time, because it was not necessary for the national security and defense to deprive the plaintiff of its property without due process of law and without compensation, because it was not for any public use, and because the defendant Burleson was not an impartial tribunal to determine the plaintiff's compensation for the use of the cables; that proper and legal provision had not been made for the plaintiff's compensation, and that the purpose was to consolidate the plaintiff's system with that of its competitor, the Western Union Telegraph Company, in violation of the Anti-Trust Act of Congress, and to suppress competition between the two; that full, adequate, complete, quick, and correct cable service had been given by the plaintiff throughout the period of the war to the government, whose messages had taken precedence over all others; that there had been no complaint on the part of the government, nor was there any occasion therefor, in the quick and accurate transmission of its messages; that the plaintiff's cables had been worked to their utmost capacity by a competent staff of officers and operators; that the service could not be increased and bettered; that the operation of the cable lines under the control of the defendant Burleson would be less efficient and satisfactory to the government and the public, and that the ground given for the seizure was a mere pretext, without substance or basis; that the cables had theretofore been under the absolute control of officials of the United States, and that nothing had been done by the plaintiff in their operation without the knowledge and approval of the Director of Naval Communications, whose every request and suggestion had been complied with by the plaintiff in every particular; that the plaintiff had co-operated in a most rigid censorship, which was established by the government, and had met all demands and requests of the government fully and completely; that the transmission of cablegrams between America and Europe did not necessitate or justify the seizure of 10,000 miles of cable between San Francisco, China, Japan, and the Philippines, or the seizing of the cables from New York to South America, nor of those to Cuba and Mexico, nor the seizing of 13 cables across the Atlantic; that the seizing of such 13 cables did not facilitate in the slightest degree the transmission of government messages; that they had been already worked to their utmost capacity, as fully and efficiently as they could be worked if operated by the government; that the joint resolution of Congress was unconstitutional, in that compensation was not provided before an impartial jury or commission; that the defendant Burleson was an improper and unfair tribunal to make a provisional estimate of the plaintiff's damages; that the appeal to the Court of Claims was illusory, because no provision was made for paying any judgment that the plaintiff might obtain; that there was no compulsory process by which a judgment of the Court of Claims could be collected, and that it was entirely voluntary with Congress whether such judgment should be paid or not; that the defendant Burleson intended to consolidate the plaintiff's business with

that of the Western Union Telegraph Company, so that its separate identity and business would disappear, and the plaintiff would be forced to abandon competition thereafter and acquiesce in the defendant Burleson's plans for government ownership of the same—all in violation of the Sherman Act.

The joint resolution under which the President acted contained a provision that just compensation should be made for possession of any cable seized, in an amount to be determined by the President, and if the amount so determined was unsatisfactory the person interested might receive 75 per cent. of the amount so determined and should be entitled to recover such further sum as might be awarded in accordance with section 24, par. 20, and section 145 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1093, 1136 [Comp. St. § 991, par. 20, and section 1136]). The first of these provisions authorized suits to be brought in the District Court, and the second a suit to be brought in the Court of Claims upon claims of similar character.

By amendment to the bills the name of the defendant Carlton was added wherever the defendant Burleson's name appeared, and an allegation was also added that the landings of some of the cables were in foreign countries, and seizure of them by the United States would constitute a violation of international law, of which all nations were properly jealous; that, if such seizure was obtained by consent, the consent would constitute in substance a treaty, which could only be made with the concurrence of the Senate, whose consent had not been obtained.

There were also, coupled with the motions, motions to strike out certain parts of the bill as irrelevant, impertinent, and scandalous; but in view of the disposition made of the case these motions need not be set forth.

Edward F. McLennan, Harold Harper, of New York City, and Charles N. Bracelin, for the motions.

Charles E. Hughes and William W. Cook, both of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). I shall dispose of this case upon the merits, and without considering two questions raised which go to the jurisdiction of the court. The first is that the bills pray for injunctions against the United States; the second, that they are in effect directed against the President. The second question involves this: Whether a court should pass a decree which directly contradicts an order made by the President, but which must necessarily be enforced only through sanctions dependent upon his execution of the writ. As the merits of the case involve questions of importance, it appears to me more desirable to base my decision upon them, only premising that the preliminary objections I pass without deciding.

The theory of the bills is twofold: First, that the seizure of the cable lines on November 16, 1918, was not justified by the joint resolution of July 16, 1918; second, that the resolution itself was an insufficient warrant, though its terms had been followed. I shall consider these in their order.

[1] The joint resolution authorized the President to seize any cables when he deemed it "necessary for the national security and defense," and the bills insist that the issue is justiciable in this court whether there was any such necessity. The scope of the court's inquiry need not concern me, for, if no inquiry whatever is possible, its scope is irrelevant. The plaintiffs assume, under the rule in such

cases as Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, Interstate Commerce Comn. v. L. & N. R. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431, and Gegiow v. U. S., 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114, that the grant given by the resolution of Congress is in effect limited by its right to delegate general legislative power. If so, they say, it can be extended only so far as to depute to an official, whether or not he be the President, the duty of ascertaining a fact, or some facts, which Congress has made a condition upon the incidence of the legislative act. Moreover, since that incidence is dependent upon an actual exercise of some intelligible decision upon the fact confided to the public official, his decision is reviewable to this extent: That there must be a tenable basis in the evidence from which a reasonable man could have reached the same conclusion. Thus it becomes justiciable, though to a limited degree.

If it be admitted that the joint resolution falls within this class, it might still be contended that under the latitude extended to the rule in cases like Buttfield v. Stranahan, supra, and Union Bridge Co. v. U. S., supra, the question of fact intrusted to the President could be considered to involve all those matters of public policy which made up the national security and defense. In these cases it was held proper for Congress to depute to officials the power to establish standards or norms of conduct to which the public must conform. This was certainly a very different duty from ascertaining whether a fact defined in general language had occurred. Even so, the decision would be justiciable, and it would become necessary to consider the allegations in the bills; but I do not rely upon any such extension of the rule, because the joint resolution does not fall into the class of legislation which these cases control. It was not a rule for the future conduct of individuals, like most legislation; it was the sovereign act of condemning the temporary possession of private property for public use, rather administrative than legislative in its nature, as those terms are generally used, though it must, of course, proceed from Congress. As such the question is whether the use to which the property was condemned was a public use within the accepted rules, and how that use should be defined.

I may assume for the moment that the use intended was to put the property at the general disposal of the President in the discharge of some of his constitutional functions, without inquiry as to the specific purposes which he might have in mind. It is true that Congress might, if it chose, have required the President to state the occasion which he thought made his possession necessary and the uses to which he would put it; but that is not the point. If he had asked of Congress the immediate possession of the cables, would it have been lawful for them to consent to that possession, without reserve or question? Had he been a private person, this clearly would not be the case;

some public use must have been disclosed, and the possession dedicated to it alone. The President is, however, vested by the Constitution with certain duties in whose discharge he is exempt from inquiry by courts. His discharge of those duties as the Constitution imposed them is in the highest sense a public use, and the committal to him of means to discharge them falls into the same category. Therefore, if the President had asked of Congress the possession of property for use in his capacity, for example, as commander in chief, it would have been as lawful for them to intrust it to him without condition as though they appropriated money for his disbursement.

If so, there was no reason why they should not have suspended the time of possession until in his judgment it became advisable that he should acquire it. Into the occasion of his necessity they need as little inquire as though he had asked for it at once. All that was necessary was that he should ask for it in some capacity which the Constitution recognized. Furthermore, it is not necessary that the capacity should be expressly stated, so long as it is apparent that the property condemned was in its nature appropriate to the exercise of some constitutional function. I must assume that, when he required it, he required it by virtue of some constitutional power, so long as that might have been the case.

The question is therefore rather of the power of Congress to condemn property for the President's use within his limited powers, than of his exercise of them. The latter in any event must be exempt from impediment by individual interests before courts. If Congress have not the power, obviously it cannot put into the President's hands those instruments which may be essential to the discharge of his duties, except upon condition that he submit to a control from which in other respects he is exempt. That the Constitution should prescribe so unworkable a system seems to me unthinkable. Without the co-operation of Congress the President is substantially without means to exercise his prerogative. If he must justify before courts any occasion he may have to accept their assistance, government becomes in the final analysis not one of laws, but of courts. Cases such as Mitchell v. Harmony, 13 How. 115, 14 L. Ed. 75, and U. S. v. Russell, 13 Wall. 623, 20 L. Ed. 474, are quite different. There the power depended upon the common law, which imposed upon its exercise the condition that the emergency was actual. It became necessary to scrutinize the decision of the officer exercising the power, to ascertain whether it existed.

Having such power, did Congress intend to bestow upon the President possession at his mere assertion that he wished it? Without doubt. The language of the resolution is that he may seize the cables "whenever he shall deem it necessary"; his conclusion is the single condition. The occasion lent color to this interpretation. The war was at its height; the nation was using every energy and resource towards its effective prosecution. The President, as its executive head, was responsible for its success, and the purpose of concentrating in him a power commensurate with that responsibility was obvious in all contemporary legislation. That Congress should have contemplat-

ed the possibility that he should be compelled at the suit of an individual to disclose and justify the reasons for his act is beyond possibility. He had to act quickly, certainly, and without the trammels of courts or private interests.

[2] Are there, then, constitutional powers of the President to whose discharge the possession of such property was suitable? If for the moment one considers the question if it had arisen before November 11, 1918, the answer is immediate. Cable lines leading to the theaters of war, Europe and Asia, were obviously appropriate to the conduct of military operations. I need hardly expatiate upon the vital necessity of rapid communication to military success. Nor does it make the least difference whether the plaintiffs are right in saying that they were already giving as good service as could be obtained under governmental control. The single question is whether they possessed an instrument available for military use; if so, the President, as commander in chief, had the sole power to determine whether it was wiser to acquire possession or to operate it otherwise. Nor do the cables leading elsewhere introduce any difficulty. The cables were already in one system of management and under one control, and it was not essential that only those which were immediately important to actual military operations should be taken. If the operation of those immediately necessary would be facilitated by possession of all, that was enough. But, indeed, it would be a lame comprehension of the scope and variety of modern war, which limited its activities to the immediate theater of military operations. The espionage system of the enemy, we are told, was not limited to belligerents—at least it may be so. Provisions for supplies and matériel could not be made without an eye to the resulting scarcity at home and the available substitutes abroad. In a war which has called for the last resources of the belligerent powers, and where the United States was in active military co-operation with many of these belligerents, it is quite impossible to say that means of telegraphic communications anywhere in the world were not appropriate to its prosecution. If the President, who by virtue of his office was charged with the successful conduct of the war, decided that any such means were necessary, his decision was final.

[3] The plaintiffs do not, however, take that position. They rely upon the fact that after November 11, 1918, the war was from a military aspect closed, and that the powers of the President had changed. By virtue of what fact did they change? Not by the intent of Congress, because the resolution expressly extends the powers until peace has been declared. Had they intended that a suspension of hostilities should terminate the right, they would not have said precisely the contrary. Nor did they change by any limitation of the Constitution that I know. Even if I were to assume that the power were only coextensive with a state of war, a state of war still existed. It is the treaty which terminates the war. The Protector, 12 Wall. 700, 20 L. Ed. 463; Hijo v. U. S., 194 U. S. 315, 24 Sup. Ct. 727, 48 L. Ed. 994. An armistice effects nothing but a suspension of hostilities;

the war still continues.[1] It is true that a war may end by the cessation of hostilities, or by subjugation; but that is not the normal course, and neither had hostilities ceased, nor had the enemy been subjugated in the sense in which that term is used. There were still military operations, the armistice had not been carried out, and after it was, armed forces of the United States were in occupation of enemy territory, and were in European and Asiatic Russia, where, indeed, they still remain. The President was still in command of these forces, and to their conduct telegraphic communication was still essential. All that the armistice could do was to introduce a new, though very vital, consideration into his decision; but it did not affect its finality. A court might conclude that there was no basis for the seizure, but a court would have as little right to entertain the issue before as after the armistice.

There is, moreover, another constitutional power of the President, under which the seizure was justified, and which also depends upon the existence of war—his initiative in the making of treaties. War is not the release of primitive combative instincts; it is an enterprise conducted for purposes consciously understood, whose realization gives to it its only rational significance.[2] The national security and defense is to be judged not by the immediate present, but by the sta-

[1] Oppenheim, International Law, vol. 2, War, §§ 231, 233, 260-266.

Section 231: "Armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared with peace, and ought not to be called temporary peace, because the condition of war remains between the belligerents themselves, and between the belligerents and neutrals on all points beyond the mere cessation of hostilities. In spite of such cessation the right of visit and search over neutral merchantmen therefore remains intact, as does likewise the right to capture neutral vessels attempting to break the blockade, and the right to seize contraband of war."

Articles 36 and 37 of the Fifth Convention at the Second Hague Conference are as follows (translation):

"Art. 36. An armistice suspends military operations by mutual agreement of the belligerents. If its duration is not determined the belligerents may resume such operations at any time provided always that the enemy is advised within the agreed time and in conformity with the conditions of the armistice.

"Art. 37. An armistice may be general or local. The first everywhere suspends military operations between the belligerent states, the second only between certain parts of the belligerent armies and within a fixed radius."

[2] Oppenheim, op. cit. § 54: "War is the contention between two or more states through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."

Section 66: "Ends of war are those objects for the realization of which a war is made. In the beginning of the war its ends are determined by its cause or causes, as already said. But these ends may undergo alteration, or at least modification, with the progress and development of the war. No moral or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the object for which war was made. If war has once broken out the very national existence of the belligerents is more or less at stake. The risk the belligerents run, the exertion they make, the blood and wealth they sacrifice, the reputation they gain or lose through the changing fortune and chances of war—all these and many other factors work or may work together to influence the ends of a war so that eventually there is scarcely any longer a relation between them and the causes of the war."

bility of the ensuing state of peace. The terms of the final conventions, the success of the nation in achieving the aims with which it set out, and which it may have adopted during the progress of war, are the measure of that security and defense. Those aims, whatever they are, are deemed essential to some vital national interest, not necessarily confined to freedom from immediate invasion. It may destroy the armed opposition of the enemy and wholly fail in securing its defense of those interests. The President is charged, by his function of negotiating, for presentation to the Senate, a treaty of peace, with the duty of reducing to preliminary form the success which the arms of the nation may have made possible. His right to hold the cables for such purposes, if valid at all, certainly was not affected by the armistice.

Had the possession of the plaintiffs' cables any relation to the negotiation of peace? Obviouly the possession of some telegraphic communication is essential, leading not only to the immediate place where the negotiations may go on, but to any part of the world which may be affected by, or may affect, the result. Many nations have been involved; many may intervene in the conference; no one can at the moment predict to what part of the world immediate, secret, and rapid communication may become a vital necessity for the success of the nation's purposes. Again, as in assistance to the conduct of war, if the cables be appropriate to a discharge of the President's constitutional duty, the number seized and the service rendered under governmental operation is not open to examination. The decision may be wrong; it may even be actuated by purposes other than those intended by Congress; but the relief is not from judges. The considerations which might dictate it are so obviously political in character as to preclude the possibility of their public disclosure or of their judicial determination. If possible, they are more foreign to the questions which courts may settle than those determining the propriety of the seizure of an instrument of active warfare. Whatever means are in their nature available to the successful conduct of negotiations are open to the President to use while negotiating, if Congress chooses to put them at his disposal.

It is true that, if the issues were justiciable, I am not prepared to say that the allegations of the bills would not present a case. Taken favorably, as I must take them, they say that the plaintiffs have given a service which in speed, in volume, in organization, and in secrecy has been all that the property is capable of giving. I take this to include either separate operation or joint control. In any event, the defect, if it were strictly a defect, could be supplied by amendment. It is plain that marine cables cannot be used for anything but the transmission of intelligence, and such allegations seem to me unavoidably to present for determination whether the change in possession could improve the character of the service, and so be necessary to the security and defense of the nation in the only respect in which it could assist in that defense. If that question were open to courts at all, I cannot think of any assertions which would better serve to open it. The defendants' argument that a trial might involve polit-

ical considerations improper for disclosure only goes to the propriety of any trial at all, not to the necessary inference from the allegations, if they be true. If true, there was no public necessity; hence the issue is well framed, if it is justiciable. I hold that it is not.

The remaining question is simply of the adequacy of the provisions for compensation. The allegations touching the partiality of the defendant Burleson are irrelevant. He will not make the preliminary estimate of the compensation due, but the President, who has not yet even deputed the defendant to advise him. But the whole question is irrelevant in any case, because of the resort given to the Court of Claims. If that be adequate, the resolution is valid. Upon that question I am concluded by the decision of the Supreme Court in Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771. The language upon which the plaintiffs rely to distinguish that case does not appear to me to indicate that a similar provision here should be considered inadequate. It occurs upon page 306 (32 Sup. Ct. 492) and refers to the intangible nature of the property taken, its possible importance to conduct of the government, and the pledge of good faith for payment. Of these the second two certainly apply in the cases at bar, and the first as well, as I understand the opinion. I assume that the reason why the Chief Justice referred to the intangible character of the property taken was because it was impossible in advance to determine its value. The value of the temporary possession of the plaintiffs' cables is as difficult of ascertainment. It was necessarily uncertain when that possession would begin and how long it would continue. How great would be the damage done could be ascertained only after a calculation which could not even approximately be made in advance. Pressing necessities of the most vital nature required the power to be given, and did not admit of any preliminary appropriation. The same statute was considered in Cramp & Sons v. Curtis Turbine Co., 246 U. S. 28, at page 42, 38 Sup. Ct. 271, 62 L. Ed. 560, and its scope somewhat limited; but it is clear that the court meant to repeat its decision that, when a public officer of the United States takes a patent right, it was by virtue of the right of eminent domain, and that a resort to the Court of Claims was adequate compensation. At least in the face of those declarations it would be an obvious impropriety for a District Judge to hold otherwise.

I conclude, therefore, that the seizure was within the powers conferred by Congress, ancillary to the constitutional powers of the President, whose execution it was intended to assist, and that the joint resolution gave adequate compensation. Of the proposed conduct of the defendant in consolidating the cables under one management, whether or not it be in contravention of the Sherman Act, the plaintiffs are not in a position to complain.

The motions are granted, and the bills will be dismissed, with costs.

In re MUNFORD.

(District Court, E. D. North Carolina. January 7, 1919.)

1. BANKRUPTCY ⟸143(8)—PROPERTY VESTING IN TRUSTEE—DOWER RIGHTS OF WIFE.
   Where, under the state law, the wife of a bankrupt has an inchoate dower right in his equitable estates, and has joined with him in mortgages under which his realty is sold subsequent to bankruptcy, she has a dower right only in the surplus proceeds, and is not, as against the trustee, representing the unsecured creditors, entitled to the present value of one-third of the entire proceeds of the sale.
2. BANKRUPTCY ⟸353—DOWER INTEREST OF WIFE.
   Where the bankrupt's wife had an inchoate dower interest for life in the surplus proceeds of his lands sold under foreclosure, one-third of such surplus was directed to be invested in government bonds, to be held by the clerk after settlement of the estate.
3. BANKRUPTCY ⟸482(3)—ADMINISTRATION OF ESTATE—ALLOWANCE OF ATTORNEY'S FEES.
   Under Bankruptcy Act 1898, § 64b (3), being Comp. St. § 9648, requiring the court to allow as costs of administration "one reasonable attorney's fee for professional services actually rendered * * * to the petitioning creditors in involuntary cases," such allowance must be confined to payment for service actually rendered in filing the petition and prosecuting it to an adjudication.
4. BANKRUPTCY ⟸482(3)—ADMINISTRATION OF ESTATE—ALLOWANCE OF ATTORNEY'S FEES—"DUTIES HEREIN PRESCRIBED."
   Under Bankruptcy Act 1898, § 64b (3), being Comp. St. 1916, § 9648, authorizing the allowance of a reasonable attorney's fee for services actually rendered to the bankrupt "while performing the duties herein prescribed," such duties are those required of the bankrupt for the benefit of the estate.
5. BANKRUPTCY ⟸4—PURPOSE OF ACT.
   The purpose of the Bankruptcy Act is (1) to apply the property of an insolvent person or corporation to the payment of the debts with as little expense and delay as is consistent with their interests; (2) to relieve the honest and unfortunate debtor from his debts, and give him another opportunity in the industrial life of the community.

In Bankruptcy. In the matter of C. T. Munford, bankrupt. On exceptions to report of special master respecting allowance of dower to Mrs. J. Caroline Munford and allowance to attorneys. Exceptions sustained in part.

Harry Skinner, of Greenville, N. C., for petitioner.

S. J. Everett and Julius Brown, both of Greenville, N. C., for creditors.

F. G. James & Son and F. C. Harding, all of Greenville, N. C., for trustees.

CONNOR, District Judge. C. T. Munford was, on the 22d day of September, 1916, adjudged bankrupt. A number of controverted questions having arisen in the course of the administration of the estate, an order of reference was made, appointing F. H. Bryan, Esq., special master, with direction to hear and report the evidence in regard thereto, together with his findings of fact and conclusions of law.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

It appears from his report that, prior to his adjudication, the bankrupt was the owner of several large and valuable tracts of land and town lots, upon which he, together with his wife, Mrs. J. Caroline Munford, had executed mortgages to secure the payment of debts, for which his wife was not personally liable. Subsequent to the adjudication, the several mortgages, pursuant to the power conferred upon them, sold the real estate for sums aggregating $83,740.10. After discharging the debts secured by the mortgages, with the expense incurred in making sales, the excess of $10,389.79 was paid to the trustees in bankruptcy, and is held by them for distribution among the unsecured creditors, subject to the dower right of Mrs. Munford, which she asserts in this proceeding.

The master reports that, on the day of the sale, C. T. Munford, was 55 years of age, and his expectancy, ascertained by reference to the mortuary table (Rev. 1905, § 1626), is 17.4 years. Mrs. Munford was, on the same day, 48 years of age, and her expectancy is 22.4 years, being 5 years in excess of the expectancy of her husband. The master finds the value of her dower interest to be $3,613.26, one-third of the amount derived from the sale of the real estate, after paying the mortgage indebtedness. He ascertains the present value of this amount to be $912.23. This result is reached by calculating that she will survive her husband 5 years, and adopting the expiration of his expectancy as the date upon which her right to dower will become consummate.

To this conclusion Mrs. Munford excepts and insists:

(1) That she is, as against the trustees, representing the unsecured creditors, entitled to the present value of one-third of the entire proceeds of the sale of the real estate.

(2) That, in ascertaining the present value of this sum, she is entitled to have her expectancy placed at 11 years—that being the period fixed by the tables for a person who has reached 65 years, her age at the date of the anticipated death of her husband.

[1] The rights of Mrs. Munford are dependent upon, and fixed by, the law of North Carolina. They are not controlled, or affected by, the provisions of the Bankrupt Law. Revisal 1905, c. 78, § 3083 (Acts 1868–69, c. 93, § 32), provides that—

"Widows shall be endowed as at common law, as in this chapter defined."

Section 3084 provides that, upon the death of her husband intestate, every married woman shall be entitled to an estate for her life in one-third in value of all the lands whereof her husband was seized and possessed at any time during coverture. The statute provides the procedure for the allotment of dower upon the death of the husband. Prior to 1868, a widow was endowed only of lands of which the husband died seized and possessed. In Thompson v. Thompson, 46 N. C. 430, it was held that the widow of a mortgagor deceased was entitled to dower in the equity of redemption, or other equitable estate, owned by her husband. It was held in Caroon v. Cooper, 63 N. C. 386, that upon the death of the husband, possessed of an equity of redemption, the widow was entitled to have the two-thirds of the

mortgaged land sold in exoneration of her dower. Ruffin v. Cox, 71 N. C. 253; Overton v. Hinton, 123 N. C. 1, 31 S. E. 285.

In Gwathmey v. Pearce, 74 N. C. 398, the wife having joined her husband in the execution of a mortgage upon land in which, under the act of 1868, she had an inchoate right of dower, which was sold under the power contained in the mortgage, she was permitted to prove, as a debt against the estate of her husband, and share in the general assets, the value of her dower—one-third the value of the mortgaged lands. The court regarded her right as the same as if she had mortgaged, for the security of her husband's debt, her separate real estate, making her, to the extent of the value of her dower, a surety of the husband. In that case the court treated the entire one-third of the price for which the land was sold under the mortgage as the measure of the value of her dower. The question as to the "present value" was not raised or referred to.

In Gore v. Townsend, 105 N. C. 228, 11 S. E. 160, 8 L. R. A. 443, it is held that the wife, who has joined her husband in the execution of a mortgage, was entitled, in exoneration of her dower, to have the personal estate of her husband applied to mortgage debt. In Southern Loan & Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435, it is held that the inchoate right to dower, while not an estate in her husband's land which can be assigned or conveyed by the wife, is a valuable right; that its release, by way of mortgage, to secure her husband's debt, constitutes a valuable consideration, and will sustain a promise on his part to pay the value thereof. 10 A. & E. Enc. 143. It is held in this state that, until the death of her husband and the allotment of dower, the widow has no present estate or title to any part of her husband's lands. Fishel v. Browning, 145 N. C. 71, 58 S. E. 759.

Reference to the text-books does not aid in fixing the character of the wife's inchoate right to dower in her husband's lands. Scribner says:

"It is difficult to state with precision the nature or qualities of inchoate dower interest, when considered as a part of the husband's property. A certain vagueness of expression uniformly characterizes the discussions on the subject, and these discussions are commonly attended with unsatisfactory results. * * * Although, therefore, an inchoate right of dower cannot be properly denominated an estate in lands, nor a vested interest therein, and notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may, nevertheless, be fairly deduced from the authorities that it is a substantial right, possessing, in contemplation of law, the attributes of property and to be estimated and valued as such." Dower, 5.

Mrs. Munford would have been entitled, for the protection of her inchoate right of dower, released by joining her husband in the execution of the mortgages, to redeem the land, and as against the heir and creditors of her husband the excess sold in exoneration of her dower. 10 A. & E. Enc. 166. She would have been entitled to a decree in a court of equity directing the sale of the several tracts of land in such manner as to exonerate her dower, but it is apparent that she would have derived no benefit from doing so. The several tracts were mortgaged to amounts approximating their full value. She therefore sustained no injury by permitting the mortgagees to sell free of

her dower right. It would seem that, upon the authority of Gwathmey v. Pearce, supra, she may have waived her claim to dower in the proceeds, and proven as a creditor her claim for the value of her inchoate dower right in the land. She would, however, encounter practical difficulty in ascertaining to what amount she would have been entitled.

Having elected to claim her dower in the proceeds, the question arises: What is the extent of her right and its present value?

She contends that, as against the trustees, she is entitled to the present worth of one-third of the entire proceeds of the land. The question presented by this contention has not been decided by the Supreme Court of this state. Reference to text-books and decisions of other courts, in which the wife is entitled to dower in the equitable estates of the husband, does not sustain her contention.

In 2 Jones on Mortgages, 1693, it is said:

"A widow, who has joined her husband in a mortgage of land of which he is seized, is in equity entitled to dower in the surplus money, arising from a foreclosure sale of the property, after satisfying the mortgage debt. To the extent of the debt secured by the mortgage, in which she released, her dower interest is extinguished, and she is dowable only in the surplus. The surplus stands in the place of the equity of redemption, and retains all the properties of realty, and does not become personalty for the purpose of distribution among the next of kin." Scribner, Dower, 697; Hall's Adm'r v. White, 114 Va. 562, 77 S. E. 474; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Denton v. Nanny, 8 Barb. (N. Y.) 618; Vartie v. Underwood, 18 Barb. (N. Y.) 562; Keith v. Trapier, Bailey Eq. (S. C.) (750) 63.

This is the general rule. 10 A. & E. Enc. 169.

[2] The next, and most difficult, question for solution is the method of securing the right to the wife, pending the life of her husband. Prior to the adoption of mortuary tables, which the courts accept as evidence upon which the expectancy of a person entitled to an estate for life in money may be ascertained, much doubt was expressed whether there was any basis upon which the present value of such interests could be ascertained. In Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452, Chancellor Kent directed that one-third of the surplus proceeds from the sale of lands mortgaged by the husband and wife jointly, sold after his death, be invested in government stocks and the interest paid to the widow during her life. In Denton v. Nanny, supra, the Chancellor says:

"The widow does not ask to have this money put into her immediate possession. She would have no right to that. But she insists that the residuum of the subject mortgaged, not required to satisfy the mortgage debt, whether it exists in lands unsold, or in the proceeds of lands sold, * * * shall be so appropriated as to secure her dower, should she survive her husband. This, I think, she is entitled to have done."

The same course was pursued in Vartie v. Underwood, supra.

In Herbert v. Wren, 7 Cranch, 370, 3 L. Ed. 374, Judge Marshall directed that the fund representing the dower interest, the husband being dead, be invested and the interest paid to her during her life, unless both parties consented to the payment of a sum in gross in lieu of dower. It is held by some courts that, unless all parties in

interest consent, the present worth of the dower interest in funds derived from sale of the lands, in which she is entitled to dower, will not be paid to the widow. This appears to be the rule in Virginia. 10 Am. & Eng. Enc. 181 (note).

In several states statutes have been enacted empowering the court to ascertain the present value and pay it to the widow. Such statutes apply only when the husband is dead and the widow's dower right has vested. As said by Ruffin, C. J., in Atkins v. Kron, 43 N. C. 1, and other chancellors, it is difficult to adopt a satisfactory basis upon which to fix the expectancy of the widow and ascertain the present value of her dower. The mortuary tables are only evidence to be considered with other evidence relevant to the question. When, as in this case, the husband is living, with an expectancy of 17 years, the problem is burdened with uncertainty. There are so many contingencies involved that any result is speculative.

It is doubtful whether courts, under such conditions, should, without the assent of all persons interested, dispose of property rights. The legal statutory right of the parties is fixed, easily protected and enforced. The investment of the fund and payment of interest to the husband, or the assignee of his interest, until the dower right vests, secures to the widow her dower right, which may be enjoyed by receipt of the interest during her life, with the payment of the corpus, representing the reversion, to the heir or his representative. Is it not more in accord with that certainty, which is "the mother of quietness and repose," and the beneficent policy of the law which seeks to protect and secure an income to the widow when deprived of the support of her husband, to hold the fund for that purpose, than, by resorting to a speculation based upon a speculation, give her, 17 years before his death, a sum arrived at by a mere guess? As illustrative of the difficulty experienced in reaching a reasonably satisfactory basis for fixing the present value of Mrs. Munford's dower right, she, with much force, insists that, if she shall, as the court is asked to assume, survive her husband, she will, at his death, be 65 years of age, with an expectancy of 11 years.

In Brown v. Brown, 94 S. C. 492, 78 S. E. 447, the court approved the rule laid down by Chancellor Walworth in Jackson v. Edwards, 7 Paige (N. Y.) 386, which was followed by the special master for ascertaining the present value of the dower when the husband was living. The court in that case dealt with the question only incidentally. It was not the point in controversy.

In the absence of a statute empowering the court to ascertain and pay to Mrs. Munford what may, by speculation, be supposed to be the present value of her dower right, or the consent of all parties in interest to the payment of the amount fixed by the special master, a decree will be signed directing the trustees to invest one-third of the surplus of the proceeds of the sale of the lands mortgaged, in United States Liberty Bonds, and upon final settlement of the estate deliver them to the clerk of this court at Raleigh, to be held for the purposes indicated herein. A decree will then be signed, protecting the interest of the parties. As the trustees do not except to the find-

ings of the special master, if Mrs. Munford shall elect to accept in lieu of her dower the amount, $912.73, found to be its present value, a decree may be drawn confirming the report in that respect.

The exceptions to allowance to attorneys will be disposed of separately.

[3] 1. The master recommends that an allowance of $1,250 be made to the attorneys for the petitioning creditors. The creditors insist that this amount is excessive. The authority for allowing counsel fees to attorneys for petitioning creditors in involuntary cases in bankruptcy is found in section 64 (3) of the act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. § 9648]). Collier on Bankruptcy (11th Ed.) 985. The allowance is confined to—

"one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors."

To such allowance the petitioning creditors, or their attorneys, are entitled, as a matter of right. The sole question, open for the action of the court, relates to its amount. The amount must, of course, be reasonable, and be determined upon the evidence of the service performed and its value.

"The amount to be allowed rests in legal judgment and judicial discretion, but not in unrestrained discretion." In re Williams (D. C.) 240 Fed. 788.

In exercising legal or judicial discretion, the court should endeavor to ascertain the rule or principle by which other courts in like cases have been governed, taking into account such modifying conditions or circumstances as may be found in the instant case.

The principles upon which, in view of the language of the statute and the purpose of the Congress in its enactment, allowances to attorneys for petitioning creditors, in involuntary cases, should be made, was carefully considered by Judge Brawley, and his conclusions stated with his usual clearness, in Re Goldville Mfg. Co. (D. C.) 123 Fed. 579. In that case he dealt with almost every phase of the question relating to allowance of attorneys in involuntary proceedings in bankruptcy. The learned judge said:

"That discretion should be exercised to carry out and effectuate the legislative will, and the courts cannot honestly disregard the manifest policy of the law, which looks to great economy of administration. * * * That discretion must be in accordance with, and not in conflict with, the policy of the law."

It is uniformly held, and is in accordance with the plan provided by the act for dealing with such cases, that the allowance is to be confined to "services actually rendered" in filing the petition and prosecuting it to the adjudication of the bankrupt. When this is accomplished, the estate passes under the jurisdiction and control of the court and its officers; the interest of the petitioning creditors, usually a small minority in number and amount of the general creditors, is merged into that of all of the creditors. The purpose of the act, the seizure and administration of the property of the bankrupt for the benefit of all the creditors, is accomplished. There is neither necessity nor opportunity for the attorney of the petitioning creditors to

render "actual service" to the estate. The suggestion, therefore, that the attorneys in this case "have been diligent and faithful for nearly two years, * * * and largely through their efforts the amount in the hands of the trustees is as large as it is," while true, cannot be taken into consideration in fixing the allowance.

In rendering service after the adjudication and election of the trustee, counsel were serving their clients, whose claims they held for collection. Other creditors had employed other counsel, and the estate is charged with counsel fees of an attorney for the trustees. I find that, of the 116 creditors who have proven debts, counsel for petitioning creditors represent 43 in number; the amount, however, is more than one-half of the whole. The bankrupt had, within four months of his adjudication, executed a deed of assignment of his stock of merchandise. This was the principal and sufficient act of bankruptcy upon which he was adjudged a bankrupt. He had, more than four months prior thereto, executed mortgages or deeds of trust on real estate. There was no complication in regard to either of these transactions. He admitted insolvency and offered a composition, to which the requisite number of his creditors did not assent, and it was not confirmed. The attorneys for petitioning creditors appeared before the court and objected to the confirmation. There was no litigation in connection with the proceeding.

It is true, as found by the special master, that the attorneys successfully resisted the acceptance of the offer of a 10 per cent. composition, and that the creditors will, in this proceeding, receive approximately 40 per cent. This should be taken into consideration in fixing the amount of the allowance. The lands were sold by the mortgagees or trustees to whom they were conveyed, and the debts, in regard to which there was no controversy, paid; the excess, constituting a large portion of the assets for distribution, paid to the trustees. The stock of goods was sold by the trustees. From these sources the bulk of the assets for distribution were derived. An examination of such cases as I find in the Federal Reporter brings me to the conclusion that an allowance of $750 to the attorneys will be ample. For such services as they shall have rendered in securing the enlargement of the volume of the assets for distribution, in which their clients share, they will, as they are entitled, receive compensation from them.

In fixing the allowance, I am not inadvertent to the zeal and skill displayed by counsel in the prosecution of this proceeding, nor to the personal and professional courage manifested; but much of this service relates to the administration of the estate, causing the stock of goods and the lands to bring more than they otherwise would have done. It is not included, either by the language or the general scope of the act, in services for which an allowance may be made to be paid by the trustees. In Re Harrison Mercantile Co. (D. C.) 95 Fed. 123, in response to a claim for such services, Philips, J., said:

"It is further claimed by these attorneys, as a basis of their compensation, that they induced several bidders to attend the sale of the property of the bankrupt. * * * Presumptively, and naturally enough, interested creditors in the estate would either attend in person, or be represented at such sale, to see that the property be not sacrificed, as they are the especial bene-

ficiaries in the product of the sale. No provision of the Bankruptcy Act even squints at an allowance against the estate for such service."

[4] 2. The next exception is directed to the allowance of $500 to the attorney of the bankrupt. The act, by section 64 (3), provides for the payment of—

"one reasonable attorney's fee to the bankrupt, in involuntary cases, while performing the duties herein prescribed, * * * as the court may allow."

What has been said in regard to the principle by which the court should be guided in the exercise of its legal discretion, in regard to allowances to attorneys for petitioning creditors, is equally applicable here. The further limitation is imposed that an allowance can be made only for such service as is rendered to the bankrupt "while performing the duties imposed upon him by the act." This excludes compensation for service rendered the bankrupt prior to filing the petition, resisting the adjudication, or in proposing or urging the acceptance or confirmation of a composition. The statute, by section 7, imposes the duty upon the bankrupt to attend the first meeting of the creditors and to file schedules of his debts and property. For necessary assistance in discharging these duties he is entitled to one reasonable counsel fee. In Re Mayer (D. C.) 101 Fed. 695, Seaman, Judge, says that the power to make the allowance is—

"limited in strict accord with the general tenor and spirit of the enactment, and neither express nor intend an allowance for the defense of the bankrupt through the course of the proceedings in matters involving his personal liability. * * * The duties to be performed by the bankrupt in the proceedings are prescribed in section 7, and all relate to attendance and service of presumptive benefit to the estate, with the possible exception of attending at 'the hearing upon his application for a discharge.' The preparation of schedules by the bankrupt in involuntary cases, and his attendance on compulsory examinations before the referee, are matters in discharge of his duty, for the benefit of the estate, and each may require the services of an attorney, for which the estate thus receiving the benefit is chargeable for reasonable compensation; but, in conformity with the purposes of the act, the allowance must be made 'sparingly and with great caution.' * * * The test for compensation out of the estate is whether the service is rendered in the performance of the bankrupt's duty in aid of the estate and its administration, and not whether the bankrupt stands in need of the service of counsel for his personal benefit and protection in any of the proceedings. No sanction appears in any of the provisions for an allowance in the last-mentioned view, and its adoption would violate the general consistency of the act for securing economy in administration."

The judge states that the allowance usually made in the district (E. D. Wisconsin) for service in drafting schedules is from $25 to $50, according to the extent—the work is mainly clerical.

In the Goldville Mfg. Co. Case, supra, the attorney for the bankrupt was allowed $200. I do not find that, in any case reported, an allowance of $500 to the attorney for the bankrupt has been made. No such allowance has been made in this district. The special master says, and in this I concur, that $500—

"would poorly compensate the attorney for the time, study, and attention that he has given the matter, and for the time that he has had to be away from his office attending to different phases as they arose."

He also calls—

"special attention to the schedules prepared by him. They are the neatest and most accurate that I have seen."

Conceding all of this, as is done, it is manifest that there was no duty imposed upon the bankrupt by the law or the orders of the court in the course of administration, requiring the aid or service of an attorney for which an allowance of $500 should be made. No charges of fraud or concealment of assets, or other improper conduct, have been made. No opposition was made to his discharge. The property scheduled consisted of tracts of land and town lots, a stock of goods, and a few choses in action of small value. The lands were sold by those who held mortgages, and the goods by the trustees. The adjudication was made without opposition. The only meeting had before the court was to hear the report of the referee upon the proposition for a composition; the only question presented was whether a majority in number and amount of the creditors had accepted. The schedules were not complicated or difficult of preparation, and, although skillfully and well done, required no study or large professional learning.

A number of complications, giving trouble to the trustees and creditors, arose in the course of administration, growing out of claims made by the bankrupt and his wife. Without criticizing the course pursued, it is apparent that much of the work imposed upon the trustees and the attorneys for creditors for the bankrupt and the trustees was caused by these complications. They pertained to the administration of the estate, did not involve or result in litigation, and cannot be considered in fixing the allowance to the attorney for the bankrupt. For services rendered the bankrupt and his wife, which were valuable, the attorney should be paid by them, and not the creditors. In view of the scale of allowances made for such services as were rendered, within the provisions of the act, in this and other districts, an allowance of $200 is made.

3. The next exception relates to the allowance of $500 as made to the attorney for the trustee. The authority for making this allowance is found in section 62, as of "the actual and necessary expenses incurred by officers in the administration of estates." The special master reports:

"For the multitude of papers that he has had to draw, and the sales and resales that he has had to attend, and the time and attention that he has had to give, this is a small allowance."

It appears that two tracts of land and three town lots scheduled by the bankrupt were under mortgage. They were sold for $83,740.10. Some of them were resold, upon advanced bids. Mrs. Munford had mortgaged her separate property for $10,000 to secure her husband's debt, and he executed to her for indemnity a second mortgage on a portion of his real estate. The crops on the farms were also mortgaged. These conditions, with other questions arising during the administration of the estate, required the services of a skilled attorney. It is conceded that the counsel retained by them, with the approval of the court, has rendered valuable and efficient service.

The estate has been wisely managed by the trustees, litigation avoided, and the interests of the creditors in all respects conserved and promoted. To March 12, 1918, the trustees had received $29,669.49 and paid out $10,659.52. Their report was submitted to the creditors and approved. I am of the opinion that, taking into consideration the conditions found by the special master, the allowance to the attorney for the trustees is just and reasonable. The report in that respect is confirmed.

An order will be signed directing the trustees to pay the attorneys for the petitioning creditors $750, the attorney for the bankrupt $200, and the attorney for the trustees $500. I concur with the special master in regard to the high character, business ability, and experience of the trustees, and their wise management of this estate. The statutory commissions, paid them jointly, of $466.69, are totally inadequate compensation for the time consumed and responsibility imposed by their office; but, as said by the special master, they will find their compensation in the consciousness that they have discharged a difficult responsibility with intelligence and fidelity. The compensation to the special master was fixed by the parties. His report discloses careful consideration, intelligent comprehension, power of analysis, and clarity of expression.

[5] The purpose of the Bankruptcy Act is: (1) To apply the property of the insolvent person or corporation to the payment of the debts with as little expense and delay as is consistent with their interests. (2) To relieve the honest and unfortunate debtor from his debts and give him another opportunity in the industrial life of the community.

ADAMS v. OSLEY et al.

(District Court, N. D. Georgia, E. D. January 9, 1919.)

No. 37.

1. BANKRUPTCY ⊂=303(3)—CONVEYANCES TO WIFE THROUGH SON—SUFFICIENCY OF EVIDENCE.

   Bankrupt's conveyances to wife through son *held* fraudulent under evidence in his trustee's suit to cancel them.

2. APPEAL AND ERROR ⊂=1044—MASTER'S REPORT—EXCEPTIONS—IMMATERIALITY.

   Exceptions to master's report, going to his ruling as to burden of proof on defendants, and as to effect of certain evidence, are immaterial, where evidence absolutely required master to hold, as he did, adversely to defendants.

In Equity. Petition for cancellation of conveyances by A. C. Adams, trustee in bankruptcy, against Patrick Osley and others. On defendants' exceptions to the master's report for petitioner. Exceptions overruled, and report confirmed.

Scott Berryman, of Bowman, Ga., and Horace & Frank Holden, of Athens, Ga., for plaintiff.

Stephen C. Upson, of Athens, Ga., for defendants.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Equitable Petition for Cancellation of Certain Conveyances.

NEWMAN, District Judge. This case was referred to Austin Bell, Esq., as special master, and his report is as follows:

"I, the undersigned, to whom as special master the issues in the above matter were referred, to ascertain and report the facts, respectfully report as follows:

"That said issues were brought on for hearing, and I was attended upon said hearing by counsel for the plaintiff and counsel for the defendants, and that testimony was adduced in said matter, the stenographic minutes of which are herewith filed.

"This is a case brought by A. C. Adams, trustee of J. J. Osley, a bankrupt. The plaintiff by his petition seeks to cancel certain deeds and transfers of bond for title, to wit:

"Deed from J. J. Osley to Patrick Osley, bearing date of December 8, 1913, to 31½ acres of land, consideration $3,500, recorded February 12, 1917, in the clerk's office of Hart county, Georgia.

"Deed from Patrick Osley to Mrs. Emma Osley, bearing date of December 19, 1913, reciting a consideration of $3,500, describing the same land, recorded February 12, 1917, in the clerk's office of Hart county, Georgia.

"Transfer by J. J. Osley to Patrick Osley of a bond for title from C. C. Boise to J. J. Osley, bond for title covering 380 acres of land in Madison and Hart counties, Georgia, the consideration expressed in the transfer being $10,000, the transfer bearing date of December 8, 1913.

"The transfer of the same bond for title, reciting the same consideration, from Patrick Osley to Mrs. Emma Osley, the transfer bearing date of December 19, 1913.

"Conclusions of Law.

"It is contended by the defendants in this case that the trustee cannot maintain this suit because, say the defendants, he did not represent creditors who were creditors prior to December 8, 1913, the date the deed and transfer of bond for title from J. J. Osley to Patrick Osley bear. This proposition is not sound. A moment's reflection will suffice. The deeds and transfers of the bond for title were recorded on February 12, 1917. Under the evidence the physical possession of the properties was never changed at any time. There is no question but that some of the creditors represented by the trustee, notably Denny & Son and the Bank of Bowman and others, were creditors prior to that time. Suppose Denny & Son, or the Bank of Bowman, had reduced their claim to judgment, and had sought to enforce same by levy and sale of this property, and a claim had been filed by Mrs. Emma Osley, claiming under the deeds now sought to be established in this case, would she have been heard to say that those creditors could not attack her deed as fraudulent on the ground that it was not actually executed in 1913, and on the ground that it was a voluntary conveyance, without consideration, made for the purpose of hindering, delaying, and defrauding them? Most certainly not.

"Then the trustee stands in their shoes, and then this contention of the defendants is disposed of.

"This being a transaction between husband and wife and son, and attacked by creditors as fraudulent, the wife now seeking to hold the property in question under the deeds so attacked, the burden is on the defendants to show valid consideration and good faith of the transaction.

"Conclusions of Fact.

"This is a case where a father undertook to deed all of his property through his son to his wife. The creditors attack the conveyances as fraudulent. The burden was thereby shifted to the defendants, and the defendants have not only failed to carry this burden, but the evidence in the case carries this case far beyond that of suspicion, and establishes by a preponderance of the evidence that the entire transaction was a fraudulent scheme on the part of all the defendants to put the property of J. J. Osley beyond the reach of his creditors.

"In the first place, J. J. Osley testified that he sold all of his property to his son, and his son, in turn, sold it to J. J. Osley's wife. The fact that a man sells out everything he has in a lump is a suspicious circumstance within itself.

"J. J. Osley testified on one occasion that the deed was made to secure a debt of $3,500, as recited in the deed. He testified on another occasion that it was an absolute conveyance. J. J. Osley testified that his son, Patrick Osley, let him have about $7,000 in money prior to the execution of the deed, and that on the delivery of the deed and transfer of the bond for title Patrick Osley paid him some $400 or $500. In the next breath he testified that he paid him $7,000. He then stuck to the $7,000, and swore that he paid it to him in cash money in the office of Alex S. Johnson, an attorney, at Royston, Georgia; that he paid him in actual cash. Patrick Osley contradicted him on this proposition. Patrick Osley swore that he paid him $7,000 in cash, but he was just as positive that it was not paid in Alex Johnson's office. J. J. Osley and Patrick Osley both swore that Mrs. Emma Osley paid over to Patrick Osley, at the time the deed and transfer from Patrick Osley to Mrs. Emma Osley bear date, the sum of $13,500 in actual cash money; that Mrs. Osley had saved up that much cash money over in Madison county on a farm, and yet prior to that time, when J. J. Osley needed some cash, to the amount of $3,500, he executed a security deed to C. C. Boise in order to obtain money, his wife having at that time, according to the evidence of these witnesses, some $13,000 in cash money in the house (the evidence is she did not keep it in bank). J. J. Osley testified that in 1913, when he received this $7,000 from his son, he did not owe a dollar in the world. He further testified that he tried to make his own bread and meat on his farm, and that his annual expenses were not over $300 to $500, and yet inside of five years we find this same man a voluntary bankrupt. He offered no explanation as to the disposition of this $7,000.

"Patrick Osley's testimony was equally as far-fetched as that of J. J. Osley. He did not undertake to explain how he came by $13,000 in actual cash.

"Mrs. Emma Osley was not put on the stand by either side.

"The above extracts from the evidence of J. J. Osley and Patrick Osley are but an index to their entire testimony, the whole of which is so improbable and unnatural as to be rendered unbelievable.

"The deeds from J. J. Osley to Patrick Osley and from Patrick Osley to Mrs. Emma Osley appear to have been written on forms printed by Bennett Printing & Stamp Company, Atlanta, Georgia. They bear a water mark, to wit, 'Courier Bond.' The plaintiff introduced Mr. W. C. Bennett as a witness. Mr. Bennett testified that he is president of the Bennett Printing & Stamp Company, of Atlanta, Georgia; that he has been connected with the concern twenty-four years. He swore that the Bennett Printing & Stamp Company did not use 'Courier Bond' paper for printing blank forms prior to August, 1916; that prior to that time they used a paper known as the 'Purchase Bond.'

"In describing the 31½ acres of land the following language is used: 'On the south by lands of L. S. Strickland and Mrs. Lillie McGarity.' According to the evidence, Mrs. Lillie McGarity is the widow of John McGarity. John McGarity owned the land referred to as bounding the 31½-acre tract on the south in his lifetime. John McGarity died, according to the evidence, in 1915.

"The evidence further shows that this 31½-acre tract deeded by J. J. Osley to Patrick Osley was part of a 56½-acre tract of land bought by J. J. Osley from Mrs. M. V. Brewer and ———. J. J. Osley testified that, when he made the deed to the 31½ acres to Patrick Osley and transferred the bond for title to the 380 acres, he sold to Patrick Osley every foot of land that he owned, and yet we find J. J. Osley, on the 27th day of November, 1915, deeding to L. W. Dorough the balance of this 56½-acre tract, off of which the 31½ acres was deeded to Patrick Osley, to wit, 25 acres. J. J. Osley offered no reasonable explanation as to why, in 1913, he deeded only 31½ acres to Pat, reserving 25 acres that two years later he was to deed to L. W. Dorough. The only explanation is that the 25 acres was already deeded to Dorough, and that the

deed to Pat was executed after the date of the Dorough deed. In fact, J. J. Osley swore that at the time he made the deed to Pat to the 31½ acres he deeded to him every foot of land he owned. If this is to be believed, then according to his own testimony the title to the 25 acres had already passed out of him.

"J. J. Osley made other deeds in 1915, and, strange to note, and rather significant, Pat's deed carries everything up to the boundaries of the tracts deeded to other parties in 1915.

"According to the evidence of J. J. Osley, it was his custom to withhold deeds from the records (the deeds to Pat and Mrs. Emma Osley were not recorded for over four years), and yet a number of deeds were introduced from various parties to J. J. Osley, and these deeds show invariably that they were recorded within a few days of their execution, possibly with one or two exceptions.

"J. J. Osley has been in possession of the land all the while since 1913, just as prior to that time. He swore that he had never told any one of the transactions between himself and his son and his wife.

"The inconsistencies mentioned reflect the entire evidence of the case; and it is the opinion of the master that the defendants not only failed to carry the burden, and show that this transaction was fair and for a valid consideration, but the evidence shows overwhelmingly that the defendants conspired to put the property of J. J. Osley beyond the reach of his creditors. The evidence fairly reeks with unexplained circumstances pointing only to this conclusion.

"The conclusion is inevitable that the deeds and transfers of the bond for title were all made at the same time.

"Under the evidence of Mr. Bennett, a disinterested witness, it is impossible that these deeds could have been written prior to August, 1916. Under the other evidence in the case, the deeds were certainly written and signed not earlier than 1915; and I find, as a matter of fact, that the deeds and transfers of the bond for title sought to be canceled were executed between August, 1916, and February 12, 1917, and were without consideration, and made for the purpose of hindering, delaying, and defrauding the creditors of J. J. Osley, known to all the defendants. The creditors represented by the trustee in this suit were creditors long before this time.

"The defendants contend that there is no evidence that A. C. Adams is trustee of J. J. Osley, bankrupt. The entire record from the bankruptcy court was introduced in evidence. Be that as it may, the plaintiff affirmatively alleges in paragraph 1 of his petition that he is trustee for J. J. Osley, bankrupt, and this is not denied by the defendants. It is therefore to be taken as true. [English v. Arizona] 214 U. S. 359, 361 [29 Sup. Ct. 658, 53 L. Ed. 1030].

"After careful and painstaking consideration of the testimony, I find that the deed to the 31½ acres of land from J. J. Osley to Patrick Osley, and the deed from Patrick Osley to Mrs. Emma Osley to the same tract of land, and the transfer of the bond for title from J. J. Osley to Patrick Osley, to an equity in 380 acres of land, and the transfer of the same bond for title from Patrick Osley to Mrs. Emma Osley were without consideration and made for the purpose of hindering, delaying, and defrauding certain of the creditors of J. J. Osley, represented by A. C. Adams, trustee for J. J. Osley, bankrupt, which was known to all parties concerned in the drawing and execution of the papers."

In conclusion, the master says:

"I therefore recommend that a decree be entered finding these conveyances void, and that the title to said property be decreed to be in the trustee of J. J. Osley, bankrupt."

[1, 2] The evidence abundantly supports the conclusion of the master in this case; indeed, to me seems to require it. At all events, there is no sufficient ground to justify sustaining any of the exceptions to

the report. Those exceptions which go to the master's ruling as to the burden of proof, and as to the effect of certain evidence, are wholly immaterial, because it seems to me that the evidence absolutely required the master to hold as he did. There was abundant evidence to justify him in holding that the deeds were made for the purpose of hindering, delaying, and defrauding creditors, as charged in the petition.

The exceptions are overruled and the report confirmed.

In re AMERICAN PAPER CO.

(District Court, D. New Jersey. January 22, 1919.)

1. BANKRUPTCY ⟸387—INDORSERS—DISCHARGE.
   Notwithstanding New York Negotiable Instruments Law, declaring that a person secondarily liable is discharged by the release of the principal debtor, the assent of the holder of a note to a composition offered by the maker does not, under Bankruptcy Act, § 16 (Comp. St. § 9600), discharge the indorser, for the discharge of the maker is brought about by operation of law, and not the voluntary act of the parties.
2. PAYMENT ⟸41(1)—APPLICATION BY COURT.
   When neither debtor nor creditor makes application of payment, they cannot do so after controversy or litigation has been instituted, and the court should make the appropriation in accordance with equitable principles.
3. PAYMENT ⟸44—APPLICATION.
   When the security is the same, it is the rule in the federal courts, as well as in the state of New Jersey, to apply a payment without designation first to the oldest obligation.
4. PAYMENT ⟸46(1)—APPLICATION—EFFECT OF SECURITY.
   When the security is not the same, the rule is to apply an undesignated payment to the obligation least secured, or whose security is most precarious.
5. BANKRUPTCY ⟸273—APPLICATION OF PAYMENTS—RULES.
   Where the trustee in bankruptcy agreed with a creditor that bonds held by the creditor should be retained and applied as a general payment upon its claim, rule for application of payment stated, and payment directed applied first to debts least secured.
6. BANKRUPTCY ⟸273—PAYMENTS.
   Where trustee in bankruptcy consented to a creditor's retention of bonds held as collateral, and the payment was sufficient, in connection with dividends received by creditor on claims for which bankrupt was only secondarily liable, to pay all amounts for which bankrupt was primarily liable, and leave a surplus applicable to payment of claims for which bankrupt was only secondarily liable, the creditor was entitled to retain dividends on claims for which the bankrupt was secondarily liable, until it received full payment, but trustee was subrogated to future dividends.
7. BANKRUPTCY ⟸273—APPLICATION OF PAYMENTS.
   Where a creditor held bonds of a bankrupt, and after bankruptcy the trustee agreed that they should be applied by the creditor to its claims, but no mode of application was agreed upon, the court, in making application, will determine the matter as of the time of bankruptcy, and not the date when the trustee agreed that the creditor might apply the bonds to payment of its claim.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Bankruptcy. In the matter of the American Paper Company, bankrupt. On review of referee's order subrogating the trustees of the bankrupt to the rights of Wilkinson Bros. & Co. in its claim filed against another bankrupt. Order reversed.

See, also, 243 Fed. 753.

McDermott & Enright, of Jersey City, N. J., for trustee.

Allan C. Rowe, of New York City, for Wilkinson Bros. & Co.

DAVIS, District Judge. The American Paper Company, hereinafter called the Paper Company, Wilkinson Brothers & Co., hereinafter called the Wilkinson Company, George F. Hills Company, hereinafter called the Hills Company, and the Webb Folding Box Company, hereinafter called the Webb Company, did business with one another. All of said companies, with the exception of the Wilkinson Company, became bankrupt; the Paper Company on July 10, 1914, the Webb Company on July 27, 1914, in the district of New Jersey, and the George F. Hills Company on July 8, 1915, in the Southern district of New York. A claim was filed against the Paper Company by the Wilkinson Company, which after some modification was allowed on December 22, 1915, as follows:

(1) Merchandise, open account	$ 2,171.36
(2) Six notes of American Paper Company	13,780.15
(3) Three notes of American Paper Company, indorsed by George F. Hills Company	3,014.12
(4) Four Fey notes, indorsed by American Paper Company	2,208.69
(5) Two Tucker notes, indorsed by American Paper Company	1,027.48
(6) Twenty-one notes of Webb Folding Box Company, indorsed by American Paper Company, and protest fees	10,729.32
(7) Sixteen notes of George F. Hills Company, indorsed by American Paper Company	12,038.57
	$44,989.69

At the time of filing the said claims the Wilkinson Company held as security for its debt first mortgage bonds of the Paper Company amounting at par to $38,000. In January, 1916, it was agreed between the Wilkinson Company and the trustee of the Paper Company that the said bonds should be retained by the Wilkinson Company and applied as a general payment upon its claim against the Paper Company, and that the said claim be reduced thereby to $6,967.69. There was no agreement whatever between the trustee of the Paper Company and the Wilkinson Company as to how the said bonds should be applied in payment of the various items in said claim, and this contest really results from the manner in which they are sought to be applied. The Wilkinson Company filed a claim against the Webb Company, but the Paper Company did not. The Paper Company contends that its bonds as a fact have been applied to the payment of the Webb Company notes on which it was indorser, and that it has the common right of an indorser, upon taking up indorsed paper, to proceed against the principal, and therefore it should be subrogated to the rights of the Wilkinson Company in the claim filed. The referee made an order subrogating the trustee of the Paper Company to the

rights of the Wilkinson Company in its claim filed against the Webb Company to which an exception was taken, and that order is before me for review.

On June 25, 1915, the Wilkinson Company made a composition with the Hills Company and received 20 per cent. of its claim against that company, being Nos. (3) and (7) in the claim above mentioned. At the time of the settlement of the bonds in January, 1916, the Wilkinson Company did not disclose that it had made a composition with the Hills Company, or give credit for the 20 per cent. dividend, and thus, the trustee contends, treated these notes as unpaid, and if this is so the Webb Company notes must have been satisfied out of the bonds of the Paper Company. It was the duty of the Wilkinson Company to disclose the composition of the Hills Company at the bond settlement in January, 1916, and it is difficult to reconcile its failure to do so with an honest purpose; but it does not follow that its failure to do so establishes the satisfaction of the Webb notes out of the bonds, or that the Wilkinson Company so regarded it.

[1] The trustee further contends that the American Company was discharged from its obligations as indorser on the notes of the Hills Company by the composition, and therefore the $38,000 paid the Webb Company notes, and the trustee of the Paper Company should be subrogated to the rights of Wilkinson Company in its claim filed against the Webb Company. This position is supported by the opinion of Referee Stone in the Matter of Harry Benedict, 18 Am. Bankr. Rep. 604. It was held in that case that the general rule of law, that if the holder of negotiable paper does any act which operates to release the principal, or which impairs the rights or remedies of the surety against the principal, the obligation of the surety will be released, is crystallized in the state of New York (in the Northern district of which this case arose) in the Negotiable Instruments Law, which provides that:

"A person secondarily liable on the instrument is discharged: 1. By any act which discharges the instrument. * * * 3. By the discharge of a prior party. * * * 5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved." Consol. Laws, c. 38, § 201.

A release, therefore, through composition of the principal, discharges the liability of the surety, notwithstanding the provisions of section 16 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9600]) that:

"The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt"

—because the relief through composition, though as effectual as a "discharge," is secured through "the co-operation of the creditors." The same rule was applied in that case to a creditor voting for a composition in bankruptcy as to a person making a voluntary composition deed outside of bankruptcy. There is a difference, however. In the one case the discharge is by the voluntary act of the party; in the other by operation of law, not by the act of the creditor who assented

to the composition. Therefore a different rule should be applied, and the case at bar accordingly comes within the provision of section 16 of the Bankruptcy Act. This seems to be the rule in the states of New York and Massachusetts and in England, as pointed out in the New York decisions. In re Burchell (D. C.) 4 Fed. 406; Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; Mason & Hamlin Organ Co. v. Bancroft, 1 Abbott, N. C. (N. Y.) 415; Eastern Furniture Co. v. Caminez, 146 App. Div. 436, 131 N. Y. Supp. 157. This rule seems to be well founded in reason and supported by the greater weight of authority. Therefore the liability of the Paper Company as indorser on the Hills Company notes was not discharged by the composition of the Hills Company.

[2-4] When a payment, insufficient to satisfy two or more debts, is made, and neither the debtor nor creditor makes an appropriation of payment, it is too late for either to make an appropriation after controversy has arisen thereover or litigation has been instituted. It is the duty of the court in such case to make the appropriation in accordance with equitable principles. When the security is the same, the state and federal rule is to apply the payment first to the oldest obligation. When the security is not the same, the rule is to apply the payment first to the obligation least secured, or whose security is most precarious. Terhune v. Colton, 12 N. J. Eq. 312; Frost v. Mixsell, 38 N. J. Eq. 589; Leeds v. Gifford, 41 N. J. Eq. 464, 5 Atl. 795; Turner v. Hill, 56 N. J. Eq. 293, 39 Atl. 137; Field v. Holland, 10 U. S. (6 Cranch) 8, 22, 28, 3 L. Ed. 136; U. S. v. Kirkpatrick, 22 U. S. (9 Wheat.) 720, 6 L. Ed. 199.

[5, 6] Item (5) in the claim filed against the Paper Company, aggregating $1,027.48, is composed of two notes of one Tucker, indorsed by the Paper Company. After the bond settlement of January, 1916, the Wilkinson Company sued Tucker and secured judgment for the full amount of the notes, thereby showing that it elected not to apply any of the bond payment to that item. This is admitted by the Wilkinson Company, and consequently in the appropriation to be made that item should be eliminated.

Items (1) and (2) in claim are obligations of the Paper Company alone. Items (3), (4), (6), and (7) are obligations of the Paper Company and another, either as maker or indorser. Items (1) and (2) should, in accordance with the above rule, be first paid out of the bond settlement, for they rest upon the liability of the Paper Company only, and are manifestly less secured than the other four. The security in items (3) and (7), other than the liability of the Paper Company, is as above stated, 20 per cent. Whether that security is more or less than that of the Fey notes in item (4), or the Webb Company notes in item (6), I am not informed, though counsel for the Wilkinson Company make the general statement that Fey is practically worthless. The security in all four items, (3), (4), (6), and (7), is precarious; but which is more and which is less precarious is, so far as I am aware, unknown. Therefore, after items (1) and (2) are paid out of the $38,000 bond settlement, the remainder should be applied to items (3), (4), (6), and (7), in accordance with the priority of the obligations. When

this has been done, there will doubtless be a small balance left unpaid on the Webb Company notes, item (6) in said claim.

The Wilkinson Company filed claim against the Webb Company for $10,729.32, the amount of the notes indorsed by the Paper Company, and is entitled to the dividends on that full claim until the same has been paid, if the dividends on the claim are sufficient to pay it. After that claim is thus paid in full, the trustee of the Paper Company is entitled to be subrogated to the rights of the Wilkinson Company as to the balance of the dividends, if any, on the claim filed against the Webb Company.

[7] The Wilkinson Company contends that, since it had compromised items (3) and (7) with the Hills Company before the payment in January, 1916, those obligations were not secured, except by the Paper Company, at the time of the payment, and the security on them was the same as on items (1) and (2), and therefore the payment should be applied to them with items (1) and (2), before anything is paid on the Webb notes. But in this case the security should be determined as of the time of the bankruptcy, and not as of the date of the payment in January, 1916. As a matter of fact, as before stated, the Wilkinson Company had the Paper Company bonds in its possession before the bankruptcy of any of the companies.

An order will be signed in accordance with these conclusions.

In re KEMP.

(District Court, S. D. New York. January 20, 1919.)

1. BANKRUPTCY ⊂=407(5)—DISCHARGE—DENIAL—GROUNDS.
   To deny the discharge of a bankrupt on the ground that he obtained a loan by a materially false statement in writing as to his financial condition, it must appear, not only that the statement was false and material, but that it was intentionally false and made with intent to deceive.
2. BANKRUPTCY ⊂=407(5)—DISCHARGE—DENIAL—FALSE STATEMENTS.
   Where a blank form of financial statement, which a bank required the bankrupt to fill out before discounting his note, included under the term "Contingent Liabilities," "Accommodation Indorsements," and "Indorsed B/R Outstanding," the bankrupt's denial of contingent liabilities, which were not of the class specified, was not false.
3. BANKRUPTCY ⊂=407(5)—DISCHARGE—DENIAL.
   Where a bankrupt, in stating his financial condition to a bank from which he obtained a loan, omitted a debt which his mother thought was due her, as well as a possible claim which the mother might have against him, but which he denied, *held*, that discharge should not be denied on the ground the bankrupt had made a materially false statement in writing; the evidence disclosing that the mother did not intend to collect the debt unless the bankrupt was able to pay it, and though it was scheduled she filed no proof of claim, and that the bankrupt insisted he did not owe the debt.

In Bankruptcy. In the matter of the bankruptcy of Peter C. Kemp. On motion to reverse a report of the referee recommending denial of discharge of the bankrupt, and for an order directing that discharge be granted. Report reversed, and bankrupt discharged.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Kaye & Scholer, of New York City, for objecting creditor.
Irving L. Ernst, of New York City, for bankrupt.

MAYER, District Judge. The sole ground upon which the referee rests his recommendation against discharge is that the bankrupt made a materially false statement to the bank in a writing dated July 2, 1917, in that he omitted liability to his mother aggregating $8,000.

[1] It is, of course, well settled that the statement must not only be false and material, but must be intentionally false, made with intent to deceive. Kemp was a depositor with the Fourteenth Street branch of the bank, and from time to time had applied for and presumably obtained loans in the ordinary course of business. In the latter part of June, 1917, Kemp saw Meehan, the manager of the bank branch, and sought to discount a note of $3,000. Meehan gave Kemp a blank form of statement to fill out, and Kemp returned on July 2d, with the statement dated that day and filled out. In this statement Kemp set forth the various items of his assets which aggregated $40,824.37 and his liabilities on notes and accounts payable which aggregated $17,600, thus showing a net worth of $23,224.37. One of the items to be answered on the printed blank was "other liabilities" to which Kemp made no answer, and another was printed thus:

"Contingent Liabilities. Accommodation Indorsements.
"Indorsed B/R Outstanding."

—and to each of these Kemp answered "No."

[2] As it is urged that Kemp's liability to his mother, if not absolute, was, in any event, contingent, that contention may be disposed of at the outset. It is plain that the bank, in its printed form, clearly defined what was meant by "contingent liabilities" for by the bracketing as above shown, the bank confined its inquiry as to "contingent liabilities" to "accommodation indorsements" and "indorsed B/R outstanding.

As Kemp had no "contingent liabilities" under these heads, his answer was truthful; but, in any event, as will presently appear, if Kemp was indebted to his mother, it was an absolute and not a contingent liability.

[3] The question, then, is whether the bank proved an absolute liability from Kemp to his mother. The transaction between Kemp and the bank is briefly outlined in Meehan's testimony:

"Q. Mr. Kemp brought in the note at the same time that he brought the financial statement in, Mr. Meehan? A. He did.
"Q. When he brought that statement in, did you have any conversation with him in regard to the showing of the statement? A. I did.
"Q. What was the conversation? A. I asked him if this was an exact statement of his condition, and he said it was.
"Q. Did you then discount the note for Mr. Kemp? A. I had a further conversation with him.
"Q. To what effect? A. I asked him what caused the depreciation in his net active assets between his previous statement and this one.
"Q. In other words, he had given to you a previous statement? A. He had.
"Q. And you compared the two? A. I did.
"Q. And called his attention to the difference? A. Of about $6,000.
"Q. In what? A. It had depreciated; that is, the surplus had depreciated.

"Q. What conversation was had in regard to this depreciation of the surplus? A. I asked him what occasioned it, and he said losses on contract work.

"Q. And despite the fact that this depreciation occurred in the surplus, upon the presentation of this financial statement and the conversation that you just related, you were willing to discount his note? A. I was.

"Q. And thereupon you discounted his note? A. I did.

"Q. After these various conversations that you testified to? A. Yes. * * *

"Q. Mr. Meehan, did Mr. Kemp say anything to you at the time of this conversation, or these various conversations that you related, about any money owing to his mother? A. He did not.

"Q. If you had known that there was additional money owing to his mother, in addition to this shrinkage in the surplus, would you have made this loan to Mr. Kemp? A. I would not."

From the foregoing it is apparent that Meehan was satisfied with the statement, but would not have made the loan if there was additional money owing to Kemp's mother.

The alleged liability of Kemp must be ascertained solely from Kemp's testimony. There was no other witness on the point. There are two items, one of $6,000 and one of $2,000. As to the $6,000, Kemp, it seems, as a youth of 18, had started his business life in his father's coal business, and was an employé of his father until the latter's death in 1908. The father's business was left to Kemp, under a provision in the father's will that Kemp should pay his mother $1,000 annually. At his examination on June 26, 1918. Kemp testified that "about seven years ago" he had to move out of what had been his father's place of business, and therefore had to buy a coal yard in Greenwich street. "About seven years ago" would be "about" June 26, 1911, more than six years prior to July 2, 1917. Kemp then took the position with his mother that he thought he was not obligated to pay her the $1,000 per annum, which he had been paying prior to his purchase of the Greenwich street yard. The mother, at that time, took the contrary view:

"She said she thought I did. She said my sisters thought I did. I said, 'The old business of my father on Hudson street was given up, and I opened up a new business on Greenwich street,' and I did not think I owed anything, and for that reason I did not pay it."

On further examination Kemp insisted that the purchase of the Greenwich street yard was some seven years previous, although there was some contradiction in his testimony given in February, 1918, which would fix the date about February, 1913. Kemp, however, never paid anything to his mother, and she never made any demand of any kind or description.

The situation, thus, is that on Kemp's testimony, which is the sole testimony relied on by the bank, he had no obligation (both by way of the statute of limitations and his assertion as to his father's will) to pay his mother after he moved from Hudson street, and both his conduct and that of his mother confirm this view.

Suppose the mother sought to recover against Kemp on the testimony as it stands in this record; could any judgment be obtained? Suppose she had filed a claim herein on this testimony; would it

have been allowed? As the answer must be in the negative, it necessarily follows that the bank has not proved liability in this regard.

As to the $2,000: When Kemp was buying the Greenwich street yard, he needed $2,000 as part of the purchase price, and borrowed that sum from his mother, giving her a note secured by a chattel mortgage on horses and trucks, which was never filed. The date of this transaction is not clear. It may have been 1911 or 1913, and, as the note was payable five or six months after date, it may be that the note, even if made in 1911, was not barred by the statute of limitations in July, 1917. But the parties evidently did not treat the matter as a debt. Payment was never demanded, interest was never paid, and the note apparently was left in Kemp's safe without any attention being paid to it.

If it be assumed that Kemp's mother could have recovered on this note, it is, nevertheless, plain that Kemp, neither in regard to this $2,000 note nor in regard to the $6,000, believed that he was under any liability to his mother. The testimony fully justifies the conclusion that the transactions were of the kind familiar between a mother and a son, where the mother never intends to proceed against the son, and only expects payment if the son is able to make it.

Therefore, even if it were to be held that there was a liability on the part of Kemp on both items, it is clear that there was no intent on his part to make a false statement or to deceive. It may be assumed, if Kemp had said to the bank, "I owe my mother $8,000," the bank would not have discounted the note. That, however, is not the question, because the matter would not have thus shaped up. Would the bank have refused the credit if Kemp had said, "I borrowed $8,000 from my mother, but she has never asked me for it, and will not seek to recover it from me," and had then explained the situation as it is set forth in the testimony? Meehan would probably have said that he would make the loan if the mother assured the bank, in satisfactory form, that she would make no claim against her son.

In point of fact, the mother has not filed any claim herein, and her time so to do has expired. Indeed, this controversy, in all probability, would never have arisen, but for the notation in the schedules:

"Sarah A. Kemp, Mawwah, N. J., not considered an absolute liability, $8,000."

Capable and conscientious counsel not infrequently ascertain from a client the facts concerning transactions which clients either disregard or look upon indifferently. It is then desirable to make just such a notation, in order (1) to safeguard the client, and (2) to put the trustee on notice, if any claim is made. It is not often that a case is presented where the intent which the statute requires is so plainly lacking. In re Kerner, 250 Fed. 993, — C. C. A. —; Gilpin v. Merchants' Nat. Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023; In re Braus, 248 Fed. 55, 160 C. C. A. 195.

The report of the referee is reversed, and the bankrupt will be discharged.

HIRAM WALKER & SONS, Limited, v. CORNING & CO. et al.

(District Court, N. D. Illinois, E. D. September 30, 1918.)

No. 591.

1. TRADE-MARKS AND TRADE-NAMES ⊂=93(3)—UNFAIR COMPETITION—SALE OF WHISKY FOR REFILLING BOTTLES OF ANOTHER MANUFACTURER—EVIDENCE.
Defendant *held* chargeable with fraudulent unfair competition in trade on evidence that complainant had for many years sold its whisky in the United States in bottles only with labels bearing its trade-mark of "Canadian Club Whisky"; that defendant since 1908 has made a whisky branded "Canadian Type," similar in proof, color, and flavor to complainant's, which it sold only in bulk to wholesalers and jobbers, with the knowledge and intention that it would be resold by them to retailers for refilling complainant's bottles; and that it was chiefly so used, the brand being practically unknown to and never called for by consumers.

2. WORDS AND PHRASES—"MISSIONARIES."
The term "missionaries," as used in the liquor trade, applies to men employed to visit saloons throughout the country and puff liquors of particular manufacture, so that salesmen of wholesalers and jobbers will find the way prepared for them.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Missionary.]

In Equity. Suit by Hiram Walker & Sons, Limited, against Corning & Co., Louis Abel, and Joseph Abel. Decree for complainant.

Defrees, Buckingham & Eaton, of Chicago, Ill., and Lucking, Helfman, Lucking & Hanlon, of Detroit, Mich., for complainant.

Herbert J. Friedman, Isaac H. Mayer, and Robert H. Parkinson, all of Chicago, Ill., for defendants.

BAKER, Circuit Judge. Infringement of trade-mark, simulation of labels, and direct fraud in refilling plaintiff's emptied bottles with Corning & Co.'s imitation of plaintiff's "Canadian Club Whisky," are the matters charged.

Part of the evidence was testimony given in open court, part was exhibits, and the remainder was in depositions.

[1] In finding the facts from the oral testimony, I have been guided by the appearance and demeanor of witnesses, their interest in the outcome of this suit, and the apparent degree of their intelligence, integrity, and candor. In weighing the testimony of deponents, I have considered the intrinsic probability or improbability of the matters they narrate, and particularly whether such matters are credible or incredible, in the light of the facts I find from the oral testimony.

Against Abel and Abel the charge of direct fraud is supported by the oral testimony of two detectives, Arthur and Arthur. One was regularly an insurance man; the other, a contractor. They were specially employed by a detective agency to investigate the refilling of plaintiff's bottles. Testimony of detectives is to be scrutinized with care—care amounting to suspicion. Even so, I find the detectives more disinterested, more reliable, more credible, than the witnesses against them.

[2] Against Corning & Co. the charge of direct fraud is supported, at least partially, by the oral testimony of Wishman, Naumann, and Pfeiffer, and by the established sales methods of the Abels and of Corning & Co.'s New York "House Account," as orally testified to by Detective Gleason, and is supported completely and explicitly by the depositions of Craig and Blake. These men, with numerous others, were employed by Corning & Co. to go to saloons throughout the country and puff that company's liquors, so that salesmen of wholesalers and jobbers would find the way prepared for them. In the liquor world these puffers are called "missionaries." In many collateral particulars the testimony of Missionaries Craig and Blake is discredited. They in fact were not such glowing successes as boosters as they pictured themselves. Even through depositions it is easy to see their tendency to exaggerate. They might not hesitate at the lie direct. In short, they are the kind one would expect in liquor boosters. But on that basis their title to credence is at least as good as that of missionaries, salesmen, and bartenders, who testified in person. Craig's and Blake's positive statements respecting Corning & Co.'s sales methods remained unshaken on cross-examination. I accept those statements, first, because they accord with the facts already established by the oral testimony of witnesses hereinbefore named; and, second, because they are inherently probable in the light of the liquor trade situation shown by the record.

From the beginning of distillation in Canada there have been numerous kinds of whisky having widely different characteristics of proof, color, and flavor. In Canada the word "Canadian" would cover all whiskies as generally as would "American" in this country. For many years prior to 1891 plaintiff, a Canadian distiller, exported to this country and here built up a nation-wide trade in its brand "Canadian Club Whisky," which had a distinctive proof, color, and flavor, and was sold only in labeled bottles. In 1891 plaintiff duly registered here its trade-mark and label. Prior to 1908, when Corning & Co. began the acts complained of, other Canadian distillers were exporting here some amount of whisky having the general characteristics of "Canadian Club." But in 1908, as well as before and after, plaintiff had four-fifths of that trade, and the remainder was practically all taken by "Segram's" and "Gooderham & Worts'." Though since 1900 "Segram's" and "Gooderham & Worts'" put the word "Canadian" on their labels, the word was so subordinated, and the labels were so distinctive in prominent names, colors, and designs, that no confusion arose. When drinkers at bars wanted "Segram's," they called for it by that name; when they wanted "Gooderham & Worts'," they called for it by that name, or simply "G. & W."; and when they wanted plaintiff's product, they asked for "Canadian Club," or simply "Canadian," or "Canuck."

In 1908, and before and since, there was a general practice among saloon keepers and bartenders of refilling bottles that bore well-known brands with cheaper whisky and then selling it over their bars, as the original contents. One witness testified that 90 per cent. of whisky retailers indulged in this practice. I find nothing in the record that

should cause me to reject his estimate. This refilling practice was a matter of common knowledge in the liquor world.

In 1908 Corning & Co. tried methods of distillation that were then new to that company. The result was a whisky which in proof, color, and flavor was a duplication of plaintiff's "Canadian Club." Corning & Co. called it "Canadian Type." As plaintiff's process and product were not patented, Corning & Co.'s act of making a like whisky was legitimate. But, instead of offering it in distinctively labeled bottles, so that drinkers who desired whisky of that proof, color, and flavor might know they were being given a competitive choice, Corning & Co. sold it only in bulk, and only to wholesalers and jobbers. At Abels', and at Corning & Co.'s New York "House Account," the detectives found Corning & Co.'s customers explaining to supposed retailers that no one could tell the difference between "Canadian Club" and "Canadian Type," and that the latter could be safely used in refilling "Canadian Club" bottles. The acts of those purchasers from Corning & Co. were in line with what Craig and Blake testified were the instructions of Corning & Co. to them. The oral testimony of other missionaries and salesmen, that they sold Corning & Co.'s said whisky only to those wholesalers and jobbers who insisted on having it, is not accepted, first, on account of the appearance and demeanor of those witnesses; and, second, because their declared attitude is improbable, in the light of established circumstances.

How was a trade of $75,000 a year built up and maintained, except by sales like those proven by the detectives and under a plan as testified to by Craig & Blake? All of plaintiff's witnesses, and all of Corning & Co.'s who on cross-examination testified on the subject, agreed that among drinkers at public drinking places no one had ever called for "Canadian Type" whisky, or had ever knowingly drunk it. There is no exception to this condition throughout the country, unless it is established by Corning & Co.'s New York depositions. The witnesses were of two kinds: First, saloon keepers, with negro trade, said some of their customers called for "Canadian Type." These were in the main the same witnesses whose oral testimony was rejected by Judge Hand. I cannot readily believe that their clientèle displayed a nice discrimination, which was found nowhere else in the land. Second, owners of "family liquor stores" testified that they sold some of Corning & Co.'s said whisky in bottles bearing "Canadian Type" labels. But that does not prove that a single ultimate consumer ever wanted, or knew that he was drinking, Corning & Co.'s said whisky.

When plaintiff notified Corning & Co. that "Canadian Type" was being palmed off by retailers for "Canadian Club," Corning & Co. took the position that, so long as no misrepresentations were made to their immediate purchasers, the wholesalers and jobbers, they could sell as they pleased. I find that Corning & Co. had both actual and constructive notice that their said whisky was being sold to unknowing consumers by means of the refilling of "Canadian Club" bottles.

To the situation hereinabove found the equitable doctrine of contributory infringement plainly applies, in my judgment.

On barrel heads Corning & Co. stamped "Canadian Type." With the bulk sales Corning & Co. supplied engraved labels and "bar bottles" bearing the words "Canadian Type." These labels are made to simulate plaintiff's. There is no evidence respecting the quantity of labels and "bar bottles" furnished by Corning & Co. as compared with the quantity of said whisky sold. Of course there was no intent to deceive wholesalers and jobbers, and they were not misled. But the labels, etc., which informed them, manifestly were not furnished to retailers, or at least not conspicuously used by them, for consumers have never come to know of Corning & Co.'s "Canadian Type."

I find it unnecessary, on the facts of this case, to inquire whether the words "Canadian Type" in and of themselves constitute an infringement of plaintiff's trade-mark. If in the public mind the word "Canadian" had acquired a meaning indicating plaintiff's whisky, so that plaintiff has a proprietary interest in that geographical word, as the Elgin Watch Company has in "Elgin," and if "Canadian Type" means in the public mind "Imitation Canadian," then an interesting question might arise, whether a trader should be permitted to administer poison, even if he accompanies it with an antidote.

The decree will be limited to restraining the trespasses hereinabove found and to an accounting therefor.

THE OROPA.

(District Court, S. D. Alabama. January 15, 1919.)

No. 1707.

1. WAR ⟸10(2)—EFFECT ON CIVIL RIGHTS—SUITS BY OR AGAINST ALIEN ENEMIES.

   The rights of an alien enemy as a party to a suit in a court of the United States are no different, whether he is a defendant or a plaintiff or libelant.

2. WAR ⟸10(2)—SUIT BY ALIEN ENEMY—CONTINUANCE.

   A libel in rem for wages against an Italian ship, by a seaman who was signed in Italy and came with the vessel to an American port, and who prior to suit became a resident and declared his intention to become a citizen of the United States, will not be dismissed because he is a subject of Austria-Hungary, but will be continued until the termination of the war.

In Admiralty. Suit by Memon Giuseppe against the Italian bark Oropa. On plea by claimant. Plea overruled, and case continued.

Howard & Pegues, of Mobile, for libelant.

Palmer Pillans, of Mobile, for claimant.

ERVIN, District Judge. This was a libel in which libelant seeks to recover his wages for the time he served on the Italian bark Oropa. It alleges that he was employed as a seaman October 3, 1917, at the port of Genoa, Italy, at the rate of 150 francs per month; that he sailed with said vessel from Genoa to the port of Mobile, and arrived here on March 22, 1918; that the vessel has been lying in the harbor

of Mobile for more than 3 months, and has not yet been provided with cargo, nor has she made arrangements to sail from this port; that he has demanded his wages, but the master refused to pay him; that he has been employed 8 months and 22 days; and that there is now due him in American money $75.30.

[1] The libel was filed on June 26, 1918. On August 2, 1918, there was filed by B. Andrea Ventura, as claimant of the Italian bark Oropa, a plea setting up that libelant was born in and is a citizen and subject of the empire of Austria-Hungary, with whom the United States is at war; that the said libelant was an alien enemy at the time of the happening of the matters and facts set out in said libel, and at the time of the bringing of the said suit. Wherefore the said libelant was then, and still is, a public enemy of the United States, and ought not to have and maintain any action in any court of the United States.

The matter now comes on to be heard on the plea, and on the hearing it is agreed that the matters of fact set out in the plea are true. In addition to this agreement, there was offered in evidence a declaration of intention for naturalization filed in the District Court of the United States at Mobile, Ala., by Memon Giuseppe, the libelant, on June 25, 1918, in which the statement is made that petitioner was born in Trieste, Italy, on the 29th day of October, 1896, and now resides at No. 8 Government street, Mobile, Ala.; that he emigrated to the United States of America from Italy on the vessel Oropa; that his last foreign residence was Trieste, Italy.

The question for determination is whether the libel should be dismissed, or whether an order should be made continuing the case until the conclusion of peace.

It is contended by proctor for claimant that the libel should be dismissed, and he supports this contention by citation of numerous authorities, all of them, however, old cases. On the other hand, the proctor for libelant contends that the severity of the old rule, has been so much relaxed by the modern authorities that the better rule, and one supported by the later authorities and better reason, is that the courts will look to the justice of the cause, even where an alien enemy is concerned, and will not dismiss the suit where justice requires the preservation of the rights of the alien, but will continue it during the existence of the state of war.

Claimant insists that an alien enemy has no standing in the courts of this country during hostilities. He, however, concedes that under the authorities this rule has been departed from in two specific instances, namely, where the suit was brought before the declaration of war, and, second, where the suit was brought by an alien enemy, who is a resident of this country at the time of bringing the suit; that in these two instances the court should make an order continuing the cause until the conclusion of peace.

Proctor for claimant, in criticizing some of the recent cases cited by libelant, urged that there was a distinction between a suit brought by an alien enemy and a suit brought against him.

In Johnson v. Thirteen Bales, Fed. Cas. No. 7,415, 13 Fed. Cas. page 839, the following language is used in the opinion by Judge Van

"Adopting this as the law, it becomes immaterial to inquire whether the claimants must be viewed as plaintiffs or defendants—whether the proceeding is by or against them."

It is true that in the case before Judge Van Ness he held that alien enemies had no standing in court, but I think he correctly held that there was no difference whether the alien enemy appears as plaintiff or defendant—that the same rule should be applied to him in either aspect. I therefore see no difference to be applied to a plaintiff or a defendant who is an alien enemy; but, if the courts should preserve the rights of an alien enemy defendant, they should equally preserve the rights of an alien enemy plaintiff or libelant.

[2] Among the cases cited by proctor for libelant as showing the trend of recent authorities is that of E. Lutz v. Van Heynigen Brokerage Company, 80 South. 72, from the Supreme Court of Alabama, decided October, 1918, and not yet officially reported, where it is said:

"As affecting civil rights and liabilities, it is said to be clear law that it is not his nationality, but the fact that he carries on business or voluntarily resides in an enemy country, that makes an alien enemy."

If this citation is correct, then it seems to me the present libel should not be dismissed, because, taking the facts as they appear in the libel, which was duly sworn to, and in the declaration of intention for naturalization, it appears that this libelant was signed as a seaman in Genoa, Italy, and served on the vessel, coming to Mobile from there, and that on June 25th, the day before the libel was filed, he filed his declaration of citizenship, giving his then residence as No. 8 Government street, Mobile, Ala.

One of the later cases cited by libelant is Posselt et al. v. D'Espard et al., from the Chancery Court of New Jersey, opinion by Lane, Vice Chancellor, found in 87 N. J. Eq. 571, 100 Atl. 893, where the Vice Chancellor holds that the cause should be continued pending the signing of peace, and bases this contention largely upon the proclamation issued by the President; and another is Plettenberg-Holthaus Co. v. I. J. Kalmon & Co. (D. C.) 241 Fed. 605, by Speer, District Judge, in which he says, in discussing the reason for refusing to permit aliens to sue, that if the alien enemy prevails, and obtains judgment, it would obviously add the sum he recovers to the resources of the power of which he is a subject. He then proceeds to hold that a suit brought by an alien enemy before the declaration of war will not be dismissed, but will be continued pending hostilities. While discussing the status of alien enemies, he says:

"Besides, with the evolution of law, the courts of the English-speaking peoples exhibit greater magnanimity in affording opportunity of redress to alien enemies. Notwithstanding a ruling of Sir William Scott, afterwards Lord Stowell, made in 1799, to the contrary, the British prize courts of to-day hear any alien enemy asserting rights under a convention of the Hague Peace Conference. Shall the courts of the United States then wholly deny a hearing to one, not such when he here sought redress, but who has since become an alien enemy? To do this would not, in my judgment, accord with the spirit of our institutions, nor with the spirit of our government, which disclaimed hostilities to the German people when it proclaimed war in defense of freedom and of a common humanity."

Another case cited is Speidel v. N. Barstow Co. (D. C.) 243 Fed. 621, before Brown, District Judge, who calls attention to the fact that two of the plaintiffs were alien enemies residing in Germany at the time of the commencement of the suit, but that the other plaintiffs were residents of this country at that time. He says:

"It is conceded by plaintiffs' counsel that an alien enemy resident in his own country is under disability during the war to institute and maintain suit. That this disability applies to Fredrich and Eugene Speidel seems well settled by authority. According to good authority, however, this disability does not attach to the alien enemy plaintiffs resident in this country" (citing authorities).

He then discusses the difficulty of dismissing as to two of the plaintiffs and continuing as to the others, and finally reaches the conclusion that the proper course was to continue the case until the termination of the war.

The case of The Kaiser Wilhelm II, 246 Fed. 786, 159 C. C. A. 88, L. R. A. 1918C, 795, is also cited. This was a decision before the Third Circuit Court of Appeals, opinion by Buffington, J. The court in its opinion says:

"This case is exceptional in its situation, and calls for the exercise of that range of discretion which the broad powers of a court of admiralty enable it to exercise. Such broad powers and range of discretion are, in our judgment, fittingly exercised by an order which will make due provision for, first, giving the German citizen and belligerent an opportunity to litigate his rights, if relations with his country are hereafter resumed; second, providing for adjudging, if the government hereafter so desires, its rights and liabilities, if any, in taking over libeled property of the German subject; third, adjudging hereafter what effect the taking of this ship by the government had on the claim of the British lienor, and the further obligation of the German vessel owners as between themselves. In following this course, and protecting the unprotected rights of an absent German citizen while this country is at war with the imperial government of its country, we are impelled by three all-sufficient reasons: First, the innate sense of fairness, decency, and justice, which respects the rights of an enemy; second, the broad principles of international intercourse, which leads courts and nations that believe in international rights to be the more careful to observe them toward belligerents; and, lastly, because the awarding to this German citizen, with whom our country is at war, the careful preservation until times of peace of its rights is in line with those high ideals of Anglo-Saxon justice which led the British courts year ago, in Re Boussmaker, 13 Vesey, 71, decided in 1806, to allow the claim of an alien enemy to be proved in time of war and the dividends held by the British court until peace. Indeed, the fact that our country is now at war with Germany is all the more reason why this court should most scrupulously award to this German citizen those international and equitable rights which no fair-minded people ever deny even to their enemies in times of war."

This case has been cited with approval by the United States Supreme Court in Watts, Watts & Co., Limited, v. Unione Austriaca Di Navigazione, etc., 248 U. S. 9, 39 Sup. Ct. 1, 63 L. Ed. ——.

I think that the severity of the ancient rule, which denied the rights of an alien enemy in the courts of this country, has been moderated by the trend of the modern authorities, and that the rule is at present more honored in the breach than in the observance, for, if the reason for the rule is the fact that to permit an alien enemy to recover prop-

erty is to give that property to the alien enemy during the time of war, then this purpose can be easily and effectually accomplished by postponing the hearing of a cause until peace is declared.

If, on the other hand, the rule is that an alien enemy has no standing in the courts of this country, then this rule is relaxed, and held not to apply where the suit was brought before the declaration of war, and where the suit was brought by an alien enemy resident of this country. These decisions are inconsistent with the general rule that an alien enemy has no standing in the courts of this country.

There can be no difference between the standing of an alien enemy who is a resident here, and one who has instituted suit before the declaration of war, and one who resides in his own country; if each of them is an alien enemy, and if an alien enemy can have no standing in the courts, then they can have no standing during the existence of a state of war.

The progress of modern thought and judicial opinion is growing much more liberal, and as the Supreme Court has so frequently had occasion to say, "where the reason of the rule ceases, the rule ceases," and I can see no reason for dismissing a suit now brought, knowing that, as soon as peace is declared, the same party can institute the same suit again, and it seems to me the better rule would be to continue the case until peace is declared, preserving to the parties the rights they now have for determination then.

Taking the instant case, this sailor was employed by the Italian bark Oropa, after the declaration of war by this country against Austria. He served on this bark without objection on the part of the claimant until the dispute arose as to his wages; the vessel will leave, and may never come back; the sailor has declared his intention to become naturalized, and, if his libel is dismissed, he may lose for all time the right to try the question of his wages.

I am therefore of the opinion that the case should not be dismissed, but should be continued until the conclusion of peace; and such a decree will accordingly be entered.

BOARD OF TRUSTEES FOR REGINA PUBLIC SCHOOL DIST. NO. 4 OF SASKATCHEWAN v. SPITZER et al.

(District Court, N. D. Ohio, W. D. January 9, 1919.)

No. 2484.

1. SCHOOLS AND SCHOOL DISTRICTS ⟸97(7)—VALIDITY OF BONDS—PROCEEDINGS PRELIMINARY TO ISSUE.

Under a statute requiring trustees of a school district, before issuing bonds, to embody the proposition in a by-law and post notices containing the same in public places, to afford the electors opportunity of demanding a poll, bonds of a district are not invalid because, whereas, the preamble to the by-law recited that they should bear interest at not more than 8 per cent., payable annually, as issued the interest was made payable semiannually, with a rate of 5 per cent., which made the loan more favorable to the district.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. STATUTES ⟸210—CONSTRUCTION—PREAMBLE.
When the enacting portion of a statute or by-law is unambiguous, its meaning will not be controlled or affected by anything in the preamble or recitals.

3. SCHOOLS AND SCHOOL DISTRICTS ⟸97(7)—BONDS—SUBSTANTIAL COMPLIANCE WITH STATUTE.
Where school district bonds have been issued in compliance with statutory requirements in every substantial matter, they are not invalidated by immaterial variations, such as the fixing of a particular place of payment, or providing for payment of interest semiannually, instead of annually; things which are not prohibited by the statute, which merely prescribes the annual rate of interest.

4. CONTRACTS ⟸328(5)—CHANGING DEFENSES.
Where defendants based their refusal to perform a contract on a specific ground, they cannot, when sued for its breach, shift their defense to other grounds, which, if they had been made known at the time, might have been obviated.

5. SCHOOLS AND SCHOOL DISTRICTS ⟸97(5)—BONDS—CONTRACT TO PURCHASE—ACTION FOR BREACH.
One contracting to purchase bonds to be issued by a school district, and who by his attorney, before making the contract, carefully examined the statute under which they were to be issued, cannot avoid the contract because of a fact claimed to render them less desirable than he supposed, but which was plainly disclosed by the statute.

6. SCHOOLS AND SCHOOL DISTRICTS ⟸97(5)—CONTRACT FOR SALE OF BONDS—VALIDITY.
A contract by a school district for the sale of bonds to be issued by it is not invalid, because the bonds are not then in existence, where the district has taken all the steps required by statute to authorize their issue.

7. SCHOOLS AND SCHOOL DISTRICTS ⟸97(5)—CONTRACT FOR PURCHASE OF BONDS—VALIDITY.
A contract for the purchase of bonds of a school district, subject to approval of the proceedings leading to their issuance by purchasers' attorneys, cannot be avoided on the ground that such approval was not given, where, after receiving a transcript of all such proceedings, with time for its examination, and without objection thereto, purchasers prepared the bonds and sent them to the district for execution.

8. SCHOOLS AND SCHOOL DISTRICTS ⟸58—VALIDITY OF CORPORATE ENACTMENT—NECESSITY OF SEAL.
Under the common law, acts of the trustees of a school district, who are made by statute a corporate body with a seal, passed at a regularly constituted meeting and made of record, need not be sealed.

9. SCHOOLS AND SCHOOL DISTRICTS ⟸97(5)—SALE OF BONDS—VALIDITY OF CONTRACTS—ULTRA VIRES PROVISION.
A provision in a contract by a Canadian school district for sale of its bonds, to be issued, that they should be made payable in money of the United States, *held*, while ultra vires, since the statute only authorized the issuance of bonds payable in Canadian or English money, a separable provision, which did not invalidate the contract as a whole, especially where it was so treated by the parties, by abandoning such provision and making the bonds conform to the statute.

10. SCHOOLS AND SCHOOL DISTRICTS ⟸97(5)—SALE OF BONDS—ULTRA VIRES CONTRACTS—EFFECT OF PART PERFORMANCE.
Where a school district, after making a contract for the sale of its bonds, on the faith of the contract and in carrying it out, incurred a considerable expense and entered into lawful contracts for the purchase of property, to be paid for from the proceeds of the bonds, the purchasers could not afterward avoid their obligation to take the bonds, on the ground that the contract contained provisions which on the part of the district were ultra vires.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

11. SCHOOLS AND SCHOOL DISTRICTS ⟸97(10)—VALIDITY OF BONDS—"BONA FIDE HOLDERS."

Under a statute of Saskatchewan, Canada, requiring the proceedings of a school district for the issuance of debentures to be submitted to the minister of education, and providing that on his approval the validity of the debentures, when executed and presented to and countersigned by him, should not be questioned in any court of the province in the hands of a bona fide holder, such "bona fide holder" includes any purchaser from the district for value and without actual fraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bona Fide Holder.]

12. SCHOOLS AND SCHOOL DISTRICTS ⟸97(5)—CONTRACT FOR SALE OF BONDS —DAMAGES FOR BREACH.

An accepted offer to purchase bonds of a school district, made in response to a public advertisement for tenders, does not create a contract merely for the loan of money, but is one for the sale and purchase of negotiable public securities, for the breach of which by the purchaser compensatory damages are recoverable.

At Law. Action by the Board of Trustees for Regina Public School District No. 4 of Saskatchewan against Adelbert L. Spitzer, Horton C. Rorick, and Carl B. Spitzer, doing business as Spitzer, Rorick & Co. Trial to the court, and judgment for plaintiff.

Marshall & Fraser, of Toledo, Ohio, and Brown, Thom, McMorran, Bastedo & Jackson, of Regina, Sask. (D. J. Thom, of Regina, Sask., of counsel), for plaintiff.

Tracy, Chapman & Welles and James S. Martin, all of Toledo, Ohio, for defendants.

KILLITS, District Judge. The defendant, a copartnership known as Spitzer, Rorick & Co., of Toledo, Ohio, dealing in municipal and other securities, entered into an agreement in April, 1913, with the plaintiff, the board of trustees for the Regina public school district No. 4, province of Saskatchewan, Canada, to purchase at the rate of 95 per cent., or for $475,000, $500,000, par value, of debentures which the plaintiff proposed to issue. These debentures were to be dated May 1, 1913, to run for 20 years, and were to be issued pursuant to the school laws as found in chapter 100 of the revision in 1909 of the laws of the province, with subsequent amendments. In citing these laws by section number hereafter, it will be understood that the numbering is that of chapter 100 of this revision. After making the agreement in question, the board proceeded to the execution of the debentures, which, as to the last $400,000, were declined by defendant for reasons hereafter discussed; the first installment, of $100,000, being accepted at the contract rate of 95 per cent. ($95,000), the defendant reserving its objection to taking the rest. Defendant finally declining to take the balance, after some delay plaintiff sold them at the rate of 90 per cent., and this action is to recover the difference between the offer of defendant of 95 per cent. of par and the price at which they were sold to third parties, or $20,000, as damages for defendant's default. A jury has been waived, there being little dispute as to the facts, and the case is tried to the court upon the facts and law. The

defense raises the question of the validity of the issue and the regularity of the proceedings by the plaintiff board preliminary to issue, principally on grounds raised for the first time in the answer. The case requires an interpretation of certain of the school laws of Saskatchewan as to which we are not materially assisted by local adjudications.

By section 82 of the laws in question:

"The trustees of every district shall be a corporation under the name 'The Board of Trustees for the ——— School District No. ——— of Saskatchewan.'"

It is provided elsewhere that the board shall consist of five members, a majority of which shall constitute a quorum, and section 88 avoids as invalid and unbinding on any party an act not adopted at a regular or special meeting with a quorum present. Section 92 provides for organization, the keeping of records, to be signed by the chairman and secretary, and for other details of control and management, including an obligation to provide and maintain adequate school property and facilities. By paragraph 2 of this section the procuring of a corporate seal is made obligatory, and by paragraph 3 is directed the prompt transmission of reports and statements respecting the board's transactions, as elsewhere required by the act to be given the provincial minister of education.

Other provisions of the chapter determine that the districts may be rural, village or town; that they shall have territorial extent, which in case of a municipality may be coterminous or otherwise with the limits thereof. By section 41 it is provided that, where a public school district has already been organized, a minority of the ratepayers therein, of whatever religious faith, Protestant or Roman Catholic, may demand and secure the erection in the same territory of a separate school district, and that in such case the ratepayers establishing such separate district "shall be liable only to assessments of such rates as they impose upon themselves in respect thereof"; and by section 45, thereafter the board of such separate district shall have the same privileges, obligations, duties, and responsibilities respecting the same as devolve upon the board of the public district. Both districts are municipal corporations of the same quality, called "public" or "separate" by way of designation only, and it is clearly provided in paragraph 2 of section 45 that no one who is legally assessed or assessable for a public school shall be liable to assessment for any separate school, nor shall "the ratepayers of the religious faith of the minority" supporting a separate district be assessable for school purposes other than for his own district.

By section 106 it is directed that the board of any district, desiring to borrow money "upon the security of the district for securing, purchasing, adding to, extending or improving a school site or sites," etc., shall pass a by-law to that effect, to be substantially in the form prescribed by the minister of education, this by-law to be "under the corporate seal of the district," and to be inscribed in the minute book containing the board's record of proceedings.

Section 107 requires that, within five days from the passing of the

by-law, a notice of the board's intention to apply to the minister of education for authority to borrow shall be given to the community in a form prescribed by the minister, and by posting at a post office situated therein and in at least four widely separated and conspicuous places elsewhere therein; and by section 108, if the amount exceeds $800, 20 ratepayers in a town district, acting within 15 days of the date of the posting of the notice in question, may demand a poll for and against the by-law.

It is provided by section 109 that, in case no poll is demanded, there shall be transmitted to the minister a certified copy of the by-law and of the notice provided by section 107, with proof of the posting thereof, and a statutory declaration stating the amount of the assessed value of the real property in the district as shown by the last revised assessment roll in a case of a town district. Paragraph 3 of this section 109 continues as follows:

"And upon receipt of the same and upon being satisfied that the several conditions required by this act have been substantially complied with the minister may in writing authorize the board of trustees to borrow the sum or sums of money mentioned in the by-law or a less sum and shall publish notice of authorization in the Saskatchewan Gazette."

Paragraph 1 of section 127, after a preliminary which does not apply in the instant case, reads as follows:

"Upon being satisfied that the several conditions required by this act have been complied with the minister may in writing authorize the board of trustees to borrow the sum or sums of money mentioned in the by-law and shall publish notice of authorization in the Saskatchewan Gazette. The board may thereupon issue a debenture or debentures to secure the amount of the principal and interest of the loan so authorized or of any less sum upon the terms specified in the by-law and the debenture or debentures and the coupons thereto shall when signed by the chairman and treasurer of the district and countersigned by the minister as provided in section 129 hereof be sufficient to bind the district and create a charge or lien against all school property or rates in the district."

Subsequent paragraphs of this same section limit the amount of the issue to one-tenth "of the total assessed value of the real property within such district as shown by the last revised assessment roll," and provide that the debentures shall be in either of three alternative forms. If form 3 is followed, it is provided that annually by assessment a sum for a sinking fund should be raised sufficient, when compounded at 4 per cent., to meet the indebtedness at maturity.

Section 128 directs that, when the securities are executed by the local board, they shall be sent before issue to the minister for registration. All preliminaries to issue are concluded by the observance of the provisions of section 129, which we quote in full as follows:

"The minister shall thereupon if satisfied that the requirements of this act have been substantially complied with and if the authority to make the loan has not been withdrawn register and countersign the debenture and such countersigning by the minister shall be conclusive evidence that the district has been legally constituted and that all the formalities in respect to such loan and the issue of such debenture have been complied with and the legality of the issue of such debenture shall be thereby conclusively established and its validity shall not be questionable by any court in Saskatchewan

but the same shall to the extent of the revenues of the district issuing the same be of good and indefeasible security in the hands of any bona fide holder thereof."

The Saskatchewan Gazette is an official publication. The school district here under consideration has boundaries identical with those of the city of Regina. Some years before the events giving rise to this action, a separate or Roman Catholic district had been erected within the same limits under the provisions of sections 41 to 45, inclusive.

The plaintiff, taking the first step under the statutes, preparatory to the issue of debentures, on February 14, 1913, regularly passed, adopted, and sealed by-law No. 16. By way of preamble was recited the necessity that the sum of $500,000 should be borrowed on the security of the district for the purpose of erecting certain new school buildings and furnishing and equipping the same, including the purchase of sites, and to improve a school already built. These debentures, as stated in the preamble, were to be "payable to the bearer at the end of twenty years, with interest at not more than 8 per cent. per annum, payable annually." The enacting portion following the preamble reads as follows:

"Now, therefore, the board of trustees of the said district enacts as follows:

"1. That the necessary proceedings be taken under the School Act to obtain the sanction of the minister of education to the said loan.

"2. That if the minister of education shall empower in writing the said board to borrow the said sum pursuant to the said act then debentures of the said district will be issued payable to the bearer at the end of twenty years with interest at not more than 8 per centum per annum and shall be executed by the chairman and treasurer of this board."

Notice of this by-law and its purposes was duly given the public and the proper declarations were made to the minister by whom it was approved, and the proposed issue authorized in writing, publication whereof was duly made in the official Gazette, whereupon the plaintiff advertised for tenders. Early in April, 1913, the defendant sent its representative, Mr. Mann, to Regina to investigate the matter, subsequently notifying the board of his full authority to represent it. Mr. Mann, who is an attorney of this bar, spent about two weeks in and about Regina upon this and other business. In behalf of defendant, April 12, he submitted a proposition in writing that the defendant would pay for $500,000 of plaintiff's 5 per cent. debentures, to be dated May 1, 1913, and to mature May 1, 1933, $475,000, with accrued interest to date of delivery. This proposition stipulated that the debentures were to be in the denomination of $1,000 each, with principal and semiannual interest payable in lawful money of the United States at either of the two branches of the Bank of Montreal at the option of the holders, located in New York City or Toronto, and that defendant would take up $100,000 of the issue August 1, 1913, and the balance in equal installments on the 1st of each of the succeeding four months. The tender concluded as follows:

"We will print and deliver to you at Regina at our expense lithographed blank debentures ready for execution.

"Prior to our taking up and paying for said debentures you are to furnish us complete transcripts of all proceedings leading up to and culminating in

the issuance of said debentures evidencing their legality to the satisfaction of our attorneys. Should our attorneys deem any additional by-law necessary, you are to pass same.

"This offer is for immediate acceptance and time is to be the essence of the contract. We will remit in New York exchange for said debentures."

A majority of the board indorsed their acceptance on this offer, whereupon a notice was regularly given for a special meeting to act formally. At this meeting, April 16, was adopted and duly recorded a resolution in detail accepting the tender following its terms. The resolution was not sealed.

The proposition of defendant embodied terms not within the provisions of by-law 16, whereupon, at the instance of Mr. Mann, representing the defendant, and who directed its substance, a new by-law, given the number 17, was passed at the same meeting. This by-law differed from by-law 16 only in that in the preamble it recited that it was desired to borrow the money with interest payable semiannually, and that in the enacting portion it read that the interest should be payable semiannually and the obligations should be payable "in lawful money of the United States at the Bank of Montreal in the state and city of New York or at the Bank of Montreal in the city of Toronto, Canada, at the option of the holders." Notice of this by-law was not given to the community, but the same was subsequently approved by the minister of education, and formal authority given to the board to issue the debentures therein provided for. Subsequently a transcript of all the proceedings of the board and of the several approvals of the minister of education was sent to defendant in Toledo and acknowledged by the latter's letter of April 22, the first paragraph whereof reads as follows:

"We acknowledge receipt of your esteemed favor of the 17th instant, with inclosures as listed. We will turn same over to our attorneys, and promptly advise you as to the result of their examination."

The attorneys in question appear to have approved the validity of the proposed issue, for defendant proceeded to prepare the blanks. May 21 the latter were forwarded by express, with a long letter of instruction from defendant as to how they should be executed, quoting the advice of defendant's Canadian counsel. It appears from the evidence that the expense incurred by defendant in preparing the blanks was approximately $100, a reprinting having been had as a matter of precaution on the part of defendant, because of the omission of the word "public" in the title of the district, which, it appears, was not regarded as vital by defendant's Canadian counsel. Meanwhile, defendant extensively advertised these securities and negotiated the sale of a substantial part of the first issue about the 1st of July. Receiving the amended blanks, the plaintiff proceeded to execute the debentures, which were countersigned by the minister of education as required by section 129. July 5 the defendant telegraphed instructions for immediate forwarding to its correspondents in New York the first installment of $100,000, which was to be delivered August 1; the defendant having already effected sales. The request for expedition involved plaintiff in the extraordinary expense of sending its secretary

to British Columbia to secure the signature of the minister. The form of the debentures, as finally provided by the defendant, conformed exactly with that prescribed as the third alternative by paragraph 5 of section 127. Each read as follows:

"The Regina Public School District Number 4, of Saskatchewan.

"Under the authority of the School Act and of by-law No. 16, passed on the 14th day of February, 1913, and by-law No. 17 passed on the 16th day of April, 1913, the board of trustees of the said school district promises to pay the bearer the sum of one thousand dollars of lawful money of Canada at the principal office of the Bank of Montreal in the city of Toronto, in Canada, or at its office in the city of New York, state of New York, in the United States, at the holder's option, on the first day of May, 1933, and to pay to the bearer the amount of each of the several interest coupons hereto attached as the same shall respectively become due. Dated May 1, 1913."

Attached thereto were semiannual interest coupons in the exact wording of the third form prescribed therefor in the statute. There was no statute directing or limiting the place of payment.

Defendant first expressed dissatisfaction with its purchase on July 8, when, by wire, it inquired whether lands liable to assessment for debenture indebtedness at the time of incurring the latter remained liable to and subject to assessment for its liquidation until that had been accomplished, or whether the subsequent transfer of lands within the public district at the time of the execution of the debentures to a Catholic owner supporting a separate school would relieve such property of the lien of the indebtedness. By letter of July 22, in which the matter was gone into at length, defendant indicated its intention to decline to take the issue because of its belief that the security was affected on account of the theoretical fluctuation of the amount of real property subject to assessment for the district's purposes, due to the provision for public and separate schools. This letter concludes with the following paragraph:

"While these debentures are not worth as much money as we contracted to pay for them, if it turns out that the security back of them is unfixed and unstable, yet to show our good faith in this matter, and as the district is probably in urgent need of funds, we are willing to take up the $100,000 now in New York pending the further investigation of this matter, if the district desires us to do so, with the express understanding that we are not waiving our rights under the contract, and are not approving the entire issue."

The offer to take the first installment without waiving the objection was accepted by the board. Under date of August 15, the defendant, referring to its letter of July 22, definitely refused to take the balance of the issue, saying, among other things, "Under the circumstances you are at liberty to dispose of the debentures elsewhere." Thereupon the board entered into negotiations with other persons, and sold the issue in September at the rate of 90 cents on the dollar. About this time, but not, however, until after the board had become obligated to sell the issue at 90, defendant made a new proposition to take the remaining $400,000 at 92.

In anticipation of the acquirement of funds through its agreement with the defendant, the plaintiff had entered into contracts and incurred obligations in the purchase of sites and the contracting for

the erection of the school buildings for which the loan was to be effected, a fact which the defendant recognized in its offer to take up the first $100,000, as indicated by the paragraph we have quoted from its letter of July 22. This anticipation of funds seems to have been in accordance with local laws (section 127a).

In this recitation of facts, two things are to be noted:

First, that the only reason given by the defendant, prior to the commencement of this action, for refusing to take the complete issue, is that fully stated in its letter of July 22, and ratified by that of August 15, to wit: Its conclusion that the laws of the province respecting the security by way of lien upon the lands within the school district at the time of issue were less favorable than it thought; and,

Second, that the debentures, as finally issued, have behind them a record which is in substantial conformity to the laws of the province.

As this second proposition plays a very important part in the final disposition of this case, it seems proper that there should now be discussed the reasons which lead the court to this conclusion. What we mean by it is this: That every step necessary to authorize the issue in question was substantially taken; that is, the statutory regulations thereto were substantially followed. To recapitulate, these steps are, successively: (a) The passage of a proper by-law which is to be sealed; (b) the opportunity through notice for a poll of the ratepayers; (c) a certified copy of the by-law and of the notice, giving an opportunity to demand a poll, with a declaration stating the amount of the assessed value of the real property of the district, to be transmitted to the minister of education; (d) the approval by the minister of the record so certified to him, followed by his authorization in writing that the loan may be effected, together with a notice of the authorization in the official publication; (e) the preparation and execution of debentures conformably to the form selected from the statute; (f) the second examination of the record made by the board had by the minister of education, followed by a registration of the issue in his office and his countersigning the several debentures.

Every one of these steps was taken in the case of this issue in substantial compliance with the law. By-law 16 was passed and sealed; notice to the community was duly given; the minister was furnished a transcript, with a proof of the notice, and the proper declaration; his authority in writing for the issue was granted—all before the representative of the defendant appeared on the scene. No one contends but that the law was followed exactly, respecting by-law 16, down to the point of execution of the debentures in substantial compliance with its provisions. The intermediate steps thereafter were properly taken as they came, and finally debentures were executed and countersigned by the minister which conformed exactly to the form prescribed by statute which the board of a district such as this may choose under paragraph 5 of section 127. Except for the filling up of the necessary blanks, the form of the debentures in question, as well as that of the coupons attached thereto, is exactly in the wording of the third alternative set of forms for debentures and coupons in the section in question.

[1] Two features of the situation which may be referred to as inconsistent with this conclusion we now discuss. By-law 16 is shown in evidence to have followed substantially the form prescribed by the minister of education whose duty it was to suggest the same. Its preamble recites that there is found a necessity, among other needs, of issuing 20-year debentures "with interest at not more than 8 per cent. per annum, payable annually." Above we have quoted exactly the formal or enacting part of the by-law. Nothing is there said about the time of paying interest. There is nothing in the law which makes it illegal for a board in a district which is coterminous with a town to issue debentures bearing semiannual interest coupons, so that, if it were not for the fact that the preamble to by-law 16 recited that the board found it necessary to issue its securities, which might bear interest as high as 8 per cent. per annum, *payable annually,* there would be no ground at all in this respect for questioning the proceedings.

This leads us to inquire as to the obvious function of the notice to the community after a by-law has been passed. The statute says (section 107) that the notice shall be in the form prescribed by the minister, and shall advertise the intention "to apply to the minister for authority to borrow the amount specified in the by-law and on the conditions therein set forth." Evidently what is required here is that a fair notice should be given to the ratepaying electorate of the fact that it may be burdened with obligations having certain maximum conditions, so that the providence of the proposed issue might be subjected to the review of the underlying responsibility through a poll. Under by-law 16 the community was apprised of a proposition to burden it with debentures which might bear 8 per cent. interest, payable annually. It cannot be said that, having given a notice of this kind, the board was precluded from making better terms for itself than these, and, to that extent only, to vary the noticed conditions; that is to say, no one could be heard to say that, if no poll was demanded on a proposition of this sort, an issue of debentures otherwise conformable to the requirements of the situation and the law, but which provided better terms for the community than 8 per cent. interest payable annually, would be illegal, and it is entirely obvious that the debentures issued at 5 per cent. per annum, with interest payable semiannually, is a much better loan for the community than one at 8 per cent. payable annually. In fact, it is demonstrable that there was a much better bargain effected for the community to sell 20-year 5 per cent. debentures at a 5 per cent. discount, with semiannual interest, than to sell even 6 per cent. debentures at par with annual interest. The last portion of paragraph 3 of section 109 says that the minister may authorize the borrowing of a less sum than the amount stipulated in the by-law, and the obvious purpose of the legislation which twice casts upon the minister (sections 109 and 129) the duty of scrutinizing the board's records and of controlling its final action is to secure as far as possible results most provident and favorable to the district.

[2] But the statute (107) refers the electorate to the by-law for information as to the proposed conditions, and in this case the by-law

itself is silent as to the times of paying the interest, and the rule is well established that, when the enacting portion of a statute or by-law is unambiguous, which is the case here, the meaning thereof will not be controlled or affected by anything in the preamble or recitals. Yazoo & Mississippi Valley Railroad Co. v. Thomas, 132 U. S. 174–188, 10 Sup. Ct. 68, 33 L. Ed. 302.

[3] Secondly, these debentures recite on their face that they are issued pursuant to by-laws 16 and 17; but, as was said by counsel for the defendant, they conform to 17 only in the fact that they carry semiannual interest coupons; otherwise, there is nothing in that ordinance which at all differs from by-law 16, and which, at the same time, has unfavorably affected the terms and conditions of the debentures in any particular. It is true that in by-law 17 first appears the condition that the obligations shall be payable at a branch of the Bank of Montreal, either at Toronto or New York, at the holder's option. But that feature seems to us to be, not only not invidious to the law, but to be a detail not important, either to the by-law or to the notice. It would seem incontrovertible that this detail, as well as that respecting the half-yearly payment of interest, is well within the conclusive determination of the minister, under the provisions of sections 109 and 129, and that the inclusion of neither derogates from the conclusion that "the several conditions" of the act "have been substantially complied with."

Our research has not proceeded far enough to disclose any Canadian or English authorities on the subject, but both matters are included in the decision in Myer v. City of Muscatine, 1 Wall. 391, 17 L. Ed. 564, where Justice Swayne, for the Supreme Court of the United States, holds that no legal principle (in the absence of a specific statute) forbids making a place other than the municipal treasury that where municipal securities are payable, or avoids a contract for the payment of interest at periods less than a year when the statute but specifies a maximum rate per annum. Considering, as we do, that the matter of semiannual interest payments is not inconsistent with the notice given to the electorate under by-law 16, the reference in the debentures to by-law 17 may, we think, be properly set aside as a mere superfluity. Eliminating the provision for an unlawful medium of repayment, this by-law made no substantial change from by-law 16 respecting matters which should be noticed preliminary to exhausting the right to a poll. We therefore conclude that the debentures were issued in substantial conformance with the laws governing such a matter.

[4] Going, now, to the force in this case of the first proposition above stated, we very much doubt whether defenses can be made available which are not set up or suggested until after suit is commenced. The defendant itself recognized that the situation put the plaintiff to a great inconvenience. That was the motive the former gave as the reason for taking the first $100,000, notwithstanding its misgiving as to security, and it seems entirely clear to us that then was the time, and not later, when the defendant should have uttered all its other criticisms, that if they were valid, plaintiff might have had a timely chance to correct conditions. Defendant had all the

knowledge then of facts underlying its additional reasons for its default, which it did not urge until its answer was filed a long while after. Railway Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693; Goodman v. Purnell, 187 Fed. 90, 109 C. C. A. 408; Moore v. Beiseker, 147 Fed. 367, 77 C. C. A. 545; Kansas Union Life Ins. Co. v. Burman, 141 Fed. 835, 73 C. C. A. 69. In the case last cited, Judge Philips epitomizes numerous authorities on the subject, saying (page 842 of 141 Fed., page 76 of 73 C. C. A.):

"It is a wholesome rule of law, instinct with fair play, expressed by Mr. Justice Swayne, in Railway Company v. McCarthy, 96 U. S. (6 Otto) 267, 24 L. Ed. 693: 'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.'

"This principle has been applied in the following instances: Davis v. Wakelee, 156 U. S. 690, 15 Sup. Ct. 555, 39 L. Ed. 578, where a bankrupt obtained his discharge, claiming that the judgment against him was not affected by it, it was held he could not, in a subsequent action on the judgment, deny its validity. In Davis, etc., Company v. Dix (C. C.) 64 Fed. 411, where it was held that the purchasers of a creamery repudiating the contract on the ground of fraudulent representations, could not thereafter set up an interpolation in the contract. In Harriman v. Meyer, 45 Ark. 40, where it was held that the defense that a tender was not made in ready money was not admissible where the prior objection was to inadequacy of price. In Wallace v. Minneapolis, etc., Elevator Company, 37 Minn. 465, 35 N. W. 269, where it was held that a bailee refusing to deliver wheat because claimed by another, could not afterwards refuse on the ground that the charges were not paid. In Harris v. Chipman, 9 Utah, 105, 33 Pac. 243, where it was held that a plaintiff rejecting title for want of administrator's bond, could not be heard to object afterwards that letters of administration were not under seal. In Ballou v. Sherwood, 32 Neb. 689, 49 N. W. 796 [50 N. W. 1131], where it was held that title objected to because of pending litigation, the purchaser could not afterwards object for want of seal on the deed. In Frenzer v. Dufrene, 58 Neb. 436, 78 N. W. 720, where it was held that, where a party alleged his wife's recalcitrance as a reason for not executing a contract, he could not afterwards be heard to allege other reasons."

[5] Now, it cannot fairly be argued that, if it were otherwise obligated to take them, the defendant gave in its two letters of July 22 and August 15 a valid excuse for not taking the debentures. That excuse relates itself entirely to the state of the law of the community issuing the securities which defendant was bound to know at all times. Assuming that the law did permit the fluctuation of the amount of real property of the district during the immaturity of these debentures, so that theoretically the security was uncertain and liable to a substantial diminution between date of issue and due date, this was a condition substantially written in the pertinent statutes then in force, and such had been the existing interpretation for a long time. McCarthy v. Town of Regina, 5 N. W. Territory Reports, 74. There is a substantial identity in this particular between the laws of the Northwest Territory and those of Saskatchewan in 1913, as shown by comparison, as well as by reference to the Saskatchewan Act, 4–5 Edward VII, c. 42, the fundamental law on this subject, and upon which the laws in evidence here (Exhibit 3J) are based. To urge the excuse under

consideration was, therefore, but to urge ignorance of the law, which is not an available plea here.

"It is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract." State v. Minnesota Transfer Ry. Co., 80 Minn. 116, 83 N. W. 35, 50 L. R. A. 656.

The statute, which Mr. Mann must have seen (section 127), specifically points out that the proposed debentures would be "a charge or lien against all school property or rates in the district." Research proceeding logically from this language would have led to other sections, which, in application, suggest the result to which defendant referred in its letter of July 22. The harshness of the maxim "Ignorantia legis neminem excusat" has been somewhat modified in equity only, but even there such modification, then resting in discretion, is to be applied only "in the most unquestionable and flagrant cases." Story, Equity Jurisprudence, quoted and approved in Snell v. Insurance Co., 98 U. S. 85, 91, 25 L. Ed. 52.

As, however, the other defenses have been vigorously argued by counsel on both sides, it is deemed not inexpedient to notice them. They are, taking them as they are classified and argued in defendant's brief: (1) The contract is void for want of a corporate seal; (2) it is void because it contemplates an ultra vires act on the part of the plaintiff; (3) there was no authority in the plaintiff to contract, because the debentures were not in existence nor lawfully provided for at the time of contracting; (4) counsel for defendant failed to approve the bonds, such approval being a condition precedent to acceptance; (5) a by-law (17), fundamental to the issue, was invalid, in that notice thereof was not given, that a poll might be demanded; (6) defendant had the right to rescind by reason of misrepresentation of facts by plaintiff. We may dispose of some of these defenses with little discussion.

[6] Thus, we are unable to accord much consideration to the defense 3, that the agreement may be avoided because the subject-matter was not in esse. At the time of the agreement, it was a matter for negotiation to determine what the issue should be as to terms within the maximum conditions of the by-law and the statutes. When Mr. Mann appeared with defendant's tender, plaintiff had regularly passed all the preliminaries to an issue of debentures; it was a matter well within its powers to seek and enter into an agreement for their sale; it was a step consonant with settled business principles, which it could not prudently avoid taking, and at the same time be faithful to the public interests.

No statute of the province instructed the plaintiff board in what manner it should market its securities, wherefore it was at liberty to proceed according to the approved practice, which it in fact did follow. There can be no question but that the negotiation of municipal bonds is a proper subject of contract. In Griffith v. Burden, 35 Iowa, 138, the court (page 143) says of municipal bonds:

"The authority to sell the bonds in the market is an incident attendant upon and growing out of the power to issue them."

This is not a case in which a municipal corporation undertakes to exercise its legislative powers at some future time in a particular way, as defendant's counsel argue. When the agreement of April 12–16 was concluded, all the legislation (by-law 16) essential to the proposed issue had been had, notice for poll had been given, authority to issue was granted, advertisement for tenders was had, and several competitive bids were on hand, including defendant's; there remained for the board but to accept the best tender and to execute the power it then possessed. Thereafter, as to it, administration only was the line of action. It is entirely clear that if a municipal body, at this stage, lacks competency to contract for the sale of its proposed issue, but must first get it into physical existence, the market therefor might be narrowed, to the detriment of the best sale. In this case defendant reserved the right to determine the physical characteristics of the issue, evidently according to that privilege an element of value. This question seems not to have troubled the Chief Justice of the province in trying, at about the time the parties here were dealing with each other, the Case of Tanner, considered infra.

[7] Defense 4, we think, is not well taken, when we compare the statement of the defense with the reservation the defendant made of its right to depend upon the opinion of its attorneys. That reservation, again quoting it, was as follows:

"Prior to our taking up and paying for said debentures, you are to furnish us complete transcripts of all proceedings leading up to and culminating in the issuance of said debentures, evidencing their legality to the satisfaction of our attorneys. Should our attorneys deem any additional by-law necessary, you are to pass same."

The evidence shows that plaintiff did everything required of it under this provision of defendant's proposal. That called for action by defendant's attorney after, and as a result of, examination of the transcripts of all the proceedings affecting the issue; and it is further limited in its effect by the provision that plaintiff should perfect its record of proceedings by the passing of any additional by-law deemed by defendant's attorneys to be necessary. The correlative of this provision clearly is that counsel for the defendant, after being afforded a scrutiny of the proceedings already had, should be diligent in suggesting necessary corrections and additions; otherwise, refusal to approve after plaintiff had adopted defendant's suggestions, and after conditions had been reached which were existent when this issue was rejected by defendant, ought not to be respected. We deem it clear that this provision in defendant's proposal should be construed as intended to further the issue of the debentures and the interests of both parties therein, and not to afford the defendant a final loophole of escape from its obligation after plaintiff had met all of its demands.

But we may go farther than this. We find in this record an approval of this issue by the defendant under this very reservation. When, July 22, was first voiced a dissatisfaction with the agreement, culminating in a rejection of the issue three weeks later, defendant knew, and had known for three months, everything which is now said to affect the validity of the issue. Indeed, with the single exception of the fail-

ure to notice by-law 17 for a poll, all the matters now alleged as affecting invalidity were taken by the board at defendant's instance, or happened under its supervising. With the transcripts of all the proceedings of the board before it, and having submitted the same to the scrutiny of its counsel, defendant itself prepared the debentures, and sent them to plaintiff for execution, without a word of criticism respecting the state of the record. In its letter of April 22, acknowledging receipt of transcripts of proceedings, defendant said:

"We will turn same over to our attorneys and promptly advise you as to the result of their examination."

The sending of the blanks for execution, and at the same time offering no criticism of the record, was tantamount to an approval, and opportunity thereafter to disapprove on grounds then in evidence became exhausted. It cannot be that the right to reject remained should defendant repent its tender. The cases cited by the defense (U. S. Trust Co. v. Guthrie Center [Iowa] 165 N. W. 188; Thurman v. City of Omaha, 64 Neb. 490, 90 N. W. 253) are not in point, because of the active participation, in the instant case, of defendant in the production of the debentures. In the Iowa case, supra, a very late decision, in which authorities are extensively reviewed, it is held that the refusal must be reasonable, even if on mistaken grounds—its good faith obvious. We know of no authority to the point that such a reservation as this is effectively used, when its exercise is attempted on the ground that the party's own handiwork in the result has produced theoretical defects.

Defense numbered above 5 has already been fully considered in our conclusion that by-law 17 was mere surplusage.

Defense No. 6, has, in our judgment, but a color of strength. If there had, indeed, been a substantial misrepresentation of fact, such a defense, of course, would be subject to serious consideration, if made at the right time. Here, however, we are unable to find any such misrepresentation, and we do this without determining the issue of veracity between Mr. Mann, the representative of the defendant, on the one side, and the several officers and members of the board, on the other, speaking to the same subject. The subject-matter of their alleged statements was the extent of the district and the amount of land to be assessed for school purposes. It is quite evident that, if there was any misunderstanding at all upon the question, it was due to the fact that the school officers spoke with a knowledge of the law of the province on these matters, and Mr. Mann heard in actual, probably, but certainly not in legal, ignorance thereof.

Substantially all that is claimed by defendant by way of misrepresentation was that the school officers stated to Mr. Mann that the limits of the district were the same as the city, and that all the lands in the district were subject to taxation for school purposes. These statements, interpreted in the light of the laws to which we have already referred, were literally true. The district had the same limits as the city, but the law provided for the anomaly of two districts having the same boundaries. The school officers had the right to assume that one

there for the purpose of buying debentures understood the laws pertaining to such obligations. These alleged statements are readily seen to relate themselves exclusively to the laws when we consider them to be, as they are, but opinions as to the way in which the laws affect property within the geographical lines of the district. At the very best for defendant, the statements direct a scrutiny of the law as the only criterion of their credibility.

Together with the alleged statements to Mr. Mann, the officers of the board exhibited a document, known as "Information, re Sale of Debentures," containing statistics relating to the extent of the district and the amount of taxable property, with other pertinent information. This statement has, indeed, an ambiguity in it, which is resolvable, however, when read in the light of the law, or, at the least, its terms are sufficient to excite inquiry to one heeding the law. The area of the district is given therein as "7,850 acres, same as city of Regina." In the same statement, however, the city's net assessment is given as $54,966,142, and that of the district (having the same area!) at $50,711,054. School rates are based upon the municipal assessment, and the collection is done by the city officials (section 89, chapter 101, Exhibit 3J), and, "subject to the School Act" (thus referring the inquirer to the sections which provide for separate schools), the property liable to be taxed for school purposes shall be that under taxation for municipal purposes (section 90, chapter 101). To one, then, with knowledge of the pertinent laws, the ambiguities of this statement disappear—the public school district has a tax roll of $4,255,088 less than that of the city, because there is a separate district in the same area. This document must be construed as a whole; so construed, it does not misrepresent. The authorities offered as typical cases of misrepresentation of fact justifying rescission (Long v. Athol, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. [N. S.] 96, and McManus v. Philadelphia, 211 Pa. 394, 60 Atl. 1001) present facts so at variance in character with those before us as to be of no persuasion to an opinion contrary to the above.

[8] It is the first two defenses which are most extensively argued. At great length both sides, searching ancient authorities, discuss the necessity for a corporate seal in the contract between plaintiff and defendant, and earnestly are argued the features of the so-called contract which, defendant claims, demanded ultra vires acts of the plaintiff. What counsel on both sides mean by the contract here is the written proposition of defendant, which we have quoted in the statement of the case, followed by the resolution of the board accepting the same, which latter, defendant claims, should have been sealed of record to be valid. The question of necessity for a seal is important only in the view which may be taken that the ultra vires terms may be eliminated, leaving a complete agreement within the power of the district to make. It seems, therefore, advisable to notice it, considering the value attached to it by counsel on both sides.

Passing upon the question, we reach the conclusion that, at common law, a seal was not necessary in such a situation as here. The corporation, by the statute, consisted of the five trustees only; the

unsealed resolution was formally recorded as the act of the corporation in session, and we do not think that to have impressed a seal upon the record page would have added to the force thereof as binding the corporation to the act there engrossed. A by-law must be sealed, because the statute (106) says so; but nowhere else is it required that any other record page be sealed as a formality of official action. Section 88 says:

"No act or proceeding of any board shall be deemed valid or binding on any party which is not adopted at a regular or special meeting at which a quorum of the board is present."

Unless the converse, that any act or proceeding adopted at a proper meeting (within the corporate power to do, of course) is "valid or binding," is an interpretation in derogation of the common law in force in Saskatchewan, and hence to be seriously questioned, that would seem to be a necessary corollary. As far back as 1 Anne, Chief Justice Holt said (Mayor of Thetford's Case, 1 Salk. 192):

"That though a corporation cannot do an act in pais without their common seal, yet they may do an act upon record."

And the reporter says that this conclusion was reached "after search of precedents which were found both ways," a situation which two centuries of adjudication has not relieved. The discussions of Mr. Justice Gwynne and Mr. Justice Patterson, in deciding Bernardin v. Municipality of North Dufferin, 19 Canada Supreme Court, 581, we think, clarify the question as applied to the instant facts. The authorities upon which both sides here mainly rely are there considered and compared, to the result, we think, of justifying the conclusion that, except as particularly demanded in case of a by-law, intra vires acts of record, taken regularly at a proper meeting of the board in question, need not be sealed. It seems very clear that the English and Canadian decisions brought to our attention, when analyzed respecting their individual circumstances, justify the language of Mr. Justice Story in Bank v. Dandridge, 12 Wheat. 64–68, 6 L. Ed. 552, that the common-law doctrine that a seal is necessary to evidence acts of a corporation aggregate is "inapplicable to acts and votes passed by such corporations at corporate meetings."

The consideration given to the apparently conflicting authorities by the two justices in the Bernardin Case establishes that the classification of the exceptions to the rigid common-law rule, employed by the text-writers, such as Anson, is much too inelastic and restricted. The language used by Mr. Justice Gwynne, on pages 591 and 592 of the Bernardin Case, becomes all the more persuasive to the conclusion we reach here, when the difference between the North Dufferin and plaintiff corporations is understood. In the case of the municipality of North Dufferin, it was all the inhabitants who constituted the body corporate, whose authority is committed, in exercise, to a representative body (the council) for convenience. In the instant case, the very individuals who acted of record on April 16 are the corporation, not the ratepayers of the district.

While we have not passed unnoticed the numerous authorities cited on this question, it is impossible to consider them all. It is sufficient here to point out criteria which differentiate from the case at bar certain of them which superficially seem important. Thus Manning v. Winnipeg, 21 Manitoba, 203, turns on the fact that, by charter, the city council could act in the premises only by by-law which should be sealed, and the same limitation marked the municipal law of Ontario, which affected the decision in Leslie v. Township of Malahide, 15 Ontario, 4. In the former case on appeal, Mr. Chief Justice Howell distinguishes Bernardin v. Municipality of North Dufferin, supra, on this precise point, and directs attention to the divergence in facts in this respect between that case and a subsequent decision of the same court (Waterous v. Palmerston, 21 Canada Supreme Court, 556). In the case at bar no such imperative legislation exists.

We therefore see no objection in the common law to construing section 88 as sustaining the validity of a contract closed of record without seal, as here. Whether or not that part of the opinion of Mr. Chief Justice Wetmore in Brandon Construction Co. v. Saskatoon School Board, 5 Saskatchewan, 250, which is to the same effect, is mere obiter, as claimed by defendant, upon which we entertain no judgment, it seems to us to very clearly state the local law, with which the learned justice is, of course, the more familiar.

[9] We think, however, if the provision for payment of the debentures in money of the United States is to be regarded as a vital part of the contract, the latter bound neither party, sealed or otherwise. This was something which plaintiff could not lawfully agree to. Section 127, as we have seen, prescribes three alternative forms of proposed debentures, one of which, "or to the like effect," must be followed. The first two provide that the repayment shall be "in lawful money of Canada." The third form, which is the one the parties of necessity had in mind to, and did, follow, allows an alternative money in the shape of "pounds sterling." The fact that one alternative, only, to money of Canada, is specified, excludes the thought that any other was within the power of the board to agree to. It is notorious that rates of exchange between foreign countries fluctuate, so that there is no assurance that, even in two having the same standard of value, as well as the same denominations, the money of one may at any time be the equivalent in substantial value to that of the other; and we are decidedly of the opinion that the issue of debentures payable in the money of the United States is not a substantial compliance with the law requiring them to be made payable either in that of Canada or in pounds sterling. But the circumstances here constrain the court to hold that the provision in question does not avoid the contract as a whole. In Railroad Co. v. McCarthy, supra, the court says (page 267 of 96 U. S. [24 L. Ed. 693]):

"The doctrine of ultra vires, when invoked * * * should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong."

And in Ill. Tr. & Sav. Bank v. Arkansas City (8 C. C. A.) 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, it is said, in a syllabus by the court:

"When a divisible part of a contract is ultra vires, but that part is neither malum in se nor malum prohibitum, the remainder of the contract may be enforced, unless it appears from a consideration of the entire agreement that it would not have been made independently of the part which is void."

Here the parties put a construction upon their agreement which abandoned the ultra vires provision, thereby enabling us to say that that condition was not, in fact, an indivisible one. Of course it was not intrinsically illegal, nor may it be said that it was malum prohibitum; it was simply ultra vires—not specifically prohibited. We are therefore justified to treat the agreement or contract as if this clause were not in it. Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. Ed. 594; Topliff v. Topliff, 122 U. S. 121, 131, 7 Sup. Ct. 1057, 30 L. Ed. 1110.

[10] But, even if we say that the agreement was void, still we think such a compact is capable of initiating mutual responsibilities upon the parties thereto which may become binding, as if by valid contract, as the parties separately proceed under it by way of execution and their procedure tends to and eventuates in a legal result, and, further, if each, in the process of execution, parts to the other with what is equivalent to consideration, i. e., in the dealings they have with each other respecting the matter, each has become under obligation to the other, or has parted with something because of the other. Any corporation, municipal or otherwise, may become bound by ratification, adoption, or acquiescence upon a contract, express or implied, which it might otherwise disavow, provided it is a compact into which its corporate powers permit it to enter. It is bound, in this respect, by the same considerations affecting individuals. This is the principle of the celebrated case of Curtis et al. v. Leavitt, 15 N. Y. 9, and the numerous cases cited amply support the text of Brice, Ultra Vires, chapter IV, section 220, and chapter VII, and of 28 Cyc., 675, 676. See City of Findlay v. Pertz (6 C. C. A.) 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188; First Nat. Bank of Red Oak v. City of Emmetsburg, 157 Iowa, 555, 138 N. W. 451, and notes thereto in L. R. A. 1915A, 990; Weil et al. v. Newbern, 126 Tenn. 223, 148 S. W. 680, Ann. Cas. 1913E, 25, and notes thereto in L. R. A. 1915A, 1023; Frank v. Board of Education of Jersey City, 90 N. J. Law, 273, 100 Atl. 211, L. R. A. 1917D, 206. This principle is involved in much of the argument in the decisions under the common law discussed in Bernardin v. Municipality of North Dufferin, supra, which find the special circumstances to avoid the common-law rule respecting the necessity for a seal.

It is a well-settled doctrine, of long standing, that corporations may be bound by implied contracts, to be deduced from authorized corporate acts, or even from parol acts of its officers, if not restricted by statute or charter, or if, properly executed, they would have been within specific or implied powers. Bank of Columbia v. Patterson, 7 Cranch, 299, 3 L. Ed. 351; Maher v. City of Chicago, 38 Ill. 266; Peterson v. Mayor, etc., of New York, 17 N. Y. 449, 453; 28 Cyc. 666, 667, and cases cited; Bernardin v. Municipality of North Dufferin, supra.

Upon these premises it seems incontestable that both plaintiff and defendant were bound in contractual implications respecting this is-

sue of debentures at the time when defendant signified its intention not to take it. What was the situation at this time? The defendant, relying upon the conduct of the board, had gone to substantial expense to prepare the debentures; had employed its energies towards finding a market therefor; had incurred substantial preliminary expenses, which were justified by its allowable confidence that the plaintiff would meet its obligations; had retained counsel to pass upon plaintiff's obligations. All of these outlays and inconveniences were factors of substantial damages it would sustain, should plaintiff finally refuse it the securities, and they were likewise substantial incidents binding upon plaintiff by way of executing a contract of which they were implications. On the other hand, the board had incurred expense in advertising for tenders, which was uselessly made, if it could not hold defendant to its proposition, for undoubtedly other tenders made in competition with defendant's were not available for the board's reconsideration. The latter, also, by way of executing the agreement, had met every demand made upon it by the defendant, even, in response to exigencies urged by defendant, going to the trouble of sending its officer to another province to get the minister's counter signature, and thus to anticipate, for defendant's benefit, the date of delivery of the first $100,000. Finally, it had executed, ready to deliver, securities which met the defendant's approval, and which were valid and indefeasible obligations of the district.

Pending the taking of these steps it had taken advantage of a law, knowledge of which concluded the defendant, and had entered into obligations requiring the expenditure of the money which these securities were to bring into its treasury. Failure to negotiate the debentures involved it in serious embarrassment, which only the default of the defendant brought about. These matters involved defendant in responsibility to plaintiff. If the contract of April 16 had avoided every technical criticism urged against it, i. e., if it had been sealed and had contained no terms and conditions which were beyond the corporate powers of the plaintiff, everything done between its date and the date of defendant's repudiation, by either defendant or plaintiff, was consistent therewith, and was an act pertinent to the execution thereof, wherefore the implied contract was precisely on valid lines. On the principle of the decisions in Township of King v. Beamish, 36 Q. L. R. 325, Marshall v. Queensborough, 1 Simons & Stuart, 523, Paterson v. Railway Co., 17 Grant, 521, and others of the same class, it is very difficult to see why mutuality has not here obtained, justifying relief at law, as in controversies of the character cited specific performance was enforced because of the inadequacy of the law.

We very much doubt, and are prepared to decide adversely, if necessary, to a decision in this case, whether defendant is competent to urge these alleged ultra vires conditions at this time. The analogy is compelling between this situation and that in State ex rel. v. Mastin, 103 Mo. 508, 15 S. W. 529, where it is held that a property owner, who assisted in instituting proceedings for the issue of local public obligations, and whose lands are being levied upon to secure their

ratable proportion of the debt thereby created, may not plead that the adventure in which he had a part was ultra vires.

[11] Only because of the able and elaborate arguments in this case have we extended this opinion to all the foregoing matters. We think that all defendant's misgivings concerning the validity of the issue were groundless, in view of the terms of sections 127 and 129. These fears must dissipate against the countersigning of the minister. When that is done, the obligations become "sufficient to bind the district and create a charge or lien against all school property or rates," for such counter signature "shall be conclusive evidence that the district has been legally constituted and that all the formalities in respect to such loan and the issue of such debentures shall be thereby conclusively established, and its validity shall not be questionable by any court in Saskatchewan, but the same shall, to the extent of the revenues of the district issuing the same, be of good and indefeasible security in the hands of any bona fide holder thereof." While ordinarily a bona fide holder is one who purchases in good faith without notice of alleged infirmities, that is not necessarily the only definition. The qualification of bona fides may be used only in the sense that fraud is not present in the transaction under consideration.

In O'Connor v. Gertgens, 85 Minn. 481, 485, 89 N. W. 871, it is said, in a syllabus prepared by the court, amplified in the opinion by consideration of the authorities, that:

"The expression 'bona fide purchaser' is oftentimes used ambiguously, and is construed in various ways. The context must be examined, and the expression considered with reference to its use and the connection in which it is found. It may mean without fraud or deception. It may mean without notice of others' rights. It sometimes signifies honesty of purpose, as distinguished from bad faith. To be a bona fide purchaser may, under some circumstances, require the payment of the consideration or purchase price, but not always. In the statute in question the term 'bona fide' was used as the opposite of 'mala fide.'"

Either the qualification "bona fide" in section 129 has that restricted sense, or we must think the provision in question to be a piece of superfluous legislation, for in Canada, as in the United States, the principle has long held that one is protected who purchases in good faith, without notice, from one who is aware of infirmities preceding execution, public securities which are regular and lawful on their face. Webb v. Commissioners of Herne Bay, L. R. 5 Q. B. 642. Before the act was passed, it was for the first purchaser of debentures to ascertain all facts pertinent to their validity. The legislation, however, seems intended to change the law by making the countersigning close the door to investigation of the antecedent situation and to establish the force of the issue as a lien. This statutory provision, to justify its enactment at all, appears to necessitate the construction of the term "bona fide holder" to mean one who then deals in good faith with the issuing body; i. e., a first purchaser who is free from actual fraud and who pays value. More than 40 years ago, one of the ablest courts of one of the middle western states (Griffith v. Burden, 35 Iowa, 138, 143) noted the steady tendency to strip from municipal securities the impedimenta of the law merchant, that the public inter-

est might be better served in their marketing. The legislation before us is capable of construction in line of that beneficent tendency of the law; otherwise, it has little function. We are constrained to give it a construction, if reasonably possible, which will magnify its usefulness.

If there is any difference in principle respecting the accrual of mutuality between the case of an accepted tender for the purchase of public securities and that of a common subscription, the favor, we think, would be with the former. In the case of a subscription, it is settled that substantial effort or expenditure in reliance thereon to further the object thereof will convert the gratuitous promise into a binding contract. 37 Cyc. 486; Sargent v. Nicholson, 25 Manitoba, 638. It can hardly be said that a formal tender in response to a public call offering public securities is ever a gratuitous promise; but, even so, the authorities just cited would bring defendant to court under circumstances as here.

This construction, we think, is consistent with that of analogous Saskatchewan statutes, 207 and 208 of the City Act, by Chief Justice Haultain in the trial of Canadian Agency, Limited, v. Tanner, 6 Saskatchewan Reports, 152, 161, in which the defendant was held to pay for city stock for which he had subscribed, and which had been approved by the minister of municipal affairs. Tanner's defense that there were infirmities antecedent to the minister's indorsement was held unavailable. Other cases cited (Harper v. Township of East Flamboro, 32 O. L. R. 490; Village of Georgetown v. Stinson, 23 Ontario Reports, 33) indicate general Canadian approval of legislation of this character.

We hold, therefore, that defendant was not justified, for anything shown upon this record, in its refusal to take the balance of this issue, and that there accrued to plaintiff, through its refusal, a right of action in damages.

[12] What should be the measure of damages? It is argued for defendant that, at the worst, damages would be nominal, on the theory that there is here but a breach of an agreement to loan money, and we are referred to Western Wagon Co. v. Welch, L. R. Chancery, 1892, 271, and Larios v. Bonany y Gurety, Privy Council Appeals, 5 L. R. 346. Our reading of these decisions fails to suggest much weight to the point as it is sought to apply it here. The latter case, particularly, is authority to the proposition that, even where the contract is merely to extend credit or to loan money, substantial damages may be recoverable, if substantial loss accrues to the obligor through reasonable reliance upon it. But, it seems to this court, an accepted offer to buy public securities, made in response to a public advertisement for tenders, is something more than an agreement to loan money; that it becomes a sale of negotiable paper, which differs from ordinary paper, in that it has many of the characteristics of chattels. Griffith v. Burden, supra.

We think it would be mischievous to hold that, until substantial progress was made by way of execution, such a contract was merely a naked pact. Public policy suggests insuperable defects in such a

doctrine. So far as we know, the exaction of a deposit guaranty by bidders has never been questioned, and in no case, so far as we know, involving a deposit of that character, has there been an attempt to so belittle the fundamental agreement. The right to exact a deposit has been upheld, because the right to actual damages is recognized. The dearth of authorities suggests that the point made by defendant's counsel is unusual. We are aware of but one. City of Junction City v. Bank, 96 Kan. 407, 153 Pac. 28. The syllabus is by the court, paragraph 5 reading:

"Where a city offers its paving bonds for sale and the successful and accepted bidder repudiates its contract of purchase, the city may recover from such bidder compensatory damages, even if these exceed the sum which the bidder puts up as a pledge of good faith accompanying the bid."

This case is not very fully reported, and the same justice writing the majority opinion indulges in a written dissent; but upon the precise question in the paragraph above quoted the court is unanimous. In the body of the majority opinion the court says of the deposit:

"The purpose of a certified check to accompany a bid is well known. It was a pledge of good faith, and to guarantee a recoupment or partial recoupment for any contingent loss to the vendor if the contract was broken by the vendee."

Recovery in this Kansas case was ordered, allowing the city damages for the difference between the bid and the price obtained on a resale, with a recovery of the excess of damages beyond the amount of the check.

Whatever view may be taken of the April agreement, i. e., whether it is a mere subscription, or a promise to loan money, or a contract void because ultra vires, the measure of recovery, under the circumstances here, should be the difference between the bid price of $400,000 of the securities and the price obtained on resale, as it would be if the agreement is held to be a binding contract. If we must assume that the actionable contract between the parties is to be implied, one of the terms necessarily found is the agreement to pay 95 per cent. of par and accrued interest, because it is inevitable that all the dealings between the parties from April 12 to August 15 were on that basis.

We come now to consider the effect on the damages of defendant's subsequent offer of 92 per cent. of par. In this connection it is to be recalled that in its letter of August 15 defendant specifically extended the privilege to plaintiff to seek another market for the balance of the issue, and there is no evidence here tending to show that diligence and good faith were not exercised in the sale at 90, nor that the price was inadequate. This sale, then, would fix plaintiff's damages at the difference between 90 and 95 on $400,000, or $20,000, with interest, and we do not think that defendant's bid to pay 92, made pending the sale to a third party at 90, affects the situation. For the plaintiff to have accepted that bid meant an abandonment of its right of action against the defendant because of the latter's failure to take the issue at 95, for defendant extended a new bid on the theory that it was absolved from its obligations under the old tender. Besides, at the time defendant's new bid came in, plaintiff had undoubtedly

entered into obligations with the final purchaser, which were capable of giving it much embarrassment.

We find, therefore, for the plaintiff, with damages and interest as prayed for.

BANNING v. PENROSE.

(District Court, N. D. Georgia, N. D. January 13, 1919.)

1. ALIENS ⟸68—NATURALIZATION—COMPLIANCE WITH STATUTE.
Where a native of Germany, as shown by the record of his naturalization, renounced allegiance to every foreign potentate, state, or sovereignty, and particularly to the Emperor of Germany, that was a substantial compliance with Rev. St. § 2165, though the Emperor's name was not given.

2. CITIZENS ⟸13—EXPATRIATION.
A naturalized citizen who returns to the country of his origin does not lose his citizenship, though he remains there indefinitely, if his purpose be to return to the land of his adoption; the test being one of intention.

3. CITIZENS ⟸13—EXPATRIATION.
Where a native of Germany, after becoming naturalized, returned to the land of his nativity, *held*, that his indefinite stay did not work an expatriation so as to deprive him of his rights as an American citizen on his return.

4. HABEAS CORPUS ⟸25(1)—ALIEN ENEMIES—INTERNMENT.
A duly naturalized citizen who has not lost his rights, if arrested as an enemy alien on Presidential warrant issued under Rev. St. § 4067, as amended by Act April 16, 1918 (Comp. St. 1918, § 7615), is entitled to be discharged on habeas corpus.

At Law. Petition by C. F. Banning for writ of habeas corpus against C. W. Penrose, Commandant of Ft. Oglethorpe, Ga. Writ issued, and petitioner ordered discharged.

Richard W. Martin, of Pittsburgh, Pa., and J. A. Branch and William Schley Howard, both of Atlanta, Ga., for petitioner.

Hooper Alexander, U. S. Atty., of Atlanta, Ga., for respondent.

NEWMAN, District Judge. This is a proceeding by C. F. Banning against C. W. Penrose, who is commandant of Ft. Oglethorpe, Ga., a military encampment. Mr. Banning asks that, on a writ of habeas corpus, he be discharged from his detention and confinement at Ft. Oglethorpe, where he was interned, as I understand it, by an order of the Attorney General, acting for the President, under section 4067, Rev. St., as amended by the Act of Congress approved April 16, 1918, 40 Stat. L. 531, c. 55 (Comp. St. 1918, § 7615), and the President's proclamation issued thereunder.

There has been a hearing on the petition, considerable evidence taken, and a lengthy argument. It is conceded at the outset that the acts above referred to are constitutional acts, and that the proclamation of the President was properly issued in pursuance thereof. No question is made as to the right to do this, if it was directed toward an alien enemy.

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At the time of his arrest and confinement at Ft. Oglethorpe, Banning was residing in the city of Pittsburgh, Pa. He is a bachelor, but he had rooms there and was staying there at the time, and had been for some time in that city.

[1] It appears that Banning, while working in New York City, in 1884, filed his declaration of intention to become a naturalized citizen of the United States. After that he went to Pittsburgh, where he worked for a firm called Naylor & Co., and in 1899 he and another employé of the firm of Naylor & Co., S. G. Cooper, formed a limited partnership under the name of Banning, Cooper & Co., Limited, and engaged in some kind of a brokerage business. In 1903 he applied to a state court in Pittsburgh, the court of common pleas, for naturalization, and was naturalized and received a certificate. The respondent here does not question at all the fact that he applied for naturalization, went through the form of naturalization, and received a certificate; but the act of Congress on the subject of naturalization (Rev. St. § 2165) provided that—

> An applicant for naturalization "shall, at the time of his application to be admitted, declare, on oath, before some one of the courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and, particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject."

The United States attorney, in his brief which I have before me, says:

> "I assume, therefore, that the court will give no consideration to any question or suggestion whatever except this: Is Mr. Banning an American citizen or an alien enemy within the classes named in R. S. 4067?"

I agree thoroughly with the United States attorney in his suggestion about this; that the only thing for the court to consider in this case is whether or not Mr. Banning, at the time of his arrest and internment, was an alien enemy or a citizen of the United States. If he was regularly naturalized and has not expatriated himself, then he is not an alien enemy, but a citizen, although a naturalized citizen, only.

Mr. Banning, in his naturalization, as shown by the records of the same, renounced all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly to the Emperor of Germany. The United States attorney contends that this renouncing of his allegiance to the Emperor of Germany is not sufficient, that he should give the name of the sovereign of the country of which he was a subject, or the name of the sovereign whose subject he was, to state it more correctly.

I have thought about this question considerably and have examined it pretty thoroughly and carefully, and my own reasoning and the authorities which impress me as the most important satisfy me that the act of Banning in renouncing allegiance to the German Emperor, as he did, is substantially sufficient. In renouncing his allegiance to the German Emperor, he clearly indicates the country with which he was severing his relations and leaving in order to take citizenship in

this country. It seems to me that the purpose and requirements of the act are very clearly complied with in a way which ought to be sufficient.

I have a case before me on this subject, Ex parte Smith, an Alien, 8 Blackf. (Ind.) 395, which is a decision by the Supreme Court of Indiana and is very brief. It is this:

"The declaration is objected to, because the party, in declaring his intention to renounce his allegiance to the queen of Great Britain and Ireland, does not give the name of the queen, viz., Victoria. We do not think the objection should prevail. The meaning of the declaration is the same as if the name of the queen had been inserted. The party by declaring his intention to renounce all allegiance and fidelity to every foreign prince, potentate, state, and sovereignty whatever, and particularly to the queen of Great Britain and Ireland, has complied substantially with the act of Congress on the subject."

This is the view I take of the matter here. It is, at least, a substantial compliance with the act and should be deemed sufficient. See, also, In re Denny (D. C.) 240 Fed. 845; In re Markowitz (D. C.) 233 Fed. 715; and United States v. Salomon, 231 Fed. 928, 146 C. C. A. 124.

[2, 3] The United States attorney also insists that, even if Banning was properly naturalized, he afterwards expatriated himself by his conduct in going to Germany and residing there some time, in Berlin. The authorities all are (and it would be useless to refer specifically to them) that a man who has become a naturalized citizen of one country, and goes back to the country of his origin, may stay there indefinitely, if his purpose is, all the time, in his mind, to retain his citizenship in the country of his adoption and to return there some time in the future. It is a question more of intention than anything else. That is the law as contained in all the decisions and the state papers read by counsel in this argument. Of course, various questions arise as to how his intention can be shown and in what way it can be shown.

I do not think there is anything in this case to show clearly that Mr. Banning ever intended not returning to the United States. On the contrary, every part of the evidence, which I will not undertake to go into in detail, and some of it very strongly, indicates that his intention was to retain his home in the country of his adoption. The evidence very clearly shows that Banning had an old father in Germany to whom he was devoted and whom he desired frequently to visit, and this seems to have been very largely the motive which actuated him in going over there, while from his own evidence it is clear that he enjoyed the life of Berlin and had rooms, as if expecting to remain there a while.

Believing that he was regularly naturalized, the evidence that he intended to take up a permanent residence in Germany should be reasonably clear. It is not so here. There are some things in the evidence, to which the United States attorney has referred, which give ground for argument that his purpose was otherwise; but I do not see how, taking all the evidence together, any conclusion can be reached which would show expatriation on his part. His using Berlin as his place of residence at other times, under other circumstances, is rather against his contention; but it is a circumstance which is readily

explained by his using that during the time he was over in Germany as "an address" more than anything else.

[4] The United States attorney stated several times in argument that if the evidence showed that Mr. Banning was a citizen at the time of his arrest and confinement at Ft. Oglethorpe, and not within the classes named in section 4067 of the Revised Statutes, he ought to be discharged. He is clearly correct in that, and I being of the opinion that he was a naturalized citizen at the time of his arrest, then he is entitled to an order on this writ of habeas corpus for his discharge, and an order may be taken to that effect.

ATWOOD et al. v. RHODE ISLAND HOSPITAL TRUST CO.

(District Court, D. Rhode Island. January 13, 1919.)

No. 96.

1. WILLS ⟸267—SUIT TO SET ASIDE WILL—INDISPENSABLE PARTIES.
To a suit against the trustee of a fund to be eventually distributed between beneficiaries to set aside a provision of the will of the creator of the trust which devised his residuary estate to the trustee to be added to the trust fund, the beneficiaries of the trust are proper, but not indispensable, parties.

2. WILLS ⟸267—SUIT TO SET ASIDE WILL—PARTIES.
A museum to which a testator bequeathed objects of art, on condition that his residuary estate proved sufficient to increase a trust fund to a certain sum, is not an indispensable party to a suit by heirs against the trustee to set aside the residuary clause of the will, although an adverse decision would indirectly deprive it of the bequest.

In Equity. Suit by Kate Atwood, individually and as administratrix, and Theodore Davis Boal, administrator, against the Rhode Island Hospital Trust Company, administrator and trustee. On motion to dismiss bill and plea to jurisdiction. Motion denied and plea overruled.

Sheffield & Harvey, of Newport, R. I., for complainants.
Tillinghast & Collins, of Providence, R. I., for respondents.

BROWN, District Judge. By motion to dismiss the bill, and by plea to the jurisdiction embodied in its answer, the Rhode Island Hospital Trust Company, which is sued both as administrator with the will annexed of the estate not already administered of the late Theodore M. Davis, of Newport, R. I., and as trustee under a certain deed of trust executed by said Davis in his lifetime, makes the objection that indispensable parties are omitted.

[1] The bill relates to the residuary estate and to the provisions of the will contained in its ninth clause. The plaintiffs allege that this is void, and in consequence the residuary estate is intestate property to which the plaintiffs are entitled.

If the plaintiffs should prevail, the defendant as trustee under the deed of trust would be deprived of the residuary estate, which, by

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the ninth clause of his will, the testator had provided should be converted into cash and the proceeds paid over to the defendant, trustee, as a part of the principal held by it in trust, and as though said proceeds had been deposited by the testator as a part of the trust estate.

The deed of trust provides that upon the termination of certain lives the principal shall be divided into equal shares and distributed among certain named beneficiaries. These shares, if the plaintiffs prevail, will be diminished in value, and the loss of the residuary estate will thus fall upon these beneficiaries under the deed of trust.

By the seventh clause of the will, a bequest is made, to the Metropolitan Museum of Art of New York, of works of art and an Egyptian collection, but subject to the condition that, if the principal of the trust estate held by the defendant as trustee shall not be sufficient to make each share equal at least to $50,000, sufficient of said works of art to realize a net amount equal to the deficiency in the trust estate are bequeathed to the defendant as trustee, so that the principal shall be increased to an amount sufficient to make each distributive share at least $50,000.

That the testator in this way has insured these beneficiaries against depreciation of the amount of their shares does not, as plaintiffs suggest, make it a matter of indifference to the beneficiaries what the result of this suit may be. The plaintiffs can derive no rights from the fact that the beneficiaries may be thus preferred to the Metropolitan Art Museum. Their shares are not limited to the sum of $50,000, and they are entitled to their full shares, whether greater or less than that sum, and have the right to relieve the art museum from the condition.

That the beneficiaries would be indifferent to the fulfillment of the testator's primary intention to devote his works of art and his Egyptian collection to the art museum is a suggestion that is both inadmissible and irrelevant to any question before us. The beneficiaries as cestuis have a direct interest in the subject-matter of the suit, and the joinder of those defendants who are resident in this district does not appear to be impracticable because of their number. On the contrary, even if we may dispense with those parties whose joinder would oust this court of jurisdiction of a bill based on diversity of citizenship, it is yet desirable that we should have before us representatives of the class of beneficiaries who are to share in the final distribution, as well as the trustee. Equity Rule 38 (see Hopkins' Fed. Eq. Rules [2d Ed.] p. 203, 198 Fed. xxix, 115 C. C. A. xxix); Hartford Life Ins. Co. v. Ibs, 237 U. S. 666, 672, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765; Wallace v. Adams, 204 U. S. 415, 425, 27 Sup. Ct. 363, 51 L. Ed. 547; McClelland v. Rose, 247 Fed. 721, 723, 724, 159 C. C. A. 579, Ann. Cas. 1918C, 341; Merchants' & Mfrs.' Traffic Ass'n v. U. S. (D. C.) 231 Fed. 292, 295.

[2] The Metropolitan Art Museum is not a beneficiary of the trust, and therefore is not entitled to share in the residuary estate. Its bequest, however, is subject to deduction in case the trust fund is insufficient to make each distributive share equal to $50,000. It may there-

fore be said that it has an interest that the principal of the trust fund, from whatever source derived, shall be sufficient in amount to make each distributive share equal to $50,000, and that it shall in no way be reduced below such amount. It hardly can be contended, however, that this general interest makes it a necessary party to all suits in which the trustee may be charged with the duty of defending claims against the trust estate, or with the duty of recovering assets which may form part of the trust estate, and in which may be involved an amount whose loss or nonrecovery will cause a deficiency in the principal, and thus in distributive shares.

Whatever the cause of the deficiency—shrinkage of values, adverse judgments in suits for or against trust funds, or other cause—the existence of such deficiency as matter of fact makes operative the condition of the seventh clause of the will.

To a suit by the trustee against the art museum it would seem to be no answer to say that a judgment, whereby the principal was in fact made insufficient, was in law an erroneous judgment, if it was binding on the trustee and unimpeachable for fraud or collusion. The question would be the actual amount of principal available for distribution; not whether, according to the opinion of some other court, it would have been more had the law been otherwise interpreted.

The question whether funds in the hands of the administrator c. t. a. d. b. n. shall be paid to the complainants, or to the trustee under the deed of trust, is said by defendant to make this a suit for the administration of a trust. It is not a suit for the administration of the trust created by the deed of trust, but rather a suit to defeat the right of the trustee of that trust to the residuary estate of the testator, and to defeat the testamentary trust for conversion into cash and payment to the trustee under the deed of trust.

Its purpose is to have the will "annulled with respect to the residuary clause." Sutton v. English, 246 U. S. 199, 207, 38 Sup. Ct. 254, 257 (62 L. Ed. 664). It is an attempt to overthrow a testamentary trust rather than a suit for administration of a trust.

The defendant urges that the art museum is not represented by the defendant in either capacity, because of antagonistic interests, and that as it will be the duty of the trustee to see that the museum performs the condition, if it be necessary, this is an adversary position. But this confuses the issues raised by the present bill, in which the interests of these defendants, of the beneficiaries, and of the art museum are identical, with questions that do not affect the present case, and that can arise only in case the defendants fail to defeat the plaintiffs' claim.

Upon the question of intestacy the defendant, in both capacities, seems to represent and to be under the duty to defend all interests. Vetterlein v. Barnes, 124 U. S. 169, 8 Sup. Ct. 441, 31 L. Ed. 400; Kerrison, Assignee, v. Stewart et al., 93 U. S. 155, 23 L. Ed. 843; McArthur v. Scott, 113 U. S. 392, 5 Sup. Ct. 652, 28 L. Ed. 1015. This question is one of common interest to the present defendants, the beneficiaries under the deed of trust, and also to the Metropolitan Art Museum, so far as it may be said to have an interest, because it

may be adversely affected by a deficiency in the trust estate upon its final distribution under the terms of the deed of trust, and thus is concerned in having the defendant prevail in this suit.

Upon the joinder of those beneficiaries resident in this jurisdiction every class will be represented, in conformity with Equity Rule 38. It does not seem necessary to resort to Equity Rule 39 (198 Fed. xxix, 115 C. C. A. xxix) in order to maintain jurisdiction, though, if necessary, it would seem proper for the court, in the exercise of its discretion, to do so.

The questions submitted to this court as to whether the Metropolitan Art Museum and all of the beneficiaries under the deed of trust are indispensable parties must be answered in the negative. I am of the opinion that all of such persons are represented by the defendant, and that there is no sufficient reason for the court to refuse jurisdiction.

The beneficiaries resident in this jurisdiction, however, are proper parties, and the court suggests their joinder in accordance with rule 38, to defend for the whole of the class of beneficiaries under the deed of trust; and the plaintiffs have leave to so amend on or before January 25, 1919.

The motion to dismiss is denied.

The defendant's plea is overruled.

PEIRCE et al. v. NEW YORK DOCK CO.

(District Court, E. D. New York. January 10, 1919.)

1. WHARVES ⟸9—LEASE OF PIER—VIOLATION OF CONDITIONS.
   Lessor of a pier, by a lease which prohibited the landing or storing thereon of high explosives, *held* justified in retaking possession in accordance with its terms, where lessees permitted a vessel having on board mines or torpedoes to lie at the pier for a number of days.
2. WHARVES ⟸9—LEASE OF PIER—CONSTRUCTION.
   A lease of a pier includes the right to tie vessels thereto, and the lessee is bound to exercise care that vessels moored to it do not contain high explosives, prohibited on the pier by the lease.

In Equity. Suit by William Peirce and George Peirce, trading as Peirce Bros., against the New York Dock Company. Bill dismissed, and decree for defendant on counterclaim.

Butler, Wyckoff & Campbell, of New York City (Frederick M. Brown, of New York City, of counsel), for plaintiffs.

Davies, Auerbach & Cornell, of New York City (Charles E. Hotchkiss and Martin A. Schenck, both of New York City, of counsel), for defendant.

GARVIN, District Judge. [1] Plaintiffs brought this action against the New York Dock Company, for convenience hereinafter referred to as the company, which is engaged in business as owner of docks and warehouses, setting forth:

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That they made a contract in writing whereby they rented and leased from it Columbia Pier No. 22, with its appurtenances, on the water front in the borough of Brooklyn, city of New York, for the term of 6 years ending in 1919; the lease among other things providing:

"3. * * * If default be made in the performance of any of the covenants or agreements herein contained, the said hiring and the relation of lessor and tenants shall, at the option of the lessor, wholly cease and determine, and the said lessor shall and may re-enter the said premises and remove all persons therefrom without recourse to legal proceedings."

"11. The tenants further agree that they will not land nor store, nor allow to be landed or stored, on the said premises, any dynamite or other high explosive, and will remove promptly upon written notice to that effect any merchandise placed upon the said premises which may prejudice the insurance or interfere with the terms of the insurance policies held by the lessor covering the said premises.

"12. The tenants also agree that they will abide by, perform, and carry out any rules, regulations, or orders now or hereafter made or issued by any government authority or department, either national, state, or municipal, or by the New York Board of Fire Underwriters, or New York Fire Insurance Exchange, with respect to the use or occupation of the herein demised premises."

That while plaintiffs were in possession the company attempted to remove them from the pier, upon the ground that 285 torpedoes or mines were loaded upon the steamer Napoli at the pier on the 10th and 11th days of January, 1918, and that plaintiffs are now in danger of being ejected from the pier by the defendant.

The company by its answer claimed that the plaintiffs had failed to perform certain of the covenants in the lease, in that they failed to obey the orders of the city of New York embraced within the Code of Ordinances of the City of New York relating to explosives, and in particular the provisions of section 65 of article 4 of chapter 10 of said Code, having among other things retained for 48 hours on board of a ship lying at the pier explosives in excess of the quantity required by the ship for its own use for signaling or life-saving purposes. The answer of the company further sets forth that the defendant actually re-entered and took peaceable possession of the pier, having terminated said lease, because plaintiffs had defaulted in their covenants thereunder, and that its right to terminate the lease was not based wholly upon the presence of the explosives on board the Napoli; and, finally, the answer alleges as a counterclaim that prior to the 23d of January, 1918, the plaintiffs violated certain agreements contained in the lease, in that they landed and stored, or allowed to be landed and stored, on, in, and about the premises, high explosives, and that they failed to obey orders issued by the city of New York relative to explosives and inflammable materials, some of which are embraced within section 65 of article 4 of chapter 10 of the Code of Ordinances; that the company on January 23, 1918, terminated the relation of lessor and tenants under the lease, and re-entered the premises covered thereby peaceably, and took entire custody and possession thereof; that by reason of a restraining order dated January 23, 1918, to which reference will be made later, the company has been prevented from using the pier so as to derive any income therefrom, which but for the restraining or-

der it would have been able to derive, and that thereby the plaintiffs have caused defendant damages from the time of the service of the restraining order on January 24, 1918, to the time when it shall be vacated.

The plaintiffs ask for a writ of injunction pendente lite, restraining the defendant company and its representatives from entering upon the pier, and from interfering with plaintiffs' possession, and from beginning or prosecuting any action for possession of the pier or damages for breach of the lease, and that upon the final hearing the injunction be made permanent.

The defendant asks that the bill of complaint be dismissed; that an injunction pendente lite issue forbidding the plaintiffs, Peirce Bros., Incorporated, their agents, and others claiming under them, from interfering with the possession of the defendant company, that the defendant company have a permanent injunction to the same effect, that the defendant recover of the plaintiffs its damages, and that it have such other and further relief as may be proper.

The plaintiffs, by way of reply, deny that the defendant company retook possession of the pier, and allege that, if (which plaintiffs deny) there has been an infraction of any part of the lease by the plaintiffs, it was not willful or negligent, but that it was due to mistake, accident, or surprise, in this: That, if explosive or inflammable materials forbidden by the city of New York were brought to or kept at Pier No. 22, or its vicinity, plaintiffs, exercising proper care, believed that such materials were permitted by the city of New York at the pier. Plaintiffs also claim that defendant has waived the right to declare the lease forfeited.

The court granted the restraining order above mentioned ex parte, and thereafter granted a motion by the plaintiffs to continue the restraining order pendente lite. After the suit was begun, and before trial, one of the plaintiffs, William Peirce, died, and the action was continued without objection by the defendant by the sole surviving partner, George Peirce.

A considerable amount of testimony was offered at the trial concerning other explosives on the pier, much of which both parties agree is irrelevant. The real question now presented is whether or not the lease was broken by the plaintiff because of what occurred with respect to the ship Napoli.

Defendant offered various witnesses connected with the fire department of the city of New York, as a result of whose testimony it is established that high explosive mines were on the steamship Napoli and on a float, both of which were moored to the pier, for several days. This created a condition of great danger and violated an exceedingly important clause of the lease. The plaintiffs had, or should, in the exercise of reasonable care, have had, knowledge of this condition. Much testimony was offered by both parties, which it is not deemed necessary to discuss at length.

[2] The lease of the pier included its appurtenances. This cannot but include the right to tie vessels thereto; otherwise, there would be no occasion for the pier extending into the water. Therefore the ten-

ant of the pier must take care that vessels moored to it are subject to the same restrictions with respect to high explosives being placed thereon.

The plaintiffs, however, claimed that they should have relief from forfeiture because the infraction of the lease was not willful or negligent. With this contention the court cannot agree, being of the opinion that reasonable care on the part of plaintiffs would have prevented the mines from being brought to the pier, or would have discovered their presence at once, and provided for their immediate removal.

The defendant may have a decree dismissing the bill of complaint herein, and enjoining the plaintiffs from in any manner interfering with defendant in the sole custody, occupation, and possession of the premises described in the lease set forth in the bill of complaint.

In re IRVINE.

(District Court, W. D. South Carolina. January, 1919.)

BANKRUPTCY ⊂=264—LANDS OF ESTATE—SALE WITHOUT APPRAISAL.

Sale by trustees in South Carolina of land of a deceased bankrupt, whose estate was solvent, would not be confirmed on objection by his heirs, where the land, located in Kentucky, was not appraised, and was described in the advertisement only as bankrupt's one-third interest "in those two tracts or parcels of land in Edmundson county, Kentucky, containing 190 acres and 225, acres, respectively."

In Bankruptcy. In the matter of W. H. Irvine, bankrupt. On rule to require trustees to execute deed to land sold by them. Rule discharged.

Martin & Blythe and L. K. Clyde, all of Greenville, S. C., for petitioner.

Haynsworth & Haynsworth and Townes & Earle, all of Greenville, S. C., for trustees.

Cothran, Dean & Cothran, of Greenville, S. C., for heirs.

JOHNSON, District Judge. A statement of the facts will aid in a clear understanding of the matter now before the court for decision. W. H. Irvine was by this court adjudged a voluntary bankrupt. Shortly thereafter Irvine died intestate. The administration of the estate went forward as provided by section 8 of the Bankrupt Law (Act July 1, 1898, c. 541, 30 Stat. 549 [Comp. St. § 9592]). On January 14, 1918, by order of the referee in bankruptcy to whom the case had been referred, the trustees offered for public sale at Greenville, S. C., numerous parcels of real estate. That involved in this controversy was described in the advertisement as follows:

"Tract No. 33. The one-third interest of W. H. Irvine, bankrupt, in those two tracts or parcels of land in Edmundson county, Kentucky, containing 190 acres and 225 acres, respectively."

The interest of said bankrupt in the said two tracts of land was bid off by A. G. New for $1,000; he being at that price the highest bid-

der therefor. New was ready and willing, and offered, to comply with the terms of his bid, and he states that he is still ready, and has always been ready. Objection was made to the making of the deed by the members of the bankrupt's family. John J. McSwain, the then referee in bankruptcy, did not order the deed to be made, nor did he ever formally decide the case one way or the other. The present referee in bankruptcy, W. C. Cothran, Esq., having been attorney for the bankrupt and his family, felt a delicacy in passing upon the question, and hence it came before the court upon the petition of A. G. New for a rule against the trustees to show cause why they should not execute to him a deed of the land hereinbefore referred to. The trustees make a formal return, setting forth that the estate is not insolvent, that the creditors will receive their money in full, and that the real parties in interest are the heirs at law of the bankrupt, and they are willing to obey whatever orders this court may make in the premises. The heirs at law of the bankrupt object to the confirmation of the sale on three grounds: First, that the price at which the land was bid off is utterly inadequate; second, that they were honestly mistaken as to the day of sale, and neither attended the sale, nor did their attorney attend it for them; third, that the property had not been appraised.

Section 8 of the Bankruptcy Act (Comp. St. § 9592) provides:

"The death * * * of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died * * * provided, that in case of death the widow or children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence."

This court, therefore, is not only acting in the capacity of a bankrupt court in administering and paying the debts of the deceased, but so far as the surplus funds are concerned it must act in exactly the same capacity as a probate court. The heirs at law in this controversy are the real parties in interest.

The policy of all courts is to sustain judicial sales. Mere inadequacy of price, unless it be so great as to shock the conscience, is no justification for the court to refuse to confirm a judicial sale. If there were nothing more before this court than the mere fact that the land was bid off for $1,000, and two other people are willing to give $1,500 for it, the court would not hesitate to confirm the sale. The heirs at law do not make any sufficient showing before the court as to how or why they were mistaken about the time of the sale, and the court cannot refuse to confirm the sale on the ground of honest mistake on their part. On the third ground, that the property was not appraised, coupled with some other circumstances in the case, the court feels constrained to refuse confirmation. Subdivision "b" of section 70 of the Bankruptcy Act (Comp. St. § 9654) provides:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."

The lands in Kentucky bid off by the petitioner have never been appraised as required by law. The advertisement, quoted above, was wholly inadequate to apprise the public of what was being sold. The inadequacy of the advertisement and the failure to appraise might not present such serious difficulties, if the property sold had been known to the community where the sale was made. In this case lands lying in Kentucky are exposed to sale at Greenville, S. C. (James L. Killian, the Perry estate, and the bankrupt estate of W. H. Irvine each owned a one-third interest in fee in a tract of 196 acres of land in Edmundson county, Ky. They owned in the same proportion the mineral rights in a tract of 225 acres of land.) There is nothing in the advertisement to indicate the character of the land, or what kind of minerals the land is underlaid with. It was stated to the court in the argument that the minerals are asphalt and coal. The value of coal lands may depend largely upon transportation. There is nothing in the advertisement to indicate how far the land is from a railroad or from a navigable stream, nor is there any statement of any geologist or mining engineer as to the quantity and quality of the asphalt and coal underlying said land. Nor are we apprised by the advertisement whether the surface of the land was desirable for farming purposes or for timber purposes.

The trustees, before selling this land, should secure the names of three reliable and responsible persons in the vicinity in which it lies to appraise it, and in their next advertisement they should state where the land lies, whether it is desirable for farming purposes or timber purposes, what kinds of minerals underlie it, and the supposed quality and quantity, together with the accessibility of the land to railroad or water transportation, so that the public may be apprised by the advertisement and by a previous appraisement of what is offered for sale, and the court would then know what had been sold, and what proportion the purchase price bore to what appraisers who knew the property had sworn that it was worth. For the reasons herein stated, the court cannot confirm the sale made on the 14th day of January, 1918.

Wherefore it is ordered that the rule be discharged. It is further ordered that the heirs at law or the trustees may apply at the foot of this order for any further orders that may be necessary and proper in the administration of this estate.

THE ALLAN WILDE (two cases).

(District Court, E. D. New York. December 30, 1918.)

1. WHARVES ⊂⊃17—AMOUNT OF WHARFAGE—CONTRACT.
Where claimant authorized one to arrange for wharfage for a vessel, wharfage to be at the regular rates, *held* that, if claimant intended the agent to fix the charge for wharfage at the statutory rate, which was much lower than the usual rate, it should have so indicated, either by reference thereto or by using the expression "rate provided by law."

2. SHIPPING ⊂⊃74—CONTRACT OF AGENT—REPUDIATION.
Where a vessel accepted the benefit of an arrangement by the claimant's agent for wharfage, claimant may not repudiate the arrangement as unauthorized.

3. WHARVES ⊂⊃19—AMOUNT—CONTRACTS—VALIDITY.
Where wharfage was contracted for at rates in excess of those prescribed by Greater New York Charter, §§ 859, 863, it will be presumed that claimant, who contracted for wharf facilities at the increased rate, waived the statute, and recovery on the contracts cannot be denied on the ground that they were contrary to law.

In Admiralty. Libels by the Caribbean Shipping Company, Limited, and by the Central Transportation Company, against the schooner Allan Wilde, claimed by the Commercial Shipping Corporation. Decree for libelant in each case.

Stuart McNamara, of New York City, for libelant Caribbean Shipping Co.

Joseph P. Nolan, of New York City, for libelant Central Transp. Co.

Macklin, Brown & Purdy, of New York City (Wm. F. Purdy, of New York City, of counsel), for claimant.

GARVIN, District Judge. Two libels for wharfage have been filed, and the cases tried together by consent. The contract in each case was made with the libelants by one Novelly, and a question at once arises as to whether claimant is bound by his acts as its agent.

[1, 2] The court is of the opinion that the evidence is sufficient to establish that the claimant of the Allan Wilde authorized Novelly to arrange dockage for her so that her cargo might be loaded, the wharfage to be at the regular rates. The usual rates were those at which Novelly closed the contract. If the claimant had intended Novelly to fix the charge for wharfage on the very much lower basis provided for by chapter 466 of the Laws of 1901, to which reference will be presently made, it should have so indicated, either by reference thereto or by using the expression "rate provided by law," or its equivalent. Furthermore, the ship accepted the benefit of the arrangement made, and the claimant may not receive the benefit of this agreement, and at the same time repudiate the obligations by it raised.

[3] The claimant insists, further, that these contracts for wharfage, which were at $75 and $100 per day, if in fact made by it, are unenforceable, being contrary to law. Chapter 466 of the Laws of 1901 provides:

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"Sec. 859. It shall be lawful to charge and receive, within the city of New York, wharfage and dockage at the following rates, namely: From every vessel that uses or makes fast to any pier, wharf, or bulkhead, within said city, or makes fast to any vessel lying at such pier, wharf, or bulkhead, or to any other vessel lying outside of such vessel, for every day or part of a day except as hereinafter provided, as follows: * * * For every vessel over 200 tons burden, two cents per ton for each of the first two hundred tons burden, and one-half of one cent per ton for every additional ton. * * *"

And again:

"Sec. 863. * * * Any person owning or having charge of any pier, wharf, bulkhead, or slip as aforesaid, who shall receive for wharfage any rates in excess of those now authorized by law, shall forfeit to the party aggrieved treble the amount so charged as damages, to be sued for and recovered by the party aggrieved."

The rate under the statute would be only $4.97 per day.

The court has not been referred to, nor has it found, any decided case which is directly in point; but, unless constrained by authority, it is not disposed to allow a boat under these circumstances to avail itself of wharfage which is worth at least $75 per day for $4.97 per day. The court holds rather that the claimant by its express contracts waived the statute. As Judge Thomas remarks in The Antonio Zambrana (C. C.) 88 Fed. 546:

"The statute is supreme, and confers a right; and unless the person upon whom the right is conferred waives it, by contract or otherwise, a court is technically barred from declaring that the exercise of the right is unlawful."

Decree for libelant in each case.

UNITED STATES v. PORRIA et al.

(District Court, W. D. Washington, N. D. November 14, 1918.)

No. 4138.

CRIMINAL LAW ⊂=200(1)—FORMER JEOPARDY—SAME OFFENSE.

Conviction in state court on indictment charging receiving and withholding stolen property is, under Comp. St. § 8604 a bar to prosecution on count charging taking in possession such property, a foreign shipment, the same having been stolen, the same character and degree of proof being necessary, but not so as to count charging larceny of the property while moving in interstate commerce.

John Porria and others were indicted for larceny of property moving in interstate commerce, and for taking in possession, the same having been stolen. The named defendant pleaded former conviction. Sustained as to count 2; denied as to count 1.

Robert C. Saunders, U. S. Dist. Atty., and Ben L. Moore, Asst. U. S. Dist. Atty., both of Seattle, Wash., for the United States.

John F. Dore, of Seattle, Wash., for defendant Porria.

NETERER, District Judge. The defendant is charged in count 1 with larceny of 21 bars of copper wire, of the value of $1,139.25,

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

while moving in interstate commerce. In count 2 he is charged with taking in his possession 21 bars of copper wire, a foreign shipment, the same having been stolen. The defendant pleaded in bar to each count a judgment of conviction in the Washington state court, and in support filed a certified copy of the judgment roll. The state court indictment charged the defendant with receiving and aiding in concealing and withholding stolen property, 21 bars of copper wire, of the value of $1,000.

The District Attorney challenges the sufficiency of the plea. The single question is whether the defendant has been twice in jeopardy for the same offense. Section 8604, U. S. Comp. Stat. 1916 (U. S. Comp. Stat. 1918), provides that—

"A judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution. * * *"

As stated, count 1 charges larceny of property moving in interstate commerce, and count 2 with receiving property stolen while moving in interstate commerce. The conviction in the state court was upon the charge of—"did * * * receive and aid in concealing and withholding * * *" the same property.

The protection intended is against second jeopardy for the same offense. Do the charges in the indictment require different or additional proof to that required in the state court? Is this charge the same in law and in fact? Consideration of the indictment and consideration of the charge and judgment of conviction in the state court bring the inevitable conclusion that the same character and degree of proof will be necessary to sustain count 2 of the indictment as was necessary to sustain the conviction in the state court. The same may not be said as to count 1, where a felonious taking, stealing, and carrying away must be established. Every issue here presented was determined by the Supreme Court in Gavieres v. United States, 220 U. S. 338, 31 Sup. Ct. 421, 55 L. Ed. 489.

The plea in bar is sustained as to count 2, and denied as to count 1.

UNITED STATES v. ONE CADILLAC EIGHT AUTOMOBILE.

(District Court, M. D. Tennessee. December 24, 1918.)

No. 1234.

1. INTOXICATING LIQUORS ⟸247—TRANSPORTATION OF INTOXICANTS—FORFEITURE OF VEHICLE USED—GROUNDS.

An automobile used to transport liquor into a state the laws of which prohibit its sale, in violation of Act March 3, 1917, § 5 (Comp. St. 1918, §§ 8739a, 10387a–10387c), is not subject to seizure and forfeiture by virtue of Act March 2, 1917, § 1, which is a proviso contained in the Indian Appropriation Act, and applies only to introduction of liquor into Indian country "or where the introduction is prohibited by treaty or federal statute" relating to Indian affairs.

2. FORFEITURES ⟸2—CONSTRUCTION OF STATUTES.

A statute imposing a forfeiture should be strictly construed and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. STATUTES ⟸228—CONSTRUCTION—SCOPE OF PROVISO.
The effect of a proviso is presumptively limited to the particular legislation to which it is appended, and it should not be construed as having a more general application unless such legislative intention is clearly and positively expressed in language admitting of no other reasonable interpretation.

Forfeiture. Libel by United States for forfeiture of Cadillac Eight Automobile, alleged to have been used in transporting intoxicating liquor from Kentucky into Tennessee. Answer by claimant, W. B. Winter, incorporating defense in the nature of demurrer to the libel. Decree for claimant.

Lee Douglas, U. S. Atty., of Nashville, Tenn.
Frank P. Bond, of Nashville, Tenn., for defendant.

SANFORD, District Judge. [1] The answer of the claimant in effect incorporates a demurrer to the libel. This has been argued by counsel, with the understanding that technical questions of pleading are waived, and that the question submitted for determination is whether, on the face of the libel, a case is made out for the forfeiture of the automobile in question.

The libel alleges that the automobile was used in transporting intoxicating liquor from Kentucky into Tennessee in violation of section 5 of the Act of March 3, 1917, c. 162, 39 Stat. 1058, 1069 (Comp. St. 1918, §§ 8739a, 10387a–10387c) commonly known as the Reed Amendment.

The specific punishment provided for violation of this Act is fine or imprisonment, or both. Admittedly it does not authorize the forfeiture of the automobile unless by virtue of a proviso contained in the earlier Act of March 2, 1917, c. 146, 39 Stat. 969, 970, making an appropriation for the expenses of the Bureau of Indian Affairs, etc.

This proviso appears in a separate paragraph, reading as follows:

"For the suppression of the traffic in intoxicating liquors among Indians, $150,000: Provided, that automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or Federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section twenty-one hundred and forty of the Revised Statutes of the United States."

Section 2139 of the Revised Statutes makes it a criminal offense to introduce or attempt to introduce "any spirituous liquor or wine into the Indian Country," but that it shall be a sufficient defense that the acts charged were done by order or under the authority of the War Department.

Section 2140 of the Revised Statutes (Comp. St. 1918, § 4141), which is referred to in the Act of March 2, 1917, is contained in title 28, "Indians," and chapter 4, "Government of Indian Country," and reads as follows:

"If any superintendent of Indian affairs, Indian agent, or subagent, or commanding officer of a military post, has reason to suspect or is informed

that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian Country in violation of law, such superintendent, agent, subagent, or commanding officer, may cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, * * * shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one half to the informer and the other half to the use of the United States."

After careful consideration of the arguments and briefs of counsel, I conclude that the phrase in the Act of March 2, 1917, on which the Government relies, "or where the introduction is prohibited by treaty or Federal statute," does not authorize the forfeiture of the automobile in question because its use in introducing intoxicating liquor into the State of Tennessee in violation of the Reed Amendment, as alleged.

[2] A statute imposing a forfeiture should be strictly construed and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation. 19 Cyc. 1358, and cases cited in note 14.

[3] The effect of a proviso is furthermore presumptively limited to the particular legislation to which it is appended, and should not be construed as having a more general application unless such legislative intention is clearly and positively expressed in language admitting of no other reasonable interpretation. Minis v. United States, 15 Pet. 423, 445, 10 L. Ed. 791. It is hence not to be construed as having a general application when its language is perfectly satisfied by confining its operation to the particular legislation to which it is appended, especially when there is no other general legislation then in force to which it can relate. 15 Pet. 446, 447, 10 L. Ed. 791. As all other provisions of the Act of March 3, 1917, in which this proviso is contained relate exclusively to Indian affairs, and the particular clause to which it is appended relates to the suppression of traffic in intoxicating liquors among Indians, it is therefore presumptively limited to the introduction of intoxicating liquor among the Indians, and should certainly not be extended beyond the treaties and statutes relating to Indian affairs unless the language admits of no other reasonable interpretation and is not perfectly satisfied when applied to such treaties and statutes.

At the time this Act was passed there were in force various treaties with Indian Tribes and Federal statutes ratifying the same, by which certain tracts of land had been ceded to the United States by the Indians and therefore had ceased to be "Indian Country," but in which, pursuant to the treaty stipulation and statutes, the laws of the United States prohibiting the introduction of intoxicating liquor into the "Indian Country" nevertheless remained in force. Treaty with Nez Perce Indians, May 1, 1893, art. 9, ratified by the Act of Aug. 15, 1894, c. 290, 28 Stat. 286, 330; Treaty with Choctaw and Chickasaw Indians, March 21, 1903, ratified by the Act of July 1, 1902, c. 1362, 32 Stat. 641, 651; also various Treaties with the Choctaws, Seminoles, Creeks and other Indian Tribes and ratifying Acts, collated in Ex parte Webb, 225

U. S. 663, 684, 685, 32 Sup. Ct. 769, 56 L. Ed. 1248. The Act of March 1, 1895, c. 145, 28 Stat. 693, prohibiting the introduction of intoxicating liquor into the "Indian Territory," including those portions which, though largely inhabited by Indians, were no longer "Indian country," also then remained in force after the incorporation of the Indian Territory into the State of Oklahoma, so far as it prohibited the introduction of intoxicating liquors from without the new State into that part of it which had formerly been the "Indian Territory," although not remaining "Indian country," under the well established authority of the Federal Government to regulate liquor traffic with the Indians, even after Statehood. Ex parte Webb, 225 U. S., supra; Joplin Mercantile Co. v. U. S., 236 U. S. 531, 537, 35 Sup. Ct. 291, 59 L. Ed. 705.

As the lands which had been ceded by the Indians under the foregoing treaties and a part at least of the former Indian Territory was no longer Indian country, it is obvious that the preceding phrase in the proviso of the Act of March 2, 1917, relating to vehicles used in introducing intoxicants "into the Indian country" would not have been applicable to these places, and that in order to make the proviso applicable to such places it was necessary to add the subsequent phrase now in question, "or where the introduction is prohibited by treaty or Federal statute," or its equivalent. The meaning of this subsequent phrase is, however, clearly satisfied when it is applied to the places in which the introduction of intoxicating liquor was still prohibited by these Indian treaties and ratifying acts and by the Act of 1895 prohibiting the introduction of intoxicating liquor into the Indian Territory. This meaning of the phrase is entirely germane to Indian affairs, the general subject matter of the Act of March 2, 1917, and also to the particular clause to which the proviso is attached relating to the suppression of traffic in intoxicating liquors among Indians, and gives to this phrase a meaning entirely consistent with the general plan of legislation of the United States in dealing with Indian affairs. The meaning of this phrase being thus clearly satisfied by its application to these Indian treaties and statutes in reference to Indian affairs, it would, in my opinion, be contrary to the fundamental rule of construction stated in Minis v. United States, 15 Pet. 423, 10 L. Ed. 791, supra, to extend its meaning so as to include general legislation having no reference whatever to Indian affairs or to the suppression of the traffic in intoxicating liquor among the Indians, even if there appeared to have been then in force any other general treaties or Federal statutes prohibiting the introduction of intoxicating liquor to which this proviso could in any event have been applicable. No such general treaty appears however to have been then in existence; and no general Federal statute other than the Webb-Kenyon Act of March 1, 1913, c. 90, 37 Stat. 699 (Comp. St. § 8739), which prohibited the transportation, through interstate or foreign commerce of intoxicating liquor into any State, Territory or District, for use in violation of the law thereof; but did not prohibit such introduction for lawful local use.

The Act of March 2, 1917, furthermore specifically provides that the vehicles used in the introduction of intoxicating liquor "shall be subject to the seizure, libel and forfeiture provided in section twenty-one

forty of the Revised Statutes of the United States." Section 2140, however, provided for search for liquor by any superintendent of Indian affairs, Indian agent, sub-agent, or commanding officer of a military post, and that if such liquor should be found it should be seized and delivered to the proper officer, proceeded against by libel, and forfeited. In United States v. Steamboat Cora, 1 Dak. 1, 46 N. W. 503, it was held by the United States Territorial District Court, construing the Act of March 15, 1864, c. 33, 13 Stat. 29, from which this section is derived, that to maintain a libel of forfeiture thereunder the seizure must be made by one of the designated officers or agents therein specified in order to constitute a legal seizure, and that a seizure made by the Marshal under writ of the court based upon the Government's libel, did not confer jurisdiction. The effect of this holding, which appears to me to be based upon a sound interpretation of the statute, is twofold: First, as the seizure and forfeiture to be made under the Act of March 2, 1917, is that provided for by R. S. 2140, and as such forfeiture can only follow a search and seizure made by certain designated officers or agents, most of whom are stationed in Indian country or closely contiguous thereto, and not generally throughout the United States, this strengthens the conclusion that it was not intended by the proviso in the Act of March 2, 1917, that it should apply generally throughout the United States or otherwise than in treaties and statutes relating to Indian affairs; and, second, as the seizure in the instant case is not alleged to have been made by any of these designated officers or agents (but as shown by the process was made by the Marshall under writ of monition and arrest based upon the libel itself) if follows that for want of showing of a legal seizure, this court has acquired no jurisdiction of the automobile thus seized.

I find nothing inconsistent with this conclusion in United States v. One Buick Roadster (D. C.) 244 Fed. 961, 963, 964, which merely held that the Act of March 2, 1917, authorized the forfeiture of an automobile used in introducing liquor into that portion of Oklahoma which was formerly the "Indian Territory" although not "Indian Country," which remained prohibited even after statehood under the Act of March 1, 1895, and was sustainable under the power of Congress in the regulation of Indian affairs; a conclusion in which I entirely concur, the construction of the proviso so as to include such cases being entirely germane to the other provisions of the Act and well within the presumptive meaning of the proviso.

I pass without determination the suggestion of counsel for the claimant that in any event the Reed Amendment is not to be deemed a Federal statute prohibiting the introduction of liquor into Tennessee within the meaning of the Act of March 2, 1917, since such prohibition arises not merely from the Federal statute but also from State legislation; as well as the question suggested in my mind in considering this case, whether in any event the Reed Amendment can be properly considered as a Federal statute prohibiting the introduction of intoxicating liquor into Tennessee or other places within the meaning of the Act of March 2, 1917, since it does not absolutely prohibit the

introduction of liquor into such places, but merely prohibits such introduction otherwise than for four specified purposes.

For the reasons stated, a decree will be entered adjudging the libel to be insufficient in law and dismissing the same.

FLANAGAN v. COLEMAN et al.

(District Court, E. D. New York. August 15, 1918.)

COPYRIGHTS ⊜85—INJUNCTION PENDENTE LITE—DENIAL.

On motion for injunction pendente lite restraining defendants from publishing, printing, or selling a musical composition or any colorable imitation thereof, *held*, that as the affidavits in support of motion were controverted by answering affidavits, and it appeared that plaintiff knew the facts more than a year before the bill was filed, the motion should be denied.

In Equity. Bill by Thomas J. Flanagan against Charles Coleman and Isidor H. Gertler, doing business under the trade-name and style of the Songland Publishing Company, and others. On motion for injunction pendente lite. Motion denied.

John J. Cunneen and Charles P. Robinson, both of New York City, for plaintiff.

George R. Bristor, of New York City, for defendant Coleman.

L. & A. U. Zinke, of New York City, for Plaza Music Co.

GARVIN, District Judge. This is a motion for an order enjoining pendente lite the defendants and each of them, their agents, servants, and employés, during the pendency of this action, from publishing, printing, reprinting, copying, selling, vending, offering for sale, or otherwise distributing the musical composition entitled, "Where is My Mama," or any imitation or colorable imitation of plaintiff's said musical composition, and for such other and further relief as may be just and proper.

The motion is based upon the bill of complaint and the exhibits thereto attached with the affidavit of Margaret V. F. McCarthy, setting forth that she had purchased from the Plaza Music Company six copies of the song in question, and the affidavit of Lew Shaffer which sets forth the employment of the affiant during 1916, 1917, and part of 1918 by Charles Coleman, apparently one of the defendants herein, during which period Coleman had the affiant selling the song in question on the title page of which appeared, "Copyrighted by Charles Coleman," and the music of which was printed by F. J. Lawson Company of New York, S. H. Talbot of Chicago, and the Plaza Music Company of New York.

The complaint sets forth that the defendants Coleman and Gertler on September 3, 1912, signed and filed a certificate in the office of the county clerk of New York county, in which they certified that they were conducting the business of music publishers with an office at 169 West Eighteenth street, borough of Manhattan, city of New York,

under the name of "Songland Music Publishing Company"; that on and before April 20, 1910, plaintiff was the author, composer, and proprietor of both the words and music of a song of great and artistic value entitled, "Where is My Mama"; that on or about April 20, 1910, plaintiff published this composition and affixed to each copy published and offered for sale, "Copyright and published MCMX by Thos. J. Flanagan," "International Copyright Secured," "All Rights Reserved," and on and before April 20, 1910, plaintiff sent to the Librarian of Congress, Copyright Office, a manuscript of the song in question; a certificate of registration appears to have been issued by the register of copyrights to the plaintiff, and on December 11, 1916, he deposited two copies of the publication with the register; that about May, 1911, plaintiff and defendant Coleman made an agreement, whereby plaintiff promised to pay or assign to Coleman one-half of the profits on sales of the said song in consideration of $100, which latter sum Coleman has refused to pay, this agreement being canceled by consent; that the plaintiff has never granted or assigned to said Coleman any interest in the profits of the song entitled, "Where is My Mama," or any right to print, reprint, copy, vend, or offer it for sale; that on the copy of the song plaintiff permitted to be written, out of courtesy to defendant Coleman, who was singing and selling said song as plaintiff's employé, the words, "Words by Chas. Coleman," although Coleman had not in fact written the words; that plaintiff has never granted or assigned to Coleman any interest of ownership, authorship, or proprietorship in the copyright thereof; that this song has acquired great popularity, and plaintiff believes it has and will continue to have a popularity which will be a source of great benefit to plaintiff; that the defendants Coleman and Gertler, appreciating the popularity of the song, and with full knowledge of the rights of plaintiff therein and of the copyright, on and after September 3, 1912, unlawfully caused to be published, and threatens to cause to be published, this song throughout the United States; that all of the defendants except Sheridan and the Plaza Music Company have unlawfully caused to be printed on the first page of the song, and with full knowledge of the plaintiff's copyright of said musical composition, the following "Copyright MCMXVI by Chas. Coleman," "Words and Music by Chas. Coleman," "International Copyright Secured," "Songland Publishing Company, 549 Kosciusko Street, Brooklyn, New York," "All Rights Reserved"; that the defendants Lawson and F. J. Lawson Company at plaintiff's request and prior to April, 1910, printed the song and printed on the first page the words, "Copyright and published MCMX by Thos. J. Flanagan," and that the latter company had full notice of the plaintiff's copyright; that thereafter during 1916 the defendant Lawson Company, at the request of defendant Coleman, unlawfully printed on the first page of copies of the said song the words, "Copyright MCMXVI by Chas. Coleman," and that the said Lawson Company at other times since 1910 had printed copies of said musical composition at the request of the defendant Coleman and without authority of the plaintiff; that the defendants Sheridan and Plaza Music Company are engaged in selling the song; that the publishing, printing, copying, vending, and offering for sale

by the defendants was and is without the authority of the plaintiff, and that plaintiff is being caused, and will be caused, great injury thereby; and that plaintiff has no adequate remedy at law.

It thus appears that the bill of complaint is a lengthy document, and it also appears from an inspection that it was originally verified on December 10, 1917, as was the affidavit immediately hereinafter referred to; both were finally reverified June 27, 1918. Upon these papers plaintiff now asks for an injunction pendente lite.

An additional affidavit by plaintiff is submitted setting forth that on the death of his father in 1912 he went to Syracuse to live, and that in 1916 he learned that defendant Coleman was publishing his song; that the plaintiff had left with the defendant Lawson Company his plates for the printing of the song, and that he wrote to the said Lawson Company to return his plates, which the defendant Lawson refused to do and admitted in writing that they were printing the song for the defendant Coleman, saying:

"That he (referring to Coleman) has made good. He has two automobiles, and no doubt has money besides. However, as we have not had any evidence of your dissolving your partnership, we would print the copies for you the same as we have for him, but you will have to settle with Coleman. He has started on a trip to take in the South, have not heard from him since last week."

The defendant Lawson submits an affidavit saying that he has known Coleman and Flannigan (so spelled in affidavit) since 1910, and has known them as copartners under the firm name of Flannigan & Coleman; that by order of both Flannigan and Coleman he had printed at the F. J. Lawson Company, of which he is president, music sheets with the statement, "Published by Flannigan & Coleman," and Flannigan never made any objection or denied that Coleman was a partner, and in fact defendant's accounts are made out in the name of Flannigan & Coleman; that in the year 1911 Flannigan called on him and stated that he had wound up the partnership with Coleman and would not be responsible for any order placed by Coleman after that date, but that he would continue business and place orders on his own account; that in 1916 or 1917 deponent received an order from Coleman, who was then in Indiana, for several thousand copies of "Where is My Mama"; that in printing these the engraver made an error and had "Copyrighted by Charles Coleman" instead of "Copyrighted by Flannigan"; that these sheets were printed and forwarded to Coleman; that thereafter Coleman wrote deponent calling attention to the mistake, and deponent immediately had the plates changed, so that the new plates contained the statement, "Copyrighted by Songland Publishing Company"; that on the outside of the cover appeared the correct statement, "Words by Coleman and Music by Flannigan." An affidavit was submitted by Daniel G. Gottlieb, who states that for about six or seven years he was employed as a singer by the firm of Flannigan & Coleman (so spelled in affidavit), having been engaged by said Coleman; that immediately thereafter Coleman introduced Flannigan as his partner, to which Flannigan made no objection; that he worked for Flannigan & Coleman for about three months, after which time Flannigan, in Gottlieb's presence, told Coleman that he was having domestic difficulties

with his wife and wished to withdraw from the partnership; that it was agreed that Coleman buy him out for about $100; that thereafter Flannigan withdrew from the firm; that Coleman continued the business, Gottlieb working for him for a period of three years; that this deponent does not know whether Coleman ever paid the $100, but he does know that Flannigan met Coleman at times, and that he (Gottlieb) saw Coleman pay something on account.

The defendant Coleman submits an affidavit in which he states further that he was in partnership with plaintiff; that plaintiff was a pianist and author of certain songs; that Coleman was a public singer; that their acquaintance began in 1909, and that they roomed together on Sixth avenue, New York City; that they decided it would be profitable to join forces and go about the streets singing and playing their compositions; that, accordingly, a copartnership was formed by them, the terms providing that plaintiff was to put into the business such songs as he owned and Coleman was to pay $100, making them equal partners; that he then paid the plaintiff $100; that the partnership was under the name of Flannigan & Coleman (so spelled in affidavit), and it was subsequently changed to Songland Music Publishing Company; that up to this time the song "Where is My Mama" had not been written; that the copartnership was continued for some time; that Coleman then suggested to the plaintiff that they needed a baby song; that thereupon after repeated efforts he (Coleman) alone wrote the words of the song, "Where is My Mama," as it was printed and since has been sung; that thereupon plaintiff undertook to set the words to music and, after many trials, he (Coleman), collaborating with him, prepared the music which is now attached to the words; that the front page bore the statement, "Words by Charles Coleman, Music by Thomas Jay Flannigan," which statement was prepared by plaintiff and not by Coleman, and that the plates for printing were originally under the direction of plaintiff and deponent together; that the copyright of said song was issued in 1916 by the Librarian of Congress; that the application for the copyright was made by T. Jay Flanagan, plaintiff; that in the application the plaintiff stated, "Words by Charles Coleman," "Music by T. Jay Flannigan"; other allegations which it is not necessary to set forth at length follow.

The plaintiff filed an answering affidavit denying a number of allegations made by Coleman and making further allegations, some of which are denied by the president of the defendant Plaza Music Company in an affidavit filed in its behalf.

In view of these conflicting statements and in view of the fact that plaintiff appears to have been guilty of laches in applying for an injunction, I am of the opinion that this motion should be denied. The affidavit of the president of the Plaza Music Company says that Flanagan knew of the conditions about a year ago; that is borne out by the fact that the bill of complaint was originally verified on December 10, 1917, and the affidavit of Flanagan on December 10, 1917.

If this action is placed upon the calendar at once, there is no reason why a trial cannot be had with reasonable promptness. The motion for an injunction pendente lite is therefore denied.

SHELTON v. SOUTHERN RY. CO.

(District Court, E. D., Tennessee. March 19, 1918.)

No. 1730.

1. NEW TRIAL ⟸105—NEWLY DISCOVERED EVIDENCE.
Newly discovered evidence, merely to contradict a witness, is not sufficient to warrant a new trial.

2. NEW TRIAL ⟸104(1)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.
Newly discovered evidence, which is merely cumulative, is not ordinarily ground for a new trial.

3. NEW TRIAL ⟸108(1)—NEWLY DISCOVERED EVIDENCE—CONCLUSION.
Where newly discovered evidence is not so conclusive as to raise a reasonable presumption that the result of a new trial would be different from the first, it is insufficient as ground for new trial.

4. MALICIOUS PROSECUTION ⟸24(7)—WANT OF PROBABLE CAUSE—PRIMA FACIE EVIDENCE.
Where a grand jury hears only the witnesses for the prosecution and determines only the question of probable cause its failure after investigation to return an indictment is prima facie evidence of want of probable cause.

5. MALICIOUS PROSECUTION ⟸24(6)—WANT OF PROBABLE CAUSE—PRIMA FACIE EVIDENCE.
Where a magistrate, who sits as a committing magistrate merely, and not to try a case on the merits, discharges the defendant, such discharge is prima facie evidence of want of probable cause.

6. ESTOPPEL ⟸68(4)—EQUITABLE ESTOPPEL.
Where defendant, having sworn out a warrant against plaintiff, cannot, in a subsequent action for malicious prosecution, deny that prosecution was under such warrant, on the ground that plaintiff was not present at the preliminary proceedings or arrested under the warrant, for a defendant cannot in one judicial proceeding deny the validity of steps taken by it in another, which would impute a fraud upon the administration of justice in such proceeding.

7. ESTOPPEL ⟸107—EQUITABLE ESTOPPEL—PLEADING.
Generally speaking, an estoppel in pais need not be pleaded; it being in effect a rule of evidence.

8. ESTOPPEL ⟸110—EQUITABLE ESTOPPEL—PLEADING.
At common law, as distinguished from code pleading, an estoppel in pais is available as a defense under the general issue.

9. COURTS ⟸347—PRECEDENTS—DECISION OF STATE COURT.
Under the Conformity Act (Comp. St. § 1537), a decision of the highest court of the state as to the necessity of a pleading in estoppel, if intended to establish a general rule of pleading, is binding on a federal court sitting within the state.

10. ESTOPPEL ⟸110—PLEADING—NECESSITY.
In an action for malicious prosecution, where plaintiff alleged a prosecution under a warrant, and defendant merely pleaded the general issue, without averring specifically the invalidity of the proceedings before a justice of the peace begun on such warrant, and the proceedings before the justice showed prima facie at least that plaintiff was bound over on the warrant, plaintiff, without specifically pleading the same, may rely on the estoppel precluding defendant from denying that plaintiff was bound over on such warrant, for, if a party have not an opportunity to show an estoppel by pleading, he may exhibit the matter thereof in evidence.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

11. MALICIOUS PROSECUTION ⊂⊃64(1)—ACTION—PROOF.
The plaintiff, in an action for malicious prosecution, is not required to prove his own innocence; it being sufficient, to establish a prima facie case, that he show malice and want of probable cause.

12. MALICIOUS PROSECUTION ⊂⊃40, 56—ACTIONS—DEFENSES.
While, as a matter of public policy, an action for malicious prosecution will not lie in favor of a guilty plaintiff, and defendant by way of defense may show plaintiff's guilt, the burden of establishing such defense is on the defendant.

13. TRIAL ⊂⊃344—VERDICT—IMPEACHMENT.
A verdict cannot be impeached as a quotient verdict on evidence of the jurors.

14. MALICIOUS PROSECUTION ⊂⊃69—DAMAGES.
An award of $1,400, in an action for malicious prosecution of a criminal proceeding wherein defendant was charged with unlawfully breaking into a railroad car, is not so excessive as to warrant new trial.

At Law. Action by Horace Shelton against the Southern Railway Company. On defendant's motion for new trial. Motion denied.

Pickle, Turner, Kennerly & Cate, of Knoxville, Tenn., for plaintiff.
L. D. Smith, of Knoxville, Tenn., for defendant.

SANFORD, District Judge. My conclusions are:

1. The verdict is not so clearly and manifestly against the weight of the evidence as to warrant its being set aside. Mt. Adams Ry. v. Lowery (6th Cir.) 74 Fed. 463, 472, 20 C. C. A. 596; Felton v. Spiro (6th Cir.) 78 Fed. 576, 582, 24 C. C. A. 321.

[1-3] 2. The affidavits as to the identity of De Witt Smith do not warrant the granting of a new trial upon the ground of newly discovered evidence. This is offered to contradict the testimony of Humbert that Smith was a white man, of Lexington, Kentucky. Newly discovered evidence merely to contradict a witness is not sufficient, however, to warrant a new trial. Lowry v. Mt. Adams Railway Co. (C. C.) 68 Fed. 827, 829. Furthermore on the point offered these affidavits were merely cumulative, as there was evidence on the trial that the plaintiff had himself brought a negro to the Knoxville depot and introduced him as De Witt Smith. Newly discovered evidence, which is merely cumulative, is not ordinarily ground for a new trial. Lowery v. Mt. Adams Railway Co. (C. C.) 68 Fed., supra, at p. 828; Flint v. Insurance Co. (C. C.) 71 Fed. 210, 221; Wright v. Express Co. (C. C.) 80 Fed. 85. The question of Smith's identity was furthermore merely collateral; the affidavits are merely negative; and the counter affidavits introduced by the plaintiff indicate that in fact Smith was a white man then living in Knoxville, who had formerly lived in Lexington. On the whole, I think the newly discovered evidence is not so conclusive as to raise a reasonable presumption that the result of a new trial would be different from the first; it is hence insufficient as ground for a new trial. Stoakes v. Monroe, 36 Cal. 383, 388; Armstrong v. Davis, 41 Cal. 494, 500; State v. Montgomery, 37 Utah, 515, 520, 109 Pac. 815. And see Williams v. United States, 137 U. S. 113, 137, 11 Sup. Ct. 43, 34 L. Ed. 590; Turner v. Schaeffer (6th

Cir.) 249 Fed. 654, 657, — C. C. A. —; and Goldsworthy v. Linden, 75 Wis. 25, 34, 43 N. W. 656.

[4, 5] 3. I find no error in the charge of the court in the matters complained of.

(a) While there is some conflict of authority on the question, I think the true rule is that where the grand jury, as in Tennessee, hears only the witnesses for the prosecution and determines only the question of probable cause, its failure, after investigation, to return an indictment, is prima facie evidence of want of probable cause. Ambs v. Atchison Railway Co. (C. C.) 114 Fed. 318, 320; Brant v. Higgins, 10 Mo. 728, 734; Vinal v. Core, 18 W. Va. 1, 42; Brady v. Stiltner, 40 W. Va. 289, 293, 21 S. E. 729; Hanchey v. Branson, 175 Ala. 236, 245, 56 South. 971, Ann. Cas. 1914C, 804. So, too, where a magistrate who sits as a committing magistrate merely, and not to try a case on the merits, discharges the defendant. Williams v. Norwood, 2 Yerg. (Tenn.) 320, 336; Vinal v. Core, 18 W. Va., supra, at p. 42; Brady v. Stiltner, 40 W. Va., supra, at p. 293, 21 S. E. 729; Hanchey v. Branson, 175 Ala., supra, at p. 245, 56 South. 971, Ann. Cas. 1914C, 804; Smith v. Clark, 37 Utah, 116, 130, 106 Pac. 653, 26 L. R. A. (N. S.) 953, Ann. Cas. 1912B, 1366. I hence find no error in the portion of the charge relating to this question.

[6] (b) The declaration alleged that the defendant, by its agent, swore out a warrant against the plaintiff charging him with unlawfully breaking into a railroad car, etc., that the plaintiff was arraigned on said charge before the justice, pleaded not guilty and was thereupon bound over to the criminal court, etc. While it was not specifically averred that the defendant was arrested under this warrant, it was necessarily implied, either that he had been arrested under it or entered his appearance to it, and that proceedings were had before the magistrate under this warrant, after his personal appearance before the magistrate. The charge to the jury which is complained of was in substance that even if the plaintiff was not in fact arrested under this warrant or present at the proceedings under it before the magistrate, nevertheless that if the jury found that certain proceedings were there had in his absence by which the warrant was treated as that upon which he was to be prosecuted, the defendant would not be in a position to deny that the prosecution was under this warrant, no matter whether he was actually arrested under it or not. The theory upon which this charge was given, although not expressed at the time, was that the facts hypothetically stated to the jury amounted to an estoppel and prevented the defendant from denying that the criminal prosecution was had under this warrant. The defendant excepted to this portion of the charge on the ground of "variation," evidently meaning variance.

I am of opinion that, if the facts were found by the jury as stated in this portion of the charge, the defendant was clearly estopped to deny that the plaintiff was in fact bound over to the criminal court on the prosecution commenced on the warrant sworn out by its agent. A defendant cannot be permitted in one legal proceeding to deny the validity of steps taken by it in another proceeding which would im-

pute to it a fraud upon the administration of justice in such other proceeding. Philadelphia Ry. v. Howard, 13 How. 307, 334, 14 L. Ed. 157.

There was no objection to the evidence at the trial on the ground of variance. In fact, much of the evidence on this question was introduced by the defendant itself, substantially in the effort to impeach the proceedings before the justice showing on their face that the plaintiff was bound over on this warrant. It need not, however, be now determined whether objection on the ground of variance must be taken to the evidence or may thereafter be taken by exception to the charge. See 31 Cyc. 754, 758, and cases cited. Irrespective of this question, I am of opinion that the charge in question was correct, provided the plaintiff could prove the substantial averments of the declaration by an estoppel in pais without having specially alleged the same in the declaration or in a replication.

[7, 8] Generally speaking an estoppel in pais need not be pleaded. 1 Rawle's Bouv. 1084, citing Bigelow, Estoppel, 765; estoppel being, in effect, a rule of evidence. 1 Rawle's Bouv. 1078, and authorities cited. At common law, as distinguished from code pleading, an estoppel in pais is held available as a defense under the general issue. 8 Enc. Pl. & Pr. 67; 16 Cyc. 806.

[9, 10] Upon the specific question whether a plaintiff may rely upon an estoppel in pais as proving the cause of action alleged, without having averred the same originally or by way of replication, there is a conflict of authority.

In Plumb v. Curtis, 66 Conn. 154, 163, 33 Atl. 998, 1003, it was said:

"At common law an estoppel in pais was never regarded as in itself a substantive ground of recovery, to be put forward in pleading as part of the plaintiff's case. It was merely a mode of shutting off a defense. A plaintiff who sued upon a cause of action, the existence of which the defendant was equitably estopped from denying, stated the facts necessary to constitute the cause of action in his complaint as if they existed, and if a denial were pleaded, did not reply specially, stating the matter of estoppel, but simply introduced it in evidence to support his original averments. Hawley v. Middlebrook, 28 Conn. 527, 536."

So, in Spears v. Walker, 1 Head (Tenn.) 166, 169, it was held that a plaintiff in ejectment might prove the boundary of the land sued for by an estoppel in pais against the defendant, arising out of the evidence, although, so far as appears, such estoppel had not been pleaded.

If intended as establishing a general rule of pleading in Tennessee this decision would of course now be binding on this court under the Conformity Statute, Rev. St. § 914 (Comp. St. § 1537). However, in Wood v. Jackson, 8 Wend. (N. Y.) 9, 36, 22 Am. Dec. 603, the plaintiff's right to prove his title by estoppel, without pleading, was referred to as an exception to the general rule. And see, to the same effect, 2 Abb. Tr. Brf. Plead. 1444.

On the other hand, in Philadelphia Railroad v. Howard, 13 How., supra, at p. 334, 14 L. Ed. 157, the Supreme Court, in speaking in reference to the plaintiff, said that the rule was well settled that if a party has a right to plead an estoppel and voluntarily fails to do so, tender-

ing or taking issue on the fact, he waives the estoppel and commits to the jury the finding of the truth; citing 1 Saund. 325a, n. 4. So in Jacobs v. Bank, 15 Wash. 358, 361, 46 Pac. 396, it was held that the plaintiff could not rely, as a ground of recovery, upon an estoppel in pais not specially averred. And see, inferentially, City of Ironton v. Harrison (6th Cir.) 212 Fed. 353, 357, 129 C. C. A. 29, in which it was held that as the facts alleged showed the estoppel, the plaintiff might have the benefit of it, though he had not pleaded it in terms.

However, in Philadelphia Railway v. Howard, 13 How. supra, at p. 335, 14 L. Ed. 157, the court said, speaking of the plaintiff, that if a party have not an opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence on the trial, and held that as the plaintiff had sued upon a sealed instrument and the defendant had merely pleaded non est factum, the plaintiff need not allege an estoppel by which the defendant was not permitted to deny that the instrument was under its seal, but might rely on this in evidence, without replication. To the same effect are Lord v. Bigelow, 8 Vt. 445, 448; Wood v. Jackson, 8 Wend. (N. Y.) supra, at p. 36, 22 Am. Dec. 603, and 2 Abb. Tr. Brf. Plead. 1444.

Without determining the broad rule of pleading which should be generally followed as to estoppel by a Federal Court sitting in Tennessee, I am of opinion that in any event the instant case fairly falls within the rule stated by the Supreme Court in the Howard Case. The plaintiff here had alleged a prosecution under this warrant. The defendant merely pleaded the general issue, without averring specially the invalidity of the proceedings before the justice. The proceedings before the justice showed, prima facie, at least, that the plaintiff was bound over to court on the warrant sworn out by the defendant's alleged agent. The defendant relied upon evidence impeaching or tending to impeach the proceedings before the justice, and showing or tending to show that in fact the plaintiff was not legally bound over on this warrant. Under these circumstances, I think the plaintiff, without any affirmative pleading, was entitled to reply to this that even if the evidence did not show that the plaintiff was in fact legally bound over on this warrant, it did establish an estoppel against the defendant from denying that fact. I therefore conclude that there was no error in the charge in this respect.

[11, 12] (c) The plaintiff in an action for malicious prosecution is not require to go further than to prove malice and want of probable cause. He need not prove his own actual innocence to support the action. Moore v. Sauborin, 42 Mo. 492, 494; McGowan v. Rickey, 64 N. J. Law, 402, 404, 45 Atl. 804; 26 Cyc. 27. And while, as a matter of public policy, such action will not lie in favor of a guilty plaintiff, and the defendant may hence, by way of defense, show the plaintiff's actual guilt (Ann. Cas. 1914C, 809), I am of opinion that the burden of establishing such defense necessarily rests upon the defendant, as the jury were instructed.

[13] 4. The verdict cannot be set aside on the ground that it was arrived at as a quotient verdict; evidence of the jurors on this point being inadmissible. McDonald v. Pless, 238 U. S. 264, 267, 35 Sup.

Ct. 783, 59 L. Ed. 1300. And see Hyde v. United States, 225 U. S. 347, 383, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. Furthermore the evidence, in so far as introduced on the hearing on the motion for new trial, did not establish the fact that there was a quotient verdict; the defendant, in view of the ruling then made by the court, resting before the proof on this question had been completed.

[14] 5. Under all the circumstances, and in view of the serious nature of the charge upon which the plaintiff was prosecuted, I do not find that the verdict was so excessive as to justify the granting of a new trial.

6. The motion for new trial will accordingly be denied and judgment entered on the verdict.

UNION BAG & PAPER CORPORATION v. BISCHOFF.

(District Court, E. D. New York. December 13, 1918.)

1. PRINCIPAL AND AGENT ⟸123(7)—AUTHORITY OF AGENT—EVIDENCE.
   In a suit to compel defendant to purchase property from plaintiff pursuant to an agreement, evidence *held* to establish the authority of defendant's agent, who signed the agreement, and to show defendant's knowledge thereof.
2. SPECIFIC PERFORMANCE ⟸31—SUIT—RIGHT TO MAINTAIN.
   Where defendant's agent signed a letter, written by plaintiff, offering to sell property, and the minds of the parties met, specific performance cannot be denied, because the parties contemplated that a formal contract would be later substituted for the more or less informal agreement.
3. FRAUDS, STATUTE OF ⟸116(5)—AUTHORITY OF AGENT—PURCHASE OF LANDS.
   Written authority is not necessary for agent to bind his principal by an agreement to purchase land.
4. PRINCIPAL AND AGENT ⟸21—AUTHORITY OF AGENT—DECLARATIONS OF AGENT—CREATION.
   While agency cannot be proved by the declarations of an agent, the agent may testify to statements made by his principal, in order that the court may determine whether an agency was created.
5. SPECIFIC PERFORMANCE ⟸31—ACTION—DEFENSE.
   In a suit to compel defendant to purchase land pursuant to an agreement, it is no defense that the draft contracts did not conform to the agreement contained in an offer by letter, which was accepted by defendant's agent, where the draft contracts were rejected for a different reason.
6. COURTS ⟸365—SPECIFIC PERFORMANCE ⟸32(3)—FOLLOWING STATE DECISIONS—CONTRACT—MUTUALITY.
   The federal court will not deny specific performance of a contract whereby defendant was to purchase New York lands, on the ground that the contract lacked mutuality, though the rule in the courts of New York is to the contrary.
7. VENDOR AND PURCHASER ⟸134(2)—INCUMBRANCE—MORTGAGE—PARTIAL RELEASE.
   Where a mortgage on all of the vendor's property provided for release of portions for sale, and it appeared the vendor had complied with the requirements which absolutely entitled it to a release, *held*, that specific performance of defendant's contract to purchase part of the vendor's lands will not be denied, because of the mortgage, though defendant could not be required to make payment, unless he receives a title free from the mortgage lien.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Equity. Suit by the Union Bag & Paper Corporation against Frederick Bischoff. Decree for plaintiff on condition.

Thomas Mills Day, of New York City, for plaintiff.
Edward T. Horwill, of Brooklyn, N. Y., for defendant.

GARVIN, District Judge. This is an action brought to compel the defendant to purchase from plaintiff a mill property at Ballston Spa, N. Y. Defendant rested at the close of the plaintiff's case.

On February 21, 1918, the following letter was signed by the plaintiff, and upon it was indorsed by one Briggs:

"Accepted: J. Meade Briggs, Agent for F. Bischoff."

"Union Bag & Paper Corporation.
"Woolworth Building, New York City.

"February 21, 1918.

"Office of the President. Mr. John L. Hurlburt, General Manager,

"F. Bischoff, 150 Sand Street, Brooklyn, N. Y.—Dear Sir: This is to confirm arrangement made with you to-day, through your representative, Mr. J. Meade Briggs, of Brooklyn, whereby we sell to you our property located at Ballston Spa, New York, consisting of real property, mill, machinery, and factory buildings and warehouses, as contained in those properties known as Union Mill property, which you have just gone over (with the exception of our Glen Mill property, which was not shown your representative), and all rights and titles connected therewith, with the exception of any merchandise that may be stored therein, for the sum of fifty thousand dollars ($50,000), on the following terms:

"Five thousand dollars ($5,000) upon the drawing up and signing of the contract, on or before March 1st.

"Fifteen thousand dollars ($15,000) as soon as the deeds for conveying the property are completed, on or before April 1st.

"A mortgage of thirty thousand dollars ($30,000) for two years, interest 6%, of which $10,000 shall be paid one year from this date, and $20,000 to be paid two years from date, and the privilege of paying off any amount in multiples of $5,000 or all on any interest-paying date. Insurance and taxes to be prorated at the date of delivery of deed.

"This sale, of course, is subject to the approval of the trustee under our general mortgage, and the approval of our executive committee, and also is made with the understanding that the property will not be used for a period of ten (10) years for the manufacture of paper bags.

"Very truly yours, [Signed] M. B. Wallace,
"MBW:EMH President."

Plaintiff claims that this constitutes a contract binding on the defendant.

[1] It must first be determined whether Briggs had authority to bind defendant. On February 12, 1918, defendant went to Ballston Spa to view the property, accompanied by John L. Hurlburt, who was his general manager, and Briggs. As they were returning, defendant told Briggs that he thought very well of the property, but that the matter was entirely in the hands of Hurlburt, and whatever the latter did was all right. Hurlburt testified that the defendant told him to go ahead and purchase that property. Briggs subsequently called at plaintiff's office, discussed the terms of purchase, and telephoned them to Hurlburt, who was then with defendant in the latter's office. Hurlburt in turn communicated them to the defendant, who said, "All

right." All this, taken together, indicates an intention on the part of defendant to be bound by Briggs' act. The letter in question was addressed to Hurlburt, because the method of taking title had been discussed with defendant, and the latter had indicated that he desired to have the transaction consummated in that manner. Five days after the letter was signed, defendant, after seeing it, returned it to Hurlburt, saying that, although he had changed his mind about some other matters, the purchase of the Ballston Spa property was not affected thereby. The letter provided that the first payment was to be made on or before March 1st, on which day the formal draft of contract was presented to defendant, who then repudiated the entire transaction, not criticizing any act of plaintiff, but claiming he had been tric'ed (in what manner it does not appear) by Hurlburt.

Defendant claims that the testimony does not make it clear that all the terms of sale were disclosed to him on February 21st. Any doubt upon this is dispelled by the statement made by him February 26th, when he expressed his approval of the purchase after the letter had been submitted to him.

Defendant also urged that the plaintiff's witnesses made confusing and contradictory statements, and that the testimony of at least one—Hurlburt—is wholly improbable. The court had an opportunity to observe the witnesses and their manner of testifying, and has reached a different conclusion. The variations were due almost, if not wholly, to misunderstandings of questions, or to mistakes that are apt to occur in describing the events of several consecutive days. No disposition to conceal or evade was manifested, and in the absence of any proof in behalf of defendant the court accepts plaintiff's witnesses as credible.

[2] It is insisted that no action can lie, because a formal contract was not signed. The true test is to ascertain whether the minds of the parties did in fact meet on February 21st. The proof is convincing that they did, for which reason no formal contract is required. U. S. v. P. J. Carlin Construction Co., 224 Fed. 859, 138 C. C. A. 449; Thomas B. Whitted & Co. v. Fairfield Cotton Mills, 210 Fed. 725, 128 C. C. A. 219; N. Y. & Philadelphia Coal Co. v. Meyersdale Coal Co., 217 Fed. 747, 133 C. C. A. 441.

[3] Defendant urges that Briggs had no written authority from the defendant, and so could not bind him in this way as agent. This was not a transfer of land; it was a contract of sale. As such the authorities hold that the memorandum of the contract need not be signed by the vendee, and that an agent may bind his principal by a contract for the sale of land without having written authority. No reason suggests itself for any different requirement in connection with a contract to purchase land.

[4] While it is quite true, as defendant insists, that agency cannot be proved by the declarations of an agent, the latter may testify to statements made by his alleged principal, in order that the court may determine whether any agency was created.

[5] Whether the draft contracts conformed to the terms of the letter is immaterial. They were rejected for quite a different reason.

[6] The contract may lack mutuality, in which case it could not be enforced by plaintiff in the courts of New York state. See Wadick v. Mace, 191 N. Y. 1, 83 N. E. 571. But the federal courts hold otherwise. Great Lakes Trans. Co. v. Scranton Coal Co., 239 Fed. 603, 152 C. C. A. 437; Montgomery Traction Co. v. Montgomery Light & Power Co., 229 Fed. 672, 144 C. C. A. 82. This case must be determined in accordance with the latter authorities. James v. Gray, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321.

[7] The mortgage referred to in the letter is in evidence. It provides that any part or parts of the mortgaged property may at any time, at the request of the mortgagor, be released by the trustee from the lien of the mortgage, provided it appears to the trustee that the release is desirable in the conduct of the business of the mortgagor (page 25 of mortgage), and provides that further real estate or other property be conveyed or transferred to the trustee to an amount equal in value to the property to be released. It is further provided by the mortgage that the trustee may accept as satisfactory and conclusive evidence, as to the desirability of any such release, or as to the value of any property to be released, the certificate of a majority of the board of directors of the mortgagor, including the president or first vice president. The executive committee of the plaintiff has approved the sale, and plaintiff is ready to turn over to the trustee the entire amount received for the property, without deducting any commission paid for effecting the sale. A certificate, in proper form, signed by a majority of the directors, is in evidence. The defendant, it is quite true, cannot be compelled to carry out the contract, unless plaintiff gives a title free from the lien of the trust mortgage; but it has been held that, if a mortgage can be discharged out of the purchase money, it does not constitute a bar to the action (Megibben's Adm'rs v. Perin [C. C.] 49 Fed. 183), and therefore a decree can be made which of course, will not result in defendant being obliged to make any payments unless he receives a title free from the mortgage lien; that is to say, the payment and cancellation of the mortgage may be provided for by the decree, which will be for the plaintiff, with costs.

COKE v. ILLINOIS CENT. R. CO. et al.

(District Court, W. D. Tennessee, W. D. January 17, 1919.)

No. 1784.

1. STATUTES ⟸217—CONSTRUCTION—HISTORY AND PASSAGE.
   Where acts of Congress are ambiguous, the courts may properly have recourse to public documents and proceedings in Congress pending consideration of the legislation and to contemporaneous events and the existing situation.

2. EVIDENCE ⟸28—JUDICIAL NOTICE—LABOR BODIES WHICH URGED ADAMSON LAW.
   It is matter of common knowledge that the Adamson Law Sept. 3, 5, 1916 (Comp. St. §§ 8680a–8680d), was enacted at instance of four bodies of organized railway employés, the Order of Conductors, Brotherhood of

Engineers, Brotherhood of Firemen and Engineers, and Brotherhood of Trainmen.

3. MASTER AND SERVANT ⟸13—RAILROAD EMPLOYMENT—ADAMSON LAW—NONAPPLICATION TO SWITCH TENDER.

The Adamson Law Sept. 3, 5, 1916 (Comp. St. §§ 8680a–8680d), making eight hours the standard of a day's work to reckon compensation of railroad employés, *held* to apply only to employés doing work performed by four railroad labor brotherhoods to prevent whose strike statute was enacted, that is, all trainmen working on engines and in cars, not to switch tender in yards of railroads.

At Law. Action by H. P. Coke against the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company. Order directed to be entered effectuating the agreement made at hearing.

Anderson & Crabtree, of Memphis, Tenn., for plaintiff.
Chas. N. Burch, of Memphis, Tenn., for defendants.

McCALL, District Judge. This is an action brought by H. P. Coke against the Illinois Central and Yazoo & Mississippi Valley Railroad Companies to recover additional compensation in the sum of $274 for services as a switch tender rendered the defendants at the Grand Central Station, Memphis, Tenn., from January 1 to August 17, 1917. It is alleged that plaintiff was actually engaged as a switch tender in the operation of interstate trains of defendants at a compensation of $75 per month, that he worked twelve hours per day, and that by virtue of the Act of Congress approved September 3 and 5, 1916, c. 436, 39 Stat. 721 (Comp. St. §§ 8680a–8680d), commonly known as the Adamson Law, he is entitled to be paid on an eight hour per day basis of compensation. The act provides that—

"Beginning January 1st, 1917, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employés who are now or may hereafter be employed by any common carrier by railroad * * * and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads. * * *"

The other provisions of the act are not material here.

There is no material controversy about the facts. The only question for decision is whether the plaintiff belongs to that class of railroad employés at whose instance and for whose benefit the Adamson Law was enacted. In other words, was the plaintiff "actually engaged in any capacity in the operation of trains used for the transportation of persons or property" within the scope, intention, and meaning of the act?

Broadly speaking, the act might be construed to include every employé of such railroad from president down to section hand, who was in any capacity actually engaged in doing those things necessary to the operation of trains; such as directing their operation in a supervising way, maintaining the roadway, lining up switches for their operation, or aboard the trains manually operating them, etc.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The undisputed evidence is that the work plaintiff did, to wit, lining up switches, is the work some member of the train crew would do but for the switch tender; the switch tender being employed to line up switches in order to obviate the necessity of stopping a train to permit a member of the train crew to alight therefrom and line up the switch. And it is insisted that, if a member of a train crew alights from his train to line up a switch for his train to pass, he would be actually engaged in operating a train, and hence a switch tender, employed to do and doing only this particular work in order to relieve a member of the train crew from such duty, would also be actually engaged in operating a train in some capacity, within the meaning of the statute.

In the interest of clearness it may be well to state in more detail the work plaintiff did. In defendants' terminals, a short distance from the passenger station, is maintained a switch over which all their trains entering or leaving the station pass. From this switch parallel tracks numbered from 1 to 10 lead into the station shed. Each train entering the shed is regularly assigned to come in over a particular track, and always does so except when late or for some other unexpected cause. In such event, the yardmaster informs the switch tender which track the train should occupy, and he lines up the switch so as to comply with this order. Trains leaving the shed for their trips over the road pass over the switch which is lined up so as the train passes onto the main line over which it makes its trip. In other words, the switch tender by lining up the switch throws the incoming train onto the proper main line, or onto a switch line which leads to the outgoing main line.

[1] Assuming, but not deciding, that plaintiff was actually engaged in some capacity in operation of trains, the question arises: Did Congress intend by the Adamson Act to include and provide for employés engaged in the work plaintiff was doing? It is too much to say that the terms of the act are clear and unambiguous. In such circumstance it is well settled that in determining the scope, intention, and meaning of acts of Congress, to give effect to them courts may properly have recourse to public documents and proceedings in Congress had pending the consideration of the piece of legislation in question, and may also properly look at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. Johnson v. S. P. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; Standard Oil Co. v. U. S., 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; Binns v. U. S., 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087; Lapina v. Williams, 232 U. S. 78, 34 Sup. Ct. 196, 58 L. Ed. 515; Holy Trinity Church v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

[2] In view of these authorities, the court feels warranted in saying that it is of common knowledge derived from the message of the President pressing the prompt enactment of the law in question, delivered orally to the Congress, from the Congressional Record, as well as from all the great newspapers and periodicals of the day, that

the Adamson Law was enacted at the instance of four bodies of organized railway employés, to wit, Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railway Trainmen. The members of these four organizations were all employés whose duties were discharged aboard railway trains, such as conductors, engineers, firemen, and railway trainmen, which latter term would include all those whose duties were performed "on the engines and in the cars." While it was thought by the four brotherhoods mentioned that the legislation provided for their best interest, and they demanded it, yet it is fair to say, judging from the Congressional Record, that it was enacted by Congress primarily to prevent a calamity to the country which was thought sure to follow in case it was not enacted, if the brotherhoods, in case it was not enacted, should carry into effect their declared purpose to call a strike, and thus stop trains moving in interstate commerce and tie up the commercial interests of the country.

As was said by the President to the Congress (page 13361, Congressional Record of August 29, 1916):

"The four hundred thousand men from whom the demands proceeded had voted to strike if their demands were refused; the strike was imminent; it has since been set for the fourth of September next. It affects the men who man the freight trains on practically every railway in the country. The freight service throughout the United States must stand still until their places are filled, if, indeed, it should prove possible to fill them all. Cities will be cut off from their food supplies, the whole commerce of the nation will be paralyzed, men of every sort and occupation will be thrown out of employment, countless thousands will in all likelihood be brought, it may be, to the very point of starvation, and a tragical national calamity brought on, to be added to the other distresses of the time, because no basis of accommodation or settlement has been found."

To avert the direful calamity so vividly pictured by the President, Congress without investigation, and without time for investigation, enacted the Adamson Law.

Senator Underwood, who was in charge of the bill during its consideration, said:

"They are not contending for an eight hour day, that a man shall work only eight hours; they do not want that. They work by piecemeal on the engines and in the cars. The bill, however, is only temporary. The only justification for us passing this bill at this time and in this haste, without our knowledge and without consideration, is the fact that we are doing it to meet a very great emergency to the American people. We are not passing this bill in the interest of the trainmen, but we are passing it in the interest of the American people, if we pass it right and properly."

And, further, in answer to a question by Senator Borah as to whether it would cover "trainmen and switchmen," Senator Underwood replied:

"I do not think that the bill would, but I will say that I have not given careful consideration to that portion of the bill, because that part of it is temporary. Section 6 if put into life will cover without discrimination every man who works for a railroad." Congressional Record, Sept. 1, 1916, p. 15558.

Section 6 was not "put into life," and from the remarks of Senator Underwood it is but reasonable to conclude that he and the Congress

understood that the law applied only to those who actually operated the trains as parts of their crews.

But over and beyond this, the validity of the act was before the Supreme Court of the United States in Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024, wherein it was held to be constitutional. The point was made in that case that the act was void for unlawful inequality and arbitrary classification, in that it included only employés actually engaged in the operation of trains, and did not include other railroad employés. The Supreme Court sustained the classification on the ground that only those actually engaged in the operation of trains (not including switchmen) were threatening to strike, and that it was therefore proper to pass legislation which affected only those who were so threatening, apparently meaning thereby to say that the legislation applied only to the Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railway Trainmen.

In discussing this phase of the case, the Supreme Court said:

"The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions. The second rests upon the charge that unlawful inequality results because the statute deals, not with all, but only with the wages of employés engaged in the movement of trains. *But such employés were those concerning whom the dispute as to wages existed, growing out of which the threat of interruption of interstate commerce arose, a consideration which establishes an adequate basis for the statutory classification.*" (Italics mine.)

[3] Clearly the Adamson Law does not apply to all employés of railroads engaged in interstate commerce, nor does it apply to all those who are actually engaged in doing some of the things necessary for the operation of trains. It would seem, therefore, reasonable and proper to follow the line of cleavage which the Congress intended to establish, as gathered from the contemporaneous history of events attending the consideration and passage of the law. When the act is thus considered in the light of the utterances of the President, the Congressional Record, the hearings before the Committee on Interstate Commerce, and the report of the Wage Commission, it appears that Congress was dealing with the four brotherhoods only, and intended the legislation to apply only to those doing the work performed by the brotherhoods. That is to say, to trainmen who worked "on the engines and in the cars." This conclusion is greatly strengthened by the language of the Supreme Court of the United States in Wilson v. New, supra.

These considerations lead to the conclusion that the act must be limited to those actually engaged in operating trains as trainmen. Since it does not appear that the class of railroad employés to which plaintiff belongs was one of the four brotherhoods at whose request, insistence, and supposed benefit the Adamson Law was enacted, or that plaintiff worked "on the engine or in the cars," and it appearing that his work was in the yards as a switch tender, it follows that in my judgment he is not entitled to the relief sought.

It was agreed at the hearing that the verdict of the jury and judgment of the court in this case should be made to turn upon the decision of the law question herein disposed of. Such order will be entered as will properly carry into effect that agreement.

COOK v. FLAGG.

(District Court, S. D. New York. September 23, 1915.)

1. TRUSTS ⊂=101, 368, 369—CONSTRUCTIVE TRUSTS—ESTABLISHMENT—INJUNCTION AND RECEIVER.
   On motion for an injunction restraining defendant from paying out money, etc., obtained from complainant and others to be used in operating on stock exchanges, *held*, from the affidavits and moving papers, without giving any weight to defendant's conviction of unlawfully using the mails in connection with his scheme, that defendant was guilty of a breach of agreement, it appearing that he did not make investments necessary to carrying out his scheme, and hence a trust arose in favor of complainant, entitling him to an injunction and appointment of a temporary receiver.
2. TRUSTS ⊂=366(2)—ENFORCEMENT—PARTIES—MULTIPLICITY OF SUITS.
   A customer of defendant, who had a scheme for operating on stock exchanges, who asserted a constructive trust in his favor on account of defendant's breach of agreement, cannot bring an action for himself and on behalf of those who might come in and join, merely to avoid multiplicity of suits, but there is no objection to the customer's bringing such a representative action because he is a creditor.
3. TRUSTS ⊂=305—SUIT FOR ACCOUNTING—PARTIES—REPRESENTATIVE ACTION.
   Where defendant, who obtained money from complainant and other customers for the purpose of operating on stock exchanges deliberately broke his agreement, a trust arose in favor of customers, entitling complainant to sue for an accounting, and he may sue for the benefit of himself and others similarly situated, who might come in and join.

In Equity. Suit by Ellsworth E. Cook against Jared Flagg. On motion for an injunction and the appointment of a temporary receiver. Motion granted.

See, also, 233 Fed. 713.

Motion for an injunction against defendant restraining him from paying out or removing from the jurisdiction of this court any of the money constituting the fund described in the bill of complaint, and also praying for a temporary receiver of said fund. Further relief is also prayed for. The fund referred to is what may remain in the possession or under the control of the defendant of sums of money (said to amount to many hundred thusand dollars) obtained by the defendant from the public upon representations that said sums of money were to be used by him in "operating" on stock exchanges in accordance with a system or theory of purchase and sale set forth by him in circulars and letters sent out for the purpose of procuring customers or depositors. The plaintiff is one of such customers, who at divers times sent to defendant sums aggregating $10,000, upon which he has received from defendant $2,800, alleged to be profits.

The substance of the bill of complaint is that Flagg's representations that he intended, with the money of plaintiff and others, to operate or speculate or invest in stocks and gain profit therefrom by sales and purchases in accordance with his "system," were all false; that he did not follow the system he advertised, and did not in truth make the profits (so called) that he paid over

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

to plaintiff and others, but that his fraudulent scheme was to get as much money as he could from as many persons as possible, and keep old customers or patrons satisfied by paying to them, under the guise of profits, moneys which really came from new customers or patrons, if he did not pay them back a portion of their own money.

Flagg was indicted in this court for using the mails in carrying on the business said to be described in the bill of complaint herein. He was convicted, and on November 17, 1914, sentenced for the period of 18 months to the penitentiary at Atlanta, Ga. He is, however, still at large on bail pending appeal.

This motion is made on voluminous affidavits, the pleadings herein, and the record of the trial under the indictment above mentioned.

Gilbert E. Roe, of New York City, for complainant.

John M. Coleman and Max Steuer, both of New York City, for defendant.

HOUGH, District Judge (after stating the facts as above). [1] On February 3, 1913, I considered the indictment against Flagg on demurrer. The opinion filed that day shows the view then entertained of what was charged against the defendant. His trial and the record there made have not changed my opinion. Comparing the bill herein with that indictment (which is one of the moving papers), it seems clear that the facts charged in this case are the same as those asserted in the criminal proceedings. It is indeed quite correct to summarize plaintiff's present contention thus: Because Flagg has done the things charged both in bill and indictment, the money he got through such actions is a trust fund, applicable, through the machinery of equity, to reimburse those whom he defrauded; and preliminary relief may be granted by injunction and receiver, because by his conviction Flagg is presumptively, if not conclusively, held to have done the very things thus doubly charged.

Before considering the technical right of plaintiff to bring a suit, and especially to bring it in the way he has done, some inquiry may be made as to whether the papers submitted on this motion throw any light on what Flagg did, as distinct from what he professed to do.

Defendant has submitted a lengthy affidavit, and also his account or record of proceedings with Cook, the plaintiff herein. In the affidavit he says:

"Each customer had in my office the same kind of an account, and was treated in exactly the same way as it (the account?) is treated in a reputable brokerage house."

Specifically of Cook he said:

"During the whole of the term of the contract I sent to Mr. Cook the profits that were made, and I continued upon commitments upon which there had been sustained losses, intending to carry them as long as his margin would last, and possibly longer, and waiting until the market turned, and until there was a clear profit of at least one point in the transaction."

No time need be spent in describing the transactions of a reputable brokerage house with a margin customer, beyond noting the fact that it is an essential of "reputability" that the broker must at all times have in his possession or under his control the stocks being carried,

and stand ready to deliver the same to his customer whenever the latter makes demand and discharges his own debt to the broker.

Flagg took from every customer (including, of course, Cook) an order contract (Exhibit C), and it may be admitted (for purposes of argument) that this paper does disclose a sort of agreement uncommon, but not at all impossible, between broker and customer, except that Cook by operating in fractional shares bound himself to be treated only as a fraction of a "unit," which word signified in Flagg's business a collection of customers whose deposits with Flagg aggregated $10,000. But, regarding a "unit" as the money of one man (which perhaps was the case in some instances), this order contract means that Flagg agreed to go long of some and short of other enumerated stocks, and take a profit of one point or better, if the market was favorable, and then repeat.

As to what would happen if the market was wholly unfavorable, the contract is silent so far as plain language is concerned; but it is inferable that it was contemplated that a customer's, or even a "unit's," margin might become exhausted. Construed by their own language only, Flagg's order contracts evidence a highly speculative margin account, which Flagg might place with any broker unless he chose to employ a floor broker only and actually carry the stocks himself; i. e., have them in his own possession or under his own control.

In my judgment the evidence furnished by Flagg himself shows that he is not now carrying and has not carried for several years any stocks either for short or long account for Cook, and there is every probability that what he has done with, to, or for Cook he has done in respect of all his other so-called customers. The convincing evidence on this point is (I think) found in the utter refusal of a man in Flagg's position to state what he has, or what he has had, or what he has done with that which he received. The inference is irresistible that he does not tell that which he must know, because, if he told, the telling would do him no good.

The next very persuasive item of evidence is Flagg's colloquy upon his trial with one of the jurors. The defendant there substantially asserted that he carried no accounts in brokers' offices, but employed only a floor broker. He said, "My customers were dealing with me as a broker;" and he agreed to the juror's suggestion that the accounts were in his books. It follows that if Flagg did not carry his customers' accounts with any broker, but carried them himself as a broker, he ought to be able to produce the stocks or show exactly how and why he lost them. But in order to escape being convicted at least of civil fraud, he must show that he lost them while pursuing the agreed scheme of operations set forth in the so-called order contract.

An analysis of the Cook account, furnished by Flagg and purporting to show the present condition of Cook's transactions, is to me conclusive proof that Flagg did not carry out the scheme originally proposed. He still has, according to this account, what he calls "open commitments" on behalf of Cook in the stock of the Reading Railroad, and he has had some of them since June, 1910, and the operation was on its face a long one. Yet he has never sold, while it is easily ascer-

tained that opportunities to sell at a profit existed for a very long time, and the amount of such profit was far more than one point.

Mutatis mutandis, the same thing is shown by examining the short account in the common stock of the Steel Corporation. In truth, Flagg's account with Cook submitted on this motion is of itself proof positive of most flagrant disregard of the contract upon which Flagg relies as between himself and Cook.

The next natural inquiry is why Flagg did not close out these short and long operations when he could have done so at a profit, if his account is truthful. The only explanation of this is found in the affidavits of the so-called liquidating committee of men who believed in Flagg, and tried to assist him when he got into trouble with the federal government in closing out his enterprises. The inference I draw from these affidavits is that, since they could not find, nor get any information concerning, the major portion of the stocks and bonds necessary to make good Flagg's engagements, there never were such stocks and bonds, at least in any quantities at all responding to the magnitude of Flagg's operations with the public.

Comment seems unnecessary upon the major portion of this defendant's affidavit. I have chosen from it certain definite statements, and measured them by a document which is assumed to be a contemporary record of what Flagg did. It is impossible to fit this record with Flagg's publications. Thus he talks about "commitments," and "open commitments," but he nowhere explains what is meant by such a loose phrase. This one failure of explanation renders most of his affidavit a mere mass of words, signifying nothing.

When one considers the affidavit in conjunction with circular letters sent out by or under the direction of Flagg, I am wholly at a loss to reconcile the plan of business or speculation described in the circulars with either Flagg's affidavit, the Cook account, or the remarks of Flagg upon his trial before Judge Rudkin.

The whole theory of speculation is this: Whether you buy for long account or sell for short, always hold on until the transaction shows a profit of at least one point. It will always do this in time; it may take years, but experience shows that every stock "reacts," if you only give it time enough.

The reason why Flagg wanted so much money was to get the funds to hang on with; this idea is set forth again and again. This is simple enough, and could have been expressed in much fewer words than Flagg has devoted to it.

But, if a speculator is going to "hang on," he must have something to hang on to; there must somewhere be actual stocks, and this is what I think these papers show do not exist, and never did exist, in any quantity that at all responded even to the $200,000 mentioned in one of Flagg's earlier circulars as the then amount of the working capital of his "units."

I am thus satisfied that, without giving any weight to Flagg's conviction, it is affirmatively shown that he is presumptively guilty of a breach of his agreement with Cook and many others, and, further, that such breach was a calculated one, intended from the beginning.

[2, 3] This action is brought by Cook on his own behalf, and on behalf of those who may come in and join; i. e., other customers of Flagg's. He obviously cannot bring this action merely to avoid multiplicity of suits. Watson v. Huntington, 215 Fed. 472, 131 C. C. A. 520. But there is no objection to his bringing such a representative action merely because he is a creditor. Perhaps the most convenient way to test his right is to consider whether he could bring the action for himself alone.

I think he could have done so, because he has a right to an accounting—an accounting from one who became Cook's trustee, a trust arising from the calculated and deliberate breach of agreement made with Cook coupled with a possible partial performance. This suit is very like Guffanti v. National Surety Co., 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848. To be sure, the claims of all Flagg's creditors do not grow out of the same contract; they grow out of absolutely similar contracts, and it is my opinion that Flagg's treatment of all the contracts was exactly alike. In its essential features, Alsop v. Conway, 188 Fed. 568, 110 C. C. A. 366, is not unlike this litigation.

An injunction and receiver may issue as prayed for. Settle order on notice.

In re IMPERIAL TEXTILE CO.

(District Court, N. D. New York. January 25, 1919.)

1. LIENS ⟸7—EQUITABLE LIENS—VALIDITY.
   An equitable lien to be valid must relate to some specific property or thing capable of segregation and identification. Therefore one who advances money to a corporation under agreement that certain of its accounts should be assigned to him is not, no assignment having been carried out, entitled to the lien on all of the accounts.
2. CHATTEL MORTGAGES ⟸11—POTENTIAL EXISTENCE.
   An oral agreement by a debtor to assign accounts to accrue to one who advanced money is not good as a mortgage, for it was not in writing and filed, even if accounts could be mortgaged, and the accounts, not being in existence, could not be mortgaged.
3. PLEDGES ⟸11—VALIDITY.
   An agreement by a debtor to assign accounts to one who made advancements is not valid as a pledge, where there was no delivery of the accounts.
4. BANKRUPTCY ⟸245—TRUSTEE—REPRESENTATION OF CREDITORS.
   A trustee in bankruptcy represents the general creditors.
5. TRUSTS ⟸10—TRUST IN ALIQUOT PART OF PROPERTY.
   Where claimant advanced money to the bankrupt under an oral agreement that the bankrupt should assign accounts as security and the money advanced could not be traced in accounts which came into the hands of the trustee in bankruptcy, there was no trust, as a trust cannot be established in an aliquot share of a man's whole property.
6. TRUSTS ⟸10—CONSIDERATION—CONSTRUCTION.
   The court cannot, in such case, treat the agreement as one to assign "all" the accounts, for that would be making a new contract.

On Rehearing. Former decision establishing an equitable lien in favor of the claimant, one William E. Nelson, reversed.

For former, opinion, see 239 Fed. 775.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This case is now before this court on a rehearing granted by the court after a decision affirming the report and decision of the referee which established an equitable lien on the sum of $585.50 in the hands of the trustee in favor of the claimant thereto, one William E. Nelson, and which sum is the proceeds of certain accounts due and owing to the bankrupt at the date of the bankruptcy and which were collected by the trustee.

See (D. C.) 239 Fed. 775.

Senior & Sisson, of Utica, N. Y., for claimant.
Martin & Jones, of Utica, N. Y., for certain creditors.
Jas. H. Merwin, of Utica, N. Y., for trustee.

RAY, District Judge. The referee found, and this court found and again finds, as the evidence shows, that in the latter part of October or first days of November, 1913, the exact date being October 27, 1913, the now bankrupt, Imperial Textile Company, then in active business at Utica, N. Y., by its duly authorized officers and agents, entered into an "oral" agreement with the claimant, Wm. E. Nelson, by the terms of which Nelson was to advance to the company sums of money, from time to time as it might require same, to carry on its business, and the Imperial Textile Company, in consideration thereof, was to assign to said Nelson accounts due it from its customers as security for or in payment of such advances. It was not the agreement to assign and transfer to Nelson "all" such accounts, but enough to secure or repay the advances. This agreement was to be reduced to writing and executed by the parties; but, owing to some disagreements as to minor details, it was not completed and signed, but Nelson in pursuance of the agreement, and relying thereon, did make advances to the amount of $4,420, and the textile company had the money and used it in its business and creating accounts which came due to it for goods sold and delivered. It is impossible to trace this money so advanced by Nelson into any particular account or accounts, or into the accounts which came into the hands of the trustee and were collected by him producing the $585.50 in question. Probably some of it did go to create those accounts.

At one time and on or about December 31, 1913, the Imperial Textile Company did select out and execute an assignment of certain accounts "then" actually existing of the face value of $1,475.02; but same were not actually turned over to Nelson, or to any one for him, and the textile company thereafter proceeded to collect such accounts and use the money derived therefrom in running and conducting its business, notwithstanding such assignment. Undoubtedly, some of the money derived from the collection of these accounts went into the creation of goods which when sold, in part at least, resulted in the creation of some of the accounts which thereafter went into the hands of and were collected by the trustee. This is largely conjectural, however.

The accounts, 65 in number, selected and specified in the assignment actually drawn, were collected in whole or in part, and the pro-

ceeds used by the textile company as follows: 38 of same in January, 1914; 17 of same in February, 1914; 11 of same in March, 1914; 6 of same in April, 1914; and 1 May 26, 1914. January 11, 1915, $1.70 was collected on one of the same.

The petition in bankruptcy was filed on March 1, 1915. Hence all of the said accounts specified in such assignment so drawn were collected and the proceeds used by the textile company more than four months prior to the bankruptcy.

No other accounts were assigned or selected to take the place of these, and no other accounts were selected or assigned under and pursuant to the oral agreement above set forth.

In deciding the case originally and affirming the referee, it was the understanding of this court that the $585.50 came from the collection of the specific accounts mentioned and set apart in the assignment actually executed, whereas, it now appears that all of such money except $1.70 came from other accounts never selected, or set apart, or assigned. The court said (see 239 Fed. 775):

"Did this agreement, followed by an advance of money to the company, in fact made, create an equitable lien on such then existing accounts as against the trustee representing then existing creditors of such company thereafter bankrupt?

"The company is not shown to have been actually insolvent at the time the agreement referred to was made, but its financial embarrassments were obvious. I think that, within some of the cases cited, the last-mentioned agreement, followed by advances of money under it, was sufficient to create an equitable lien on the accounts then in existence. * * *

"Here a list of accounts was made out and signed by an officer of the company indicating a purpose to appropriate those particular accounts or their proceeds to the payment of advances made by the claimant. It is true there was no corporate action by the directors setting aside these particular accounts, but in view of all the facts I think the setting aside and specification of these accounts was an act done by one having authority and binding on the corporation.

"The trustee, after bankruptcy, went on and collected them, and the referee has ordered that the money in the hands of the trustee derived therefrom belongs to or should be paid to the claimant, who made the advances, and not to the trustee. The advances were $4,420—far in excess of the money derived from the accounts to which the referee attached a lien, viz., $585.50. It would operate as a fraud on the claimant, who advanced his money under promise of an assignment of these accounts, to award this money to the trustee for the benefit of the general creditors, on the ground the written agreement was not completed and signed prior to the bankruptcy."

The now bankrupt had other creditors during all the times above mentioned, and no written agreement creating or purporting to create a lien on its accounts, due or to become due, was executed or filed.

[1-4] The question is, therefore: Did the oral agreement above stated between the Imperial Textile Company and William E. Nelson, followed by the advance of money as stated, operate to create any lien as against the trustee in bankruptcy on the other accounts of such company not selected and included in the assignment mentioned and which came into the hands of the trustee and from the collection of which he derived the $585.50, or did the collection by the Imperial Textile Company of the said accounts so actually assigned and the use by it of the money derived from their collection operate to create

an equitable lien or furnish sufficient ground to authorize the establishment or declaration of an equitable lien on the other accounts subsequently coming into existence or accruing and which came to the trustee and were collected by him? These questions were not originally passed upon or decided, as it was supposed the money referred to was derived from accounts produced by the moneys advanced by Nelson and collected by the trustee after same had been selected and specified in the assignment actually drawn and executed.

An equitable lien to be valid must relate to some specific property or thing capable of segregation and identification. Grinnell v. Suydam, 5 N. Y. Super. Ct. 132; Willetts v. Brown, 42 Hun, 140; Porter v. White, 127 U. S. 235, 8 Sup. Ct. 1217, 32 L. Ed. 112; Wright v. Ellison, 1 Wall. 16, 17 L. Ed. 555; National City Bank v. Hotchkiss, 231 U. S. 50, 57, 34 Sup. Ct. 20, 58 L. Ed. 115; In re Stiger, 209 Fed. 148, 126 C. C. A. 96.

The equitable lien, if any, of Nelson, was not to attach "to all" the accounts of the Imperial Textile Company. There was no such agreement. From time to time as advancements of money were made accounts were to be selected and assigned. The accounts were never selected except as stated, and Nelson did nothing to enforce performance. It is not a case of the mixing or commingling by a wrongdoer of his own property with that of an innocent party.

It is the case of an advance of money to keep the now bankrupt going with an agreement by it to assign accounts due the borrower and in which, on default of the borrower to give the security it promised, and the performance of which agreement required selection of accounts and an assignment thereof which was not done, this court is called upon in the exercise of its equitable powers and jurisdiction to declare and enforce a lien against creditors on "all the accounts" of the now bankrupt which have gone into the hands of the trustee in bankruptcy and been collected by him. This agreement is not good as a mortgage, for it was not in writing and filed even if accounts could be mortgaged; and, again, property not in being cannot be mortgaged. It is not good as a pledge, as there was no delivery. It cannot hold good as an equitable lien, as the thing or things to which the lien was to attach was not ascertained and is not capable of identification. Again, the rights of general creditors have intervened, and these creditors are represented by the trustee. See Titusville Iron Company v. City of New York, 207 N. Y. 203, 100 N. E. 806; In re P. J. Sullivan Co., Inc. (D. C.) 247 Fed. 139, affirmed by C. C. A. November 13, 1918, 254 Fed. 660, — C. C. A. —; Sexton v. Kessler & Co., 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; and see cases above cited.

If the money advanced by Nelson could be traced with reasonable certainty into the accounts which went into the hands of the trustee and were collected by him, thus producing the money in question, this court would not hesitate to impress such money with a lien in Nelson's favor and direct its payment to him on the authority of Hurley, Trustee, v. Atchison, Topeka & Santa Fé Ry., 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, and Hauselt v. Harrison, 105 U. S. 401, 407,

26 L. Ed. 1075. But there is no reasonable certainty that any of Nelson's money advanced by him went to produce such accounts. It is not like several persons, or one person taking his grain to an elevator or a storage warehouse where it is rightfully commingled with that of the owner of the storage warehouse and perhaps with that of others, in which case each has a property right in the grain in the elevator or warehouse bins although emptied and filled by the owner 20 times. See Sexton v. Kessler, 225 U. S. 98, 32 Sup. Ct. 657, 56 L. Ed. 995. In National City Bank v. Hotchkiss, 231 U. S. 50, 57, 34 Sup. Ct. 20, 21 (58 L. Ed. 115) the court said:

"A trust cannot be established in an aliquot share of a man's whole property, as distinguished from a particular fund, by showing that trust moneys have gone into it. On similar principles a lien cannot be asserted upon a fund in a borrower's hands, which at an earlier stage might have been subject to it, if by consent of the claimant it has become a part of the borrower's general estate."

And at page 58 of 231 U. S., at page 22 of 34 Sup. Ct. (58 L. Ed. 115), the court further says:

"In both Gorman v. Littlefield, 229 U. S. 19 [33 Sup. Ct. 690, 57 L. Ed. 1047], and Richardson v. Shaw, 209 U. S. 365 [28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981], in addition to the personality of the holder there was also a specific stock, which identified the fund relied upon and separated it from the general mass of the estate."

In the instant case the Imperial Textile Company had property other than its accounts; some money from time to time and some other property, and it was accounts—some accounts—not all, that were to be assigned from time to time. The security was to come from accounts, but was not a pledge of "all" accounts. But does this fact take the case from the principle announced in the Hotchkiss Case, supra? True the lien, if any, was on accounts, to be selected and assigned, and hence that part of the textile company's property consisting of accounts due, or to become due to it, was pointed out, and it is not sought to establish a lien on an aliquot part of the debtor's "entire" estate. But it is sought to establish a lien on an aliquot part of all that portion of the entire estate consisting of accounts inasmuch as the security to be given was to be selected from accounts receivable.

[5] But we meet another difficulty. Certain accounts were selected and a written assignment of same actually executed. Nelson did not insist on his rights or on the actual delivery of such assignment or the execution and delivery of assignments thereafter, and the textile company was permitted by him to go on dealing with all accounts payable to it as its own property until actual bankruptcy occurred. Even if we can properly term all accounts receivable a fund out of which, by assignment of selected accounts Nelson was to be paid, did he not by his conduct consent that they become a part of the debtor's general estate? Nelson made his last and final advancement May 25, 1914, and it was March 1, 1915, when the petition in bankruptcy was filed. In the meantime business was conducted as usual. If this had been an agreement to assign certain specified accounts, or if certain specified accounts had been selected and agreed upon for

assignment and the transaction had not been perfected by actual assignment and such selected and specified accounts had gone into the hands of the trustee thus charged with an equitable lien and had been collected by him, there would be no difficulty in establishing a lien on the moneys collected. Equity would regard that as actually done which ought to have been done, and the rights of the trustee would not be greater than those of the bankrupt company. But that case is not here. In Hurley, Trustee, v. Atchison, 213 U. S. 126, 132, 133, 29 Sup. Ct. 466, 468 (53 L. Ed. 729), the Supreme Court cited with approval the following from In re Chase, 124 Fed. 753, 755, 59 C. C. A. 629, 631:

"It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

And also the following from Thompson v. Fairbanks, 196 U. S. 516, 526, 25 Sup. Ct. 306, 310 (49 L. Ed. 577):

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

In Greey v. Dockendorff, 231 U. S. 513, 515, 34 Sup. Ct. 166, 58 L. Ed. 339, Schwab-Kepner Company, the bankrupt, agreed with Dockendorff to assign to him, after shipment of goods, the accounts receivable representing the purchase price of such goods sold on credit as security for the loans of money as now stated, viz., Dockendorff was to lend to said firm 80 per cent. of the net face value of such accounts receivable as he should approve, less commissions and discounts, up to a certain sum, not exceeding $175,000 at any one time. The said Schwab-Kepner Company was to give its notes, deliver shipping documents, furnish evidence of the receipt of the merchandise and give notice of any return of goods or counterclaim for damages, deliver the proceeds of such accounts as were found correct, and permit examination of its books. Dockendorff's lien was to be for all sums due, and was to cover all accounts; but he was not bound to lend on accounts he did not approve. When the said firm failed, it owed Dockendorff $252,838.54 for advances made under the agreement for which he had actually received assignments of accounts from the firm as it received orders, and after the contract of sale was made but prior to the actual delivery of the goods. The business of the firm was to purchase raw material from the mills, have it sent to bleacheries, and when finished to ship same to buyers. The question was whether such agreement was good and carried title to the accounts

actually assigned or was void as in fraud of creditors. The contract was held good and that—

"Where the goods never would have come into the bankrupt's hands had he not promised to give a lien thereon to one making the advances necessary for obtaining them, there is no reason why the rights of general creditors (represented by the trustee) without liens should intervene to defeat the security given in good faith before there was any knowledge of insolvency."

In that case, it will be noted, the lien by actual assignment of the accounts had been given, and the issue was as to the validity of the agreement. In the instant case there is no question of the validity of the agreement to assign accounts on advances made, and as security therefor; but, while the advances were made and some accounts were selected and assigned and collected by the textile company, the proceeds were not turned over to Nelson, and it would seem clear the accounts in question, from which the money collected by the trustee and on which money it is sought to impress a lien was derived, were not in existence when the advances were made, but were created and accrued some months thereafter and were never agreed upon or selected to be assigned and never were assigned. The Dockendorff Case has no application to the one now before the court. I am unable to find authority for holding that because the textile company orally agreed October 27, 1913, in consideration of advances thereafter to be made by Nelson, such advances to be used in the business, to assign accounts either in payment, or as security, and which advances to the extent of $4,420 were all made prior to May 25, 1914, that an equitable lien may be established on the proceeds of accounts due such company when it went into bankruptcy March 1, 1915, and which accounts came to the trustee after his appointment and were collected by him; it not being shown that such accounts were in existence when the agreement was made, or when the advances were made, or that any of the advances went to create such accounts, or that such accounts, which went to the trustee, were ever selected or agreed upon to be assigned, especially in face of the fact that Nelson, who made the advances, did not insist on compliance with the agreement, and that the only accounts ever selected and included in an assignment were collected by the textile company and the proceeds used in its business, apparently with the consent of Nelson, at least without objection on his part—all long before the bankruptcy.

[6] If the agreement had been to assign "all" accounts, those then existing as well as those thereafter to be created, the case would be different, as in such case the accounts as they came into existence could be regarded as the fund to which Nelson was to look for reimbursement and which was to be assigned to him. This court cannot make and substitute a new contract for the parties in order to do what it might think justice would require. The agreement as found by the referee was:

"That said Nelson was to furnish funds to said Imperial Textile Company for use in its business as the same should be called for by its officers, and that as security for such funds so advanced said Imperial Textile Company would assign accounts receivable for goods sold; such accounts to repay said loans as the accounts were collected in course of business."

The finding of the referee on this subject is as strong as the evidence will warrant. As already stated, this agreement contemplated, not an assignment of "all" accounts due or to become due the textile company, but the assignment of accounts to be selected by one or both the parties, and we cannot import into it an agreement for a lien on "all" accounts due the firm or that might come due it. To do so would work injustice on the other creditors of the textile company. The order of the referee is reversed, but if desired by the claimant the case may be sent back to the referee to take further evidence and allow such claimant to establish, if he can, that the accounts that went to the trustee and were collected by him, or some of them, were in existence when the agreement was made, or when the advances were made, or that the money advanced went to create such accounts or some of them. If such proof is not made, the application and petition of the claimant will be denied.

There will be an order accordingly.

PICTORIAL REVIEW CO. v. CURTIS PUB. CO.

(District Court, S. D. New York. June 23, 1917.)

MONOPOLIES ⊂=17(2)—SYSTEM OF MARKETING PERIODICAL—CLAYTON ACT—"PURCHASERS."

Contract between publisher of "Ladies' Home Journal" and its so-called "district agents," which prohibited handling other magazines without the publisher's consent, withheld in case of "Pictorial Review," competitor of "Ladies Home Journal," *held* not forbidden by Clayton Act, § 3 (Comp. St. § 8835c), as requiring purchasers to refrain from handling goods of competitors, or as generally causing unreasonable restraint of trade; district agents being more than mere "purchasers."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Purchaser.]

In Equity. Suit by the Pictorial Review Company against the Curtis Publishing Company. On plaintiff's motion for temporary injunction. Motion denied.

Stanchfield & Levy, of New York City (John B. Stanchfield, William M. Parke, and Toney A. Hardy, all of New York City, of counsel), for complainant.

Joseph W. Welsh and John G. Milburn, Jr., both of New York City (John G. Milburn, of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. The complainant corporation publishes the Pictorial Review, and the defendant the Ladies' Home Journal, the Saturday Evening Post, and the Country Gentleman. The Pictorial Review has been distributed by the American News Company, a distributing agency, which has about 60 branches throughout the United States. The defendant, on the other hand, has put the Ladies' Home Journal on the market through wholesale dealers of established efficiency in the various towns and cities of the Unit-

ed States. Munsey seems to have distributed his publications to some degree as early as the year 1890 through local dealers, but the defendant in 1899 introduced an elaborate system for training newsboys to do expert work in selling magazines. It was evidently the opinion of the defendant that the circulation of its magazines would be greatly promoted if the newsboys selling the defendant's publications were organized, their mental and moral progress stimulated, and a legitimate ambition to excel in their work fostered. The affidavit of its circulation manager describes the system. It involves the appointment by the defendant of district agents, who select the boys and teach them to sell. These agents make a weekly detailed report to the defendant as to each boy. The boys form a "League of Curtis Salesmen," consisting only of schoolboys, and with various ranks. These ranks are determined by proved efficiency. Each league member is given a Y. M. C. A. membership paid for by the defendant, and the latter undertakes to secure a good position for each master salesman after he has finished school and outgrown the work. More than 2,000 firms and corporations appear to have filed applications with the defendant to secure these graduate master salesmen as employés.

Regular publications are issued monthly as a part of this system: (1) To the district agent; (2) to the boys; (3) to the parents and teachers of the boys. The defendant has spent a large amount of money in developing and maintaining this system. Sometimes the defendant has selected as its district agents wholesalers who had an existing staff of newsboys, but in such cases the boys have apparently become a real part of the "League of Curtis Salesmen," and have been required to conform to the system. More often the district agents and their staff of boys have been started and developed from the beginning through the labors of the defendant, and in many cases the district agents have been old Curtis boys, who have graduated from their earlier work, followed the same general kind of business, and become wholesale dealers for the Curtis Company. This system was used by the defendant to promote the sale of the Saturday Evening Post, and was so successful that it employed it with the Ladies' Home Journal.

It is evident that supervising district managers were necessary to carry out the plan I have described, and defendant in contracting with these managers has provided that they should pay for magazines furnished them in advance and should supply subagents, both boys and dealers, with copies of defendant's publications at fixed rates. It also has provided that the district agents shall refrain from wholesaling to boys or dealers, and from attempting to influence any Curtis agent to sell any periodical other than those published by the Curtis Publishing Company, and shall refrain from furnishing any other publisher or his agent with the names and addresses of any Curtis agents without first obtaining the approval of the publishers. The clause in the contract with the district agents relating to the Curtis boys is subdivision 12, and is as follows:

"To send to the home office, on blanks furnished by the publishers, not later than directed by the report blanks, reports itemizing the number of copies of each publication sold by each boy, dealer, or other subagent, or

sold at retail by the district agent or his employés, and to distribute rebate vouchers regularly to subagents, according to instructions from the publishers: Provided that rebate vouchers shall be given to subagents only, and are not redeemable by the district agent nor by his relative or salaried employés."

The district agents may sell any magazines they desire, including the complainant's, at their own news-stands, but their contracts forbid them to furnish boys or retail dealers with magazines other than those of the defendant, without first obtaining the defendant's approval. Such approval has been in general granted, but has been refused in the case of the Pictorial Review. That magazine is the active competitor of the Ladies' Home Journal. Each has a large sale throughout the country, and is of special interest to women. The marked success of defendant's system of marketing its magazines has attracted the complainant, and the latter desires to avail itself of defendant's wholesale agents, without the expense which is involved in building up such a system as the defendant has employed. It argues that the defendant cannot insist that its wholesalers shall not market the Pictorial Review without violating the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730), for the reason that a contract that the district agents shall not deal in the Pictorial Review through newsboys or subdealers substantially lessens competition, and is forbidden by section 3 of that act (Comp. St. § 8835c), which reads as follows:

"Sec. 3. *Requiring Purchasers, etc., of Goods, etc., to Refrain from Handling Goods, etc., of Competitors.*—That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

I can have no doubt that the district agents or wholesalers who receive from the defendant the Ladies' Home Journal and put it on the market are purchasers of the magazine. There can be no question, in view of the payment in advance and the other elements of the transaction, that title to the magazines which these wholesale agents receive passes to them. They are not mere factors or agents. Nevertheless they are clearly much more than purchasers. The prime characteristic of the Curtis system is to market the defendant's magazines through newsboys, and to develop an efficient body of these boys by a proper selection in the first place, by keeping them in good surroundings, by appealing to their ambition through conferring ranks and prizes in case of success, and by obtaining good business positions for those who have retired. There is no doubt that by means of this system the sale of the defendant's magazines is greatly increased.

If nothing but a sale were involved, I might support complainant's

contention that defendant has violated the Clayton Act by preventing its wholesale dealers from selling the Pictoral Review through subdealers and boys; but what complainant evidently desires is, not merely to sell to these wholesalers, which it can do already in cases where the wholesalers have a retail trade, and to the extent of that retail trade, but to avail itself of the organization of the Curtis boys, built up by the ingenuity, labor, and capital of the defendant. The defendant, in insisting upon maintaining the integrity of its system, is not in my opinion guilty of unfair trade. On the contrary, the complainant, in attempting to avail itself of this system, is engaging in unfair trade. That it cannot build up a system of its own, if it desires to do so and will go to the trouble and expense, I do not believe. It is attempting here to secure a preliminary injunction to prevent the defendant from contracting with the latter's district agents not to market the Pictorial Review through boys and dealers. To grant such an injunction would break up what I think is a perfectly legitimate system for the promotion of sales of the defendant's magazines, and would enable the complainant, without expense, to employ the organization built up and fostered by the defendant.

If I thought that the system of marketing defendant's magazines was a cover to avoid the provisions of the Clayton Act, or obtain a monopoly, I might reach a very different conclusion, but I am satisfied that the system is genuine, and not in any respect other than what it represents itself to be. It may not be entirely original, but I think it is doubtless due very largely to the constructive business ability of the defendant in devising an ingenious means of marketing its magazine. The principal reason, doubtless, for selling the magazines to the district agents, rather than making consignments, with consequent financial risks, is one of safety and simplicity, and is not sufficient, in my opinion, to subject the relations of the parties in all respects to those of mere vendor and vendee.

Judge Hough, in the case of Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co. (D. C.) 224 Fed. 566, held that the refusal of the manufacturers of Cream of Wheat to sell to a dealer who resells at retail at less than the regular price did not entitle the dealer to an injunction to restrain such conduct on the part of the manufacturer, and added that the substantial restraint of competition denounced by the Clayton Act is an unreasonable restraint. He placed his decision largely on the ground that defendant had a lawful monopoly in Cream of Wheat, because there could be nothing lawfully called "Cream of Wheat" without defendant's consent and approbation. It may in the same way be said in this case that the defendant has a lawful right to employ the means of selling its product exclusively through the League of Curtis Salesmen. It is not the monopoly of a patented article or of a trade-name, but so long as the defendant is maintaining the above agency for selling its product, just so long, I think, it has a right which the law will recognize to refuse to have its magazines sold by the boys, if they are to handle at the same time a competing magazine of the complainant. The fact that they are a better trained set of boys, with a larger measure of experience, and perhaps also of

good will in the community, than any which the complainant is likely readily to secure, is immaterial.

Any restraint of competition which may take place is due to no other cause than the employment by defendant of selling agents who contract not to distribute the Pictorial Review through subagents or boys who are engaged in selling the Ladies' Home Journal. In some towns there may be no existing agent as efficient as the one employed by the defendant, but that fact may in many cases be due to the thorough prosecution of the plan of organizing news boys and selling magazines through them which the Curtis Publishing Company has developed. In these localities complainant can doubtless obtain equally good selling agencies by the expenditure of a similar amount of effort. Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction, I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in co-operation with the Curtis boys than it does an outright sale to the district agents and nothing more. At any rate it has not been established, with the clearness necessary to warrant the granting of a temporary injunction, that the defendant's contract referred to causes an unreasonable restraint of trade or otherwise comes within the prohibitions of the Clayton Act.

The motion for a temporary injunction must be denied.

UNITED STATES v. LE FANTI.

(District Court, D. New Jersey. January 22, 1919.)

1. RECEIVING STOLEN GOODS ⟸4—ACTUAL POSSESSION—NECESSITY.
   In statutes denouncing the receiving of stolen goods, actual manual or personal possession is not a necessary element of the crime, it being sufficient if possession is constructive, if goods are shown to be under control of person charged though in actual physical possession of another.
2. RECEIVING STOLEN GOODS ⟸4—CONSTRUCTIVE POSSESSION.
   If constructive possession of stolen goods is relied on to make out defendant's guilt of receiving them, and it appears that arrangement by which he was to acquire possession or title had not been consummated, as where he was still bargaining, such possession would not justify conviction.
3. RECEIVING STOLEN GOODS ⟸4—INTERSTATE SHIPMENT OF EXPRESS—CONSTRUCTIVE POSSESSION BY AGENTS.
   Saloon keeper, who, when express employés offered to sell him stolen bale of silk, told them to drive to dump and throw it off, which they did on signal from him, he having followed and passed them in his automobile, *held* to have had possession of silk by his agents justifying conviction of having possession of stolen goods, part of an interstate shipment of express, in violation of Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604).
4. CRIMINAL LAW ⟸877—JOINT INDICTMENT—SINGLE CONVICTION.
   Assuming that two of three jointly indicted for receiving stolen goods could not be convicted because they were the thieves, the third was subject to conviction.
5. RECEIVING STOLEN GOODS ⟸3—BELIEF THAT GOODS WERE EMBEZZLED.
   When goods forming part of interstate shipment of express had been stolen in strict legal sense, and had come into possession of defendant,

who believed from circumstances they had been either embezzled or stolen, he can be convicted for having in possession such goods, in violation of Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604).

6. CRIMINAL LAW ⊂=829(1)—INSTRUCTION—REPETITION.
Defendant's request for instructions, quite comprehensively covered in court's main charge, was properly refused, particularly where charge in defendant's language would have tended to confuse rather than assist the jury.

7. CRIMINAL LAW ⊂=372(1)—EVIDENCE—PREVIOUS SIMILAR TRANSACTION—RECEIVING STOLEN GOODS.
In prosecution for having in possession stolen goods, part of an interstate shipment of express, in violation of Act Feb. 13, 1913 (Comp. St. §§ 8603, 8604), testimony relating to similar transaction four or five days before *held* admissible.

Dominick Le Fanti was convicted of receiving stolen goods, part of an interstate shipment of express, knowing the same to have been stolen. On rule to show cause why verdict of guilty should not be set aside and new trial granted. Rule discharged, and new trial denied.

Charles F. Lynch, U. S. Atty., and Samuel I. Kessler, Asst. U. S. Atty., both of Newark, N. J.

Louis G. Morten, of Jersey City, N. J., for defendant.

HAIGHT, District Judge. The defendant, Dominick Le Fanti, was indicted jointly with Joseph A. Reaves and Frank McManus, for having in their possession a bale of silk which had theretofore been stolen from a platform or depot of the American Railways Express Company, at Jersey City, in this district, and which was a part of an interstate shipment of express, knowing the same to have been stolen, in violation of Act Feb. 13, 1913, c. 50, 37 Stat. L. 670 (Comp. St. §§ 8603, 8604). Le Fanti (hereinafter referred to as the defendant) was tried alone and convicted. While I have never entertained any doubt that the verdict of the jury, under the instructions of the court, was entirely correct, I allowed the rule to show cause, so that I could consider, more carefully than it was possible to do during the course of the trial, the question whether, under the aspect of the evidence most favorable to the government, the defendant had the goods in question "in his possession" within the meaning of the act. Upon the return of the rule to show cause some additional reasons for setting aside the verdict, which were not urged during the trial, have been advanced. They will be hereafter discussed. I will first take up the question above stated.

[1-3] 1. It was permissible, and the jury were quite justified in finding—and under the instructions which they received their verdict establishes that they did find—the following facts: McManus and Reaves, two boys aged 16 and 24, respectively, who were employés of the American Railways Express Company, on the morning of September 17, 1918, stole a bale of silk which was a part of an interstate shipment of express, from the platform or depot of the express company, in Jersey City. During the early evening of the same day, they drove the wagon in which they had been making deliveries of express

packages during the day, and which bore the name of the Wells-Fargo Express Company, plainly written thereon, to defendant's saloon for the purpose of selling to him the bale of silk, as they had done with another bale four or five days previous. Reaves first went into the defendant's saloon, to interview the defendant, whereupon the latter told him to drive away, as his place of business was being watched. Thereupon the two boys drove around the block, and Reaves waited while McManus went back to find out what disposition the defendant wished them to make of the silk. The latter, upon being advised by McManus that he and Reaves had a bale of silk on their wagon, told McManus to drive "to the dumps," a dark and lonely spot used for dumping a part of the city's refuse, and drop the bale of silk off the wagon, and that he would follow in an automobile and pick it up. The two boys then proceeded to do as the defendant had directed them. On their way towards the "dumps," the defendant passed them in an automobile and motioned to them to keep going on in the direction in which they were proceeding, and which led to the "dumps." The lights on his automobile were at that time lighted. When they reached the "dumps," the lights on the automobile were extinguished, and the defendant made a motion with his hand, which the boys interpreted to be a signal to put the bale of silk off; which they accordingly did, among some weeds. McManus then drove the wagon to the express company's stable, while Reaves waited five or ten minutes for Le Fanti to come after the silk, and, when he did not do so within that time, Reaves went home. Both he and McManus were arrested that evening, as was also Le Fanti. The bale of silk was found in the place where the boys had deposited it. There was no evidence that defendant ever had it in his physical possession. His possession, if any, therefore, was constructive. The statute under which the defendant was indicted and convicted, so far as the point in question is concerned, differs in no material respect from the English statutes and those of the various states which have endeavored to bring within the pale of the criminal law receivers of stolen goods. It has long been settled that, under such statutes, actual manual or personal possession is not a necessary element of the crime, but it is sufficient if the possession be constructive, that is to say, if the goods are shown to have been under the control of the person charged, although they were in the actual physical possession of another. Reg. v. Wiley, 15 Jurist, 134; Reg. v. Smith, 1 Jurist (N. S.) 575; Reg. v. Hobson, 6 Cox, C. C. 410; Reg. v. Miller, 6 Cox, C. C. 353; Reg. v. Rogers, 2 Moody's Crown Cases, 85; Commonwealth v. Kuperstein, 207 Mass. 25, 92 N. E. 1008; State v. Stroud, 95 N. C. 626; State v. Conklin, 153 Iowa, 216, 133 N. W. 119; Huggins v. State, 41 Ala. 393; Kaufman v. State, 70 Tex. Cr. R. 438, 159 S. W. 58; Commonwealth v. Light, 195 Pa. 220, 45 Atl. 933; 2 Bishop on Criminal Law, § 1139; 2 Wharton's Criminal Law (11th Ed.) p. 1453, § 1236.

Of course, if constructive possession is relied upon, and it appears that the arrangement by which the accused is to acquire possession or title has not been consummated, but is still inchoate—as where the accused is still bargaining to purchase or acquire the goods—such pos-

session would not justify a conviction of the accused, for under such circumstances the goods would not be under his control in the sense required by the before-mentioned rule. And this is the principle upon which the decisions in Reg. v. Hill, 13 Jurist, 545, Reg. v. Wiley, 15 Jurist, 134, and Commonwealth v. Sheriff, 3 Brewst. (Pa.) 342, were rested. The question then is whether, under the before stated facts, the transaction under which the defendant was to acquire "actual" possession of the stolen silk had been so far consummated, prior to the recovery of the same by government officials, as to justify the conclusion that it was constructively in his possession, or whether the necessary conclusion was that the transaction was incomplete, so that there was a locus penitentiæ, until he should himself, or through agencies other than Reaves and McManus, have taken actual possession of the same. I perceive no difficulty, either on principle or authority, in holding that, although Reaves and McManus were the thieves, their actual possession could in law be the defendant's possession quite as well as could the possession of any other persons, who were not the thieves, be his possession. Such I think is the clear effect of the decisions in Reg. v. Wiley, supra; Reg. v. Smith, supra; State v. Stroud, supra; and Kaufman v. State, supra. In fact, Lord Chief Justice Campbell said in Reg. v. Smith that it had been held in Reg. v. Wiley (in which he sat) that possession might be jointly in the receiver and the thief. On principle this must be so, because the decisive point is whether the person who had actual possession was the mere agent of the defendant, and not what his connection with the stolen goods may theretofore have been. Of course, the latter consideration may be an element in determining whether or not he was a mere agent, and hence whether the transaction had been consummated in the sense before mentioned.

If the jury believed the story of Reaves and McManus as outlined in the before-recited statement of facts, as their verdict demonstrates that they did, there would seem to be no question that, at least from the time the bale of silk was thrown off of the express wagon at the "dumps," it was in the constructive possession of the defendant, for it was then under his control, in a place where he had directed the boys to take and deposit it, and where he had arranged with them, prior to their taking it there, that he would come and pick it up. They had followed his instructions in all respects. Indeed, the conclusion seems quite irresistible that, under the circumstances of this case, from the time he first told them what to do with the silk, that they were from thence on merely his agents, and that their possession was his. There was nothing inchoate so far as the transaction by which he was to acquire actual possession was concerned. His ultimate actual possession was not dependent upon any agreement to be made as to price, or anything of the sort; nothing remained to be done so far as consummating the bargain was concerned; he directed the boys what to do with the silk, and they followed out his instructions. Indeed, the facts of this case cannot be well distinguished from those which were before the courts in State v. Stroud, supra, and Kaufman v. State, supra. Although no exception has been taken to the

charge on this point, except as it is embraced within the question under discussion, I have carefully examined it, and think that it properly stated the before-mentioned rules of law and submitted the decisive question to the jury. The jury, after being instructed that there was no testimony to the effect that the defendant had ever had physical control of the bale of silk and that it was not necessary that he should have had such, it being sufficient if it was in the possession of some one else and was there subject to his control and dominion, and as to the circumstances under which the boys could be considered as to his agents, were charged as follows:

"If you believe the story of McManus, supplemented as it is by the additional testimony of Reaves, as to what was done and as to his first conversation with Le Fanti, then you would be justified in finding that these goods, from the time that Le Fanti told McManus what to do with them, were in the possession of Le Fanti, in law. If he was exercising—and this is the question which you have got to determine—control and dominion over them, from that point on they were in his possession, even though they were in the actual, physical possession of some third party."

I therefore conclude that the jury's finding that the defendant had the stolen bale of silk in his possession within the meaning of the Act of February 13, 1913, was correct.

[4] 2. It is next urged on behalf of the defendant that because he, McManus, and Reaves were jointly indicted for having the bale of silk in their possession, and because the evidence shows that the latter two were the thieves, the conviction should be set aside. This contention is based on the proposition that, because they were jointly indicted, a joint possession must be proved, and that there can be no joint possession in law between the thieves and the receiver because the thieves could not also be receivers. Assuming for the purpose of argument, as defendant contends, that the original thieves could not, under the statute in question, be convicted for having the "stolen goods in their possession" as has been held under similar statutes in some of the states (Tobin v. People, 104 Ill. 565; Owen v. State, 52 Ind. 379; In re Henry Franklin, 77 Mich. 615, 43 N. W. 997. See, contra, U. S. v. Sullivan [D. C. E. D. Pa.] 250 Fed. 632, construing the act in question), I am unable to conclude that the defendant could not alone have been convicted under this indictment. It has been several times decided that, where two or more are jointly indicted for having received stolen goods, one may be acquitted and the other convicted; and when the evidence demonstrates that the receipt was not joint, but separate and successive, the first receiver may be convicted and the other acquitted. Com. v. Slate, 11 Gray (Mass.) 60; State v. Smith, 37 Mo. 58 (in both of which the English cases are reviewed and distinguished); Com. v. Billings, 167 Mass. 283, 45 N. E. 910. Such seems also to have been the decision in U. S. v. Montgomery, Fed. Cas. No. 15,800. In that case one of the two defendants who were jointly indicted for receiving the stolen property was discharged from the indictment on his plea of autrefois convict, but the conviction which he apparently pleaded was of having been the thief. His acquittal was seemingly based on the theory that he could not be convicted both of stealing and

receiving the same goods. If that is so, then that case is directly in harmony with the others just cited. Those cases but recognized and applied the well-settled rule of criminal procedure that, where several persons are jointly indicted and tried for an offense which may be committed by one person alone, one or more may be convicted and the others acquitted, or there may be a disagreement as to the others; for such an indictment, although joint in form, is regarded as a several charge against each defendant. See cases cited 16 C. J. 1104, § 2591; 22 Cyc. 376; and Wharton's Criminal Procedure (10th Ed.) vol. 1, § 363. A fortiori the same rule applies when only one of two or more jointly indicted is tried and the evidence demonstrates that one or more of the others is or could not be guilty of the offense charged.

[5] 3. It is next contended that the verdict should be set aside because the evidence demonstrated that the defendant knew or believed that the bale of silk had been "embezzled" quite as forcibly as it did that he believed it had been "stolen," and that consequently, as his knowledge was sought to be proved by circumstantial evidence and as the indictment charged him with knowledge that the silk had been stolen as distinguished from embezzled, or otherwise unlawfully obtained, the evidence was not sufficient to justify a verdict that it had been "stolen." There was ample evidence to justify the jury in finding that he had knowledge that it was either embezzled or stolen (using the latter word in a strict and narrow sense). Indeed, if the jury disbelieved (as their verdict demonstrates that they did) the defendant's improbable story, it would have been quite impossible for them to have reached any other conclusion than that the defendant did have such knowledge. The question therefore is whether, under a statute such as the indictment in this case is based upon, it is necessary for the government to show that the defendant had knowledge that the goods had been "stolen as distinguished from embezzled." The statute while making it a crime for any one to "steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain," etc., imposes a criminal responsibility upon a receiver of "any such goods and chattels" only when he knows "the same to have been stolen." The indictment charges that the defendant knew that the silk "had been stolen." I think that the correct rule on the point in question is that stated by the Supreme Judicial Court of Massachusetts in Com. v. Leonard, 140 Mass. 473, at 478 and 479, 4 N. E. 96, 102 (54 Am. Rep. 485), as follows:

"If the property had actually been stolen, a belief on the part of the defendant that it had been stolen is tantamount to knowledge. If the defendant knew all of the facts, and the facts constituted larceny, as distinguished from embezzlement, it would be no defense that the defendant thought that the facts constituted embezzlement. If the defendant did not know the facts, but believed, from the circumstances, that the property had been either embezzled or stolen and it had been actually stolen, it was competent for the jury to find the defendant guilty of the offense charged. The second request for instructions was therefore rightly refused."

In that case the defendant was charged with knowledge that the property had been "feloniously stolen, taken, and carried away." The second request, referred to in the above-quoted extract of the opinion which was refused, was as follows:

"To justify a conviction, it is not sufficient to show that the accused had a general knowledge of the circumstances under which the goods were stolen, unless the jury are also satisfied that he knew that the circumstances were such as constituted larceny."

It will be borne in mind that the offense charged in that case was not embezzlement; in fact, the court, in the opinion, pointed out that under the Massachusetts statute "the offense of receiving stolen property, knowing it to have been stolen, must be considered as distinct from the offense of receiving embezzled property, knowing it to have been embezzled," and that the punishment of the two offenses might be different. According to the rule announced in that case, it was therefore competent for the jury to find the defendant guilty of having in his possession the stolen silk, "knowing that it had been stolen," upon proof, either direct or circumstantial, that he believed that it had been "either embezzled or stolen," when the proofs demonstrated, as they did in this case, that it had been actually stolen, as distinguished from embezzled. Not only does that rule seem to me to be a reasonable and sensible one, but it has the support of a court to whose decisions very great weight is always accorded. It has been many times held that belief that goods have been stolen is tantamount to knowledge. Com. v. Kronich, 196 Mass. 286, 82 N. E. 39; State v. Gargare, 88 N. J. Law, 389, 95 Atl. 625, L. R. A. 1916C, 991, Ann. Cas. 1917D, 950; cases cited in 34 Cyc. 516, and subsequent annotations.

The rule relieves the government of the impossibility which would be presented in the great majority of cases, where knowledge is sought to be imputed from facts and circumstances, of proving that the accused actually knew or believed that the goods were stolen, as distinguished from embezzled, or vice versa. No injustice is done to an accused who believes that goods have either been stolen or embezzled, in holding that under such circumstances he had knowledge that they had been stolen, when they in fact were. And thus a reasonable interpretation, and one in harmony with what must have been the intention of the Legislature, is given to a statute such as this. It is inconceivable that Congress intended that such a narrow construction should be given to the phrase "knowing the same to have been stolen," as would require an acquittal of a person who had received "stolen" goods, and who, from the circumstances, knew that they had either been stolen or embezzled, but was not sure which. It is unreasonable to assume that Congress was not fully aware that, in the great majority of cases, knowledge would have to be established by circumstances which would be quite as susceptible of a finding that the defendant believed that the goods had been embezzled as that they had been stolen. I do not wish to be understood as holding that if in any given case the proofs demonstrate that goods were "embezzled" rather than "stolen" (using that word in a strict sense), that a defendant might be held guilty, under this statute, upon proof of knowledge that they had been stolen or embezzled. I do not find it necessary to pass upon that question in this case. This is not a case, as State v. Fink, 186 Mo. 50, 84 S. W. 921, where one is charged with receiving stolen goods, and the proofs demonstrate that the goods were not in fact stolen but were

embezzled. It may be that there has been an omission in the act to include within its provisions those who receive goods which have been unlawfully acquired in any of the ways mentioned in the act other than stealing, strictly speaking. What I decide is that when it has been demonstrated that goods have been "stolen" (using that word in a strict sense), and they have come into the possession of another, and that person believed from the circumstances that the property had been either "embezzled" or "stolen," it is competent on such proof under this statute for the jury to find him guilty of having had in his possession stolen goods, knowing the same to have been stolen, the offense denounced by the statute.

[6, 7] 4. The other reasons advanced for disturbing the jury's verdict, which have not been covered by what has already been said, relate to a refusal to charge the jury in the language requested by the defendant, and in the admission in evidence of testimony relating to a transaction whereby the defendant, four or five days previous to the date in question, acquired another bale of silk from these defendants. The second request was quite comprehensibly covered in the main charge, I think, and to have acceded to the defendant's request and charged in the language requested by him would have tended to confuse rather than assist the jury. The evidence the reception of which is objected to was admissible, I think, under well-settled rules of evidence. The circumstances surrounding the acquirement by the defendant of the previous bale of silk, which was the subject-matter of the testimony in question, was sufficient to justify the jury in finding that the defendant must have believed that the same had been stolen or otherwise unlawfully acquired by Reaves and McManus. It also made intelligible the testimony of Reaves and McManus as to the circumstances surrounding his acquirement of the bale of silk which was the subject-matter of the indictment upon which he was tried and convicted.

The rule to show cause will therefore be discharged, and a new trial denied.

UNITED STATES v. TWO HUNDRED AND SIXTY-SEVEN TWENTY-DOLLAR GOLD PIECES.

SAME v. ONE McLAUGHLIN AUTOMOBILE, NO. 438020.

(District Court, W. D. Washington, N. D. January 23, 1919.)

Nos. 4233, 4250.

1. WAR ⊂⊃5—ESPIONAGE ACT—FORFEITURE OF PROPERTY ABOUT TO BE UNLAWFULLY EXPORTED—"SHALL."

The provision of Espionage Act June 15, 1917, tit. 6, § 2 (Comp. St. 1918, § 7678e), that the officer seizing property as about to be unlawfully taken out of the United States shall apply within ten days to the District Judge for a warrant to justify its further detention, otherwise "the property shall forthwith be restored to the owner," is mandatory, and, if such application is not made within the time limited, the owner is entitled to return of the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Shall.]

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. STATUTES ⟸227, 239—CONSTRUCTION—STATUTES IMPOSING FORFEITURES.
A statutory power to divest an owner of his property is to be strictly construed, and where the statute prescribes the procedure such provisions are mandatory.

Forfeiture under Espionage Act. Libels by the United States against Two Hundred and Sixty-Seven Twenty-Dollar Gold Pieces, coin of the United States, and against One McLaughlin Automobile, No. 438020. On exceptions to libels by Lauretta M. Lesage, claimant. Exceptions sustained.

Ben L. Moore and Robt. C. Saunders, U. S. Dist. Atty., both of Seattle, Wash., for libelant.

Farrell, Kane & Stratton, of Seattle, Wash., for claimant.

NETERER, District Judge. Two libels are filed, one against 267 $20 gold pieces, and one against one McLaughlin automobile. The same facts are alleged with relation to both cases. The cases were presented together. In substance, it is contended by the libelant that the automobile was owned and operated by Lesage on August 30, 1918, and that by the use of said automobile, he did willfully and feloniously attempt to export out of the United States at the port of Blaine, Wash., into the province of British Columbia, the gold pieces, coin of the United States, without having first made application to a Federal Reserve Bank, etc., in violation of Espionage Act June 15, 1917, c. 30, 40 Stat. 217, and executive orders pursuant thereto; that at Blaine the said automobile was seized, together with the 267 $20 gold pieces. The libel to forfeit the gold pieces was filed on the 17th of September, and the libel to condemn the automobile was filed on the 18th of September, 1918. On the 23d of September following Lauretta M. Lesage appeared and filed claim for ownership, stipulations for costs and exception to the libel filed against the automobile, and on the 26th the same party appeared and filed a claim of ownership for the gold pieces and also stipulations for costs and exceptions to the libel. The exceptions in substance are that the libel fails to state a cause of action against either the gold or the automobile; that the persons making the seizure did not, within 10 days after making the seizure, or at all, apply to the District Judge of the district having jurisdiction for a warrant to justify further detention; that the libels were prematurely filed; that the claimant owner is entitled to have the property returned, and that the officers have no right to the possession or any lien thereon.

[1] The claimant contends that a strict compliance with the statutory method of procedure outlined in title 6 of the Espionage Act is a condition precedent to a prosecution in rem for a forfeiture. The libelant contends that these provisions of the statute are directory and cumulative, and that they are in no sense jurisdictional.

The proclamations, regulations, and orders of the President, issued pursuant to section 1, title 7, of the Espionage Act (Comp. St. 1918, § 7678a), prohibit the exportation of gold to the Dominion of Canada, without a license from the Federal Reserve Bank, except certain

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

amounts much less than the amount at issue. Section 2 of title 7, supra (section 7678b), makes it a criminal offense to export gold in violation of any regulation made, and also provides "that any article delivered for exportation * * * shall be forfeited," and section 1 of title 6, supra (section 7678a), provides:

"Whenever an attempt is made to export * * * articles * * * in violation of law * * * inspectors of customs * * * may seize and detain any articles * * * about to be exported * * * and the * * * vehicles containing the same, and retain possession thereof until released or disposed of as hereinafter directed."

Section 2, supra (section 7678e), provides that:

"It shall be the duty of the person making any seizure under this title, to apply, with due diligence, to the judge of the District Court of the United States, * * * having jurisdiction over the place within which the seizure is made, for a warrant to justify the further detention of the property so seized * * * and if the judge refuses to issue the warrant, or application therefor is not made by the person making the seizure within a reasonable time, not exceeding ten days after the seizure, the property shall forthwith be restored to the owner or person from whom seized."

Section 3 of the act, supra (section 7678f), provides:

"The owner or claimant * * * may, at any time before condemnation proceedings have been instituted, as hereinafter provided, file his application for its restoration in the District Court of the United States, * * * whereupon the Court shall advance the case for hearing and determination with all possible despatch, and after causing notice to be given to the United States attorney for the District and to the person making the seizure. * * *"

Section 4 of the act, supra (section 7678g), provides:

"Whenever the person making any seizure under this title applies for and obtains a warrant for the detention of the property, and (a) upon the hearing and determination of the petition of the owner or claimant restoration is denied, or (b) the owner or claimant fails to file a petition for restoration within thirty days after the seizure, the United States Attorney for the District wherein it was seized, upon direction of the Attorney General, shall institute libel proceedings in the United States District Court * * * having jurisdiction over the place wherein the seizure was made, against the property for condemnation. * * *"

Section 5 of the act, supra (section 7678h), provides that the admiralty proceeding, as nearly as may be, shall be adopted, except that jury trials may be demanded. Concisely stated, the act provides that after seizure, within 10 days, the person making the seizure shall on oath or affirmation apply to the District Judge for a warrant to justify the detention of the seized property, and, if the judge refuses to issue the warrant, or application therefor is not made within 10 days after the seizure, the property shall forthwith be restored to the owner or person from whom seized.

[2] A statutory power to divest the owner of title to the property is here enacted, and I think the mode of procedure prescribed by the act creating this power is complete, and must be strictly construed, and that the provisions are mandatory as to the essence of the thing to be done. Franklin Glass Co. v. White, 14 Mass. 286; Monk v. Jenkins, 2 Hill's Eq. (S. C.) 9.

A new power was here created, and means to execute it provided. The statute expressly says he shall apply for a warrant within ten days after seizure, and, on failure, shall forthwith restore to the owner the property seized.

"Where a statute declares a thing shall be done, it is a peremptory mandate." Bouvier's Dictionary.

" 'Shall' ought undoubtedly to be construed as meaning 'must,' for the purpose of sustaining or enforcing an existing right." W. W. R. Co. v. Foley, 94 U. S. 100, at page 103 (24 L. Ed. 71).

While it is said in Railroad Co. v. Hecht, 95 U. S. 168, 24 L. Ed. 423, that as against the government, the word "shall," when used in statutes, is to be considered as "may," unless the contrary intention is manifest, here the contrary intention is manifest. Section 1 of title 6 expressly limits the government's retention of the "article" and the "vehicle" "until released" as "hereinafter directed," and further refers to due inquiry as "hereinafter provided." And section 4 limits the right to libel "until," "unless," "if," "only on," "upon," "then," "whenever," predicated upon requirements set out, and fixes 30 days within which no libel can be filed, and then only "upon direction of the Attorney General." The spirit of the law is pregnant with points of protection, as indicated by the apt words used.

I do not think that the contention of the libelant that the forfeiture attaches at the moment the gold was attempted to be exported in the automobile is sound. While the offense was completed at that moment, and prosecution could follow at any time within the statutory limitation, the criminal liability of the offender must not be confused with the statutory right of the government in the property. In this there is a distinction in the cases cited in support of the libelant's contention: U. S. v. Morgan, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198, which is a criminal conviction under the Pure Food Law (U. S. Comp. St. 1918, § 8721). No condition is placed upon the government's right to present a criminal information under the Pure Food Act, but rather imposed a duty to proceed "without delay." No conditions and restrictions are present in that act, as appear in the act in question, and the only method by which the claimants under that law could obtain the property was by "payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond." Section 8726, Comp. St. 1918, supra.

Forfeiture by original seizure depends entirely upon the statute. It may declare the forefeiture absolute upon seizure, or make the forfeiture depend upon certain conditions. U. S. v. Stowell, 133 U. S. 11, 10 Sup. Ct. 244, 33 L. Ed. 555.

Under Act March 2, 1799, c. 22, 1 Stat. 678, 3 Fed. St. Ann. 95, the right to libel was absolute, and not dependent upon statutory restrictions and conditions, and the return of a car used in violation of the act of 1874 could not be decreed prior to a declaration of forfeiture. U. S. v. One Certain Locomobile (D. C.) 242 Fed. 998. Whereas, by the 1917 act, by special provision of section 3, the owner has the right to petition a restoration at any time before condemnation proceedings to forfeit have been instituted, and condemnation

cannot be begun until after 30 days from date of seizure, and then "upon direction of the Attorney General."

The suggestion of the libelant that the provision for obtaining a warrant is merely for the protection of the officer making the seizure and to afford a summary remedy to the owner or claimant of the property, if an unreasonable detention might be attempted without any resort to legal proceedings to adjudicate the issues, and that it does not provide steps which must be taken by the government, I do not think to be well founded. Instead of looking to the protection of the officer, sections 2 and 4 bristle with provisions for the protection of private property, and require a speedy investigation of all facts with relation to the seizure by the officers, and require a prima facie case to be made, under oath, to the District Judge within 10 days. On failure so to do, "the property shall forthwith be restored to the owner or person from whom seized."

Two methods of procedure are provided; one "summary," the other "plenary." The summary method (section 3) may be by petition of the owner for restoration; and plenary, if the claimant's petition for restoration is denied, or the claimant fails to file a petition for restoration within 30 days after seizure, and then, upon direction of the Attorney General, libel proceedings shall be instituted. But, as a basis for either proceeding, a warrant shall be obtained from the District Judge within 10 days.

It is apparent that the various words of limitation as employed in this act were designedly used, and the intent appears clear to fix a time limit within which the government must move or return the property. It seems that no other conclusion can follow, and that, even if the Congress could and had intended to destroy a vested right, the limitations would not have been provided, and that it would have done so in clear language, from which there is no escape. Lincoln v. U. S., 202 U. S. 484, 26 Sup. Ct. 728, 50 L. Ed. 1117.

The language employed in the manner and form as set out in this act will not warrant the court in disregarding the express provisions of the act, and holding the "apt words" employed merely directory and cumulative.

The exceptions are sustained.

QUEENS LAND & TITLE CO. et al. v. KINGS COUNTY TRUST CO. et al.

(District Court, E. D. New York. December 12, 1918. Supplemental Opinion, December 18, 1918.)

1. LIS PENDENS ⟸24(2)—FORECLOSURE—PURCHASER.
Where mortgagor conveyed long after filing of notice of pendency of a foreclosure action, its grantee is bound by the proceedings.

2. COURTS ⟸509—CONFLICTING JURISDICTION—SETTING ASIDE FORECLOSURE SALE.
As against grantee of mortgagor, which conveyed before filing of notice of pendency of foreclosure action, the foreclosure sale is a nullity, and the grantee cannot sue in the federal courts to set it aside, as ample relief can be had in the state court.

3. COURTS ⟸509—FORECLOSURE—ERRONEOUS DECISION—ATTACK IN FEDERAL COURTS.
Where mortgagor moved in state court to set aside foreclosure sale, thereby taking position court had power to grant or deny motion, decision of state court, even if erroneous, cannot be reviewed by federal courts in suit by mortgagor and its grantee to set aside sale; state court having determined there was no violation of due process guaranty of federal Const. Amend. 14.

In Equity. Suit by the Queens Land & Title Company and the Massapequa Shore Company against the Kings County Trust Company and the Title Guaranty & Trust Company. Bill dismissed for lack of jurisdiction.

Wood, Cooke & Seitz, of New York City, for plaintiffs.

Brower, Brower & Brower, of Brooklyn, N. Y., for Kings County Trust Co.

Arthur P. Hilton, of Jamaica, N. Y., for Title Guaranty & Trust Co.

GARVIN, District Judge. Plaintiffs have brought this suit to set aside a foreclosure sale made under the direction of the New York Supreme Court in an action therein brought by the Title Guaranty & Trust Company as trustee for the Kings County Trust Company, both defendants here, against the Queens Land & Title Company, a plaintiff here. The action in the New York Supreme Court resulted in a judgment of foreclosure and sale November 16, 1916, and the court found that the sum of $429,745.65 was due.

The mortgaged property was advertised for sale under this judgment on December 30, 1916. At the sale the Kings County Trust Company bought it for $250,175. Before the sale the Queens Land & Title Company made a motion in the New York Supreme Court to set aside that judgment and for a recomputation of the amount due thereunder. This motion was denied December 29, 1916, and an appeal was taken to the Appellate Division of the Supreme Court, which on August 14, 1917, made an order providing that the judgment be vacated and a recomputation ordered, unless the parties stipulated nunc pro tunc that the amount due was $245,169.50, with interest and costs to be taxed, and that if the parties should so stipulate the order appealed from be affirmed without costs. Title Guaranty & Trust Co.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

v. Queens Land & Title Co., 178 App. Div. 931, 165 N. Y. Supp. 1115. The parties did so stipulate. On September 10, 1917, the Queens Land & Title Company made a motion in the New York Supreme Court to set aside the sale under the aforesaid judgment, and this motion was denied. Thereafter the Title Guaranty & Trust Company made a motion to confirm said sale, which motion was granted. The Queens Land & Title Company appealed from both decisions to the Appellate Division of the Supreme Court, which court on March 28, 1918, affirmed both orders. Title Guaranty & Trust Co. v. Queens Land & Title Co., 169 N. Y. Supp. 1116. Thereafter the Queens Land & Title Company applied both to the Appellate Division and the New York Court of Appeals for leave to appeal to the New York Court of Appeals, and both applications were denied.

These facts were either admitted by the defendants or proven by plaintiffs. At the conclusion of the plaintiffs' case, the defendants moved to dismiss the action upon various grounds, claiming that the bill of complaint failed to set forth matters sufficient to constitute a cause of action, that plaintiffs had failed to offer proof sufficient to entitle them to the relief demanded or to any relief, and that the court upon the proof as submitted is without jurisdiction to determine or to take cognizance of the action.

The question now presented for judicial determination is whether, in view of the fact that the matters in controversy here have been regularly passed upon by the New York Supreme Court with all the parties there represented (except the Massapequa Shore Company, to which reference will be presently made), the plaintiffs can now bring an action in the United States District Court the effect of which, if plaintiffs prevail, is to grant a relief which under the same state of facts the New York Supreme Court refused.

[1] At the trial it developed that the defendants herein admit that the Queens Land & Title Company conveyed to the plaintiff Massapequa Shore Company a part of the property. The bill of complaint does not fix the date of such conveyance. The answers set up that the conveyance was made long after the filing of the notice of the pendency of the action which resulted in the sale, and, in view of the fact that this was not disputed by counsel for plaintiffs at the trial, it may be regarded as conceded. Therefore the Massapequa Land Company is bound by the proceedings in the state courts.

[2] Even if the bill of complaint should be construed to allege that the conveyance took place prior to the filing of the lis pendens, the Massapequa Shore Company is not entitled to the relief here sought. The sale as to it is a nullity, and ample relief can be had in the state court.

[3] The plaintiffs claim they have been deprived of their property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, inasmuch as the property in question was not sold under a judgment of $245,169.50, which was the correct amount of the judgment as finally determined, but was in fact sold for $429,745.65, which was held by the Supreme Court not to be the proper amount.

The Queens Land & Title Company does not attack the validity of the judgment of the New York Supreme Court under which the sale was made; indeed, that judgment was amended on its application. Neither the jurisdiction of the Supreme Court of New York nor the regularity of the procedure there followed is questioned.

The motion to set aside the sale was made by the Queens Land & Title Company, which thereby must have taken the position that the New York Supreme Court had the power to grant or deny the motion to set aside the sale. It does not appear that the plaintiffs make any contention here other than that the state courts made a decision that was erroneous.

It seems to be well settled by authority that such an erroneous decision cannot be reviewed by the federal courts in the manner sought to be accomplished by the present action. Arrowsmith v. Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243; Bonner v. Gorman, 213 U. S. 86, 29 Sup. Ct. 483, 53 L. Ed. 709; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 801, 40 L. Ed. 91; Howard v. Kentucky, 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421.

The case of Fayerweather v. Ritch, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193, holds that the United States Court will take jurisdiction of a matter decided by the state court in a case where the state court failed to make a finding with respect to a point at issue. That, of course, is not the situation here. In declining to set aside the sale, the state court determined that there was no violation of the fourteenth amendment to the United States Constitution. The plaintiffs now ask this court to decide that there was such a violation.

It is also suggested by defendants that the present action cannot lie because the method of obtaining a review of the state court is by a writ of error. See New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764.

It is urged that the case of Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, is an authority which warrants this court in taking jurisdiction. What that case really decided is summarized in the opinion at page 241 of 166 U. S., at page 586 of 17 Sup. Ct. (41 L. Ed. 979):

"A judment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

Such a taking of private property was not had here, for which reason the case is not decisive of the action at bar.

It follows therefore that the bill of complaint must be dismissed for lack of jurisdiction, without costs.

Supplemental Opinion.

Since the opinion in the foregoing action was rendered, it has been brought to the attention of the court that on page 2 of the opinion it is stated that the Appellate Division made an order providing that, if

the parties should stipulate to reduce the amount of the judgment, the order appealed from would be affirmed without costs, and that the parties did so stipulate. It appears that the order of the Appellate Division provided that unless the plaintiff Title Guaranty & Trust Company and the defendant Kings County Trust Company should stipulate to modify the judgment the order appealed from would be affirmed. The plaintiff Title Guaranty & Trust Company and the defendant Kings County Trust Company did so stipulate. This in no way affects the determination heretofore made.

CITY NAT. BANK OF SELMA v. DRESDNER BANK OF BREMEN.

(District Court, S. D. Alabama. January 28, 1919.)

No. 42.

1. WAR ⟸10(2)—TRADING WITH ENEMY ACT—ACTION—DEBTOR—BANKS—DEPOSITS.
   Within Trading With the Enemy Act, § 9 (Comp. St. 1918, § 3115½e), as to suit by one to whom a debt is owing by an enemy, a bank in which the proceeds of sale of a shipment of cotton were deposited for the benefit of the owner of the cotton when determined is debtor of complainant, to whom had been assigned the bill of lading, vesting it with the title to the cotton.

2. WAR ⟸10(2)—PROTECTING RIGHTS OF ALIEN ENEMY.
   Cause against an alien enemy for proceeds of shipment of cotton will be continued till peace is declared, German firms claiming it as owner of the cotton under bills of lading which complainant alleges were forged.

In Equity. Suit by the City National Bank of Selma against the Dresdner Bank of Bremen. On motion to dismiss bill. Motion overruled, and cause continued.

Pettus, Fuller & Lapsley, of Selma, Ala., for plaintiff.

Alexander D. Pitts, U. S. Dist. Atty., of Selma, Ala., for defendant.

ERVIN, District Judge. This matter comes on to be heard on a motion filed by the Alien Property Custodian and the Treasurer of the United States to dismiss the bill for want of equity.

The bill is filed under the provisions of section 9 of an "Act to define, regulate and punish trading with the enemy and for other purposes," commonly known as the "Trading with the Enemy Act (Act Oct. 6, 1917, c. 106, 40 Stat. 419 [Comp. St. 1918, § 3115½e]).

Section 9 of said act, when all its provisions not bearing upon the question here sought to be raised are eliminated, reads as follows:

"That any person, not an enemy, to whom any debt may be owing from an enemy whose property shall have been delivered or paid to the Alien Property Custodian and held by him or by the Treasurer of the United States, may file with said custodian a notice of his claim under oath; that said claimant, at any time before the expiration of six months after the war, may institute a suit in equity in a District Court of the United States for the district in which such person resides, or, if a corporation, where it has

its principal place of business, against the Alien Property Custodian or the Treasurer of the United States to establish the debt so claimed, and if suit shall be so instituted, then the money or the property of the enemy against whom such debt is claimed, shall be retained by the Alien Property Custodian or in the treasury of the United States until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment by the Alien Property Custodian or Treasurer of the United States, on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated."

So far as I have been able to ascertain, there have been no constructions of this act by the courts, and it is therefore a question of first impression with me.

The contention is made that the provisions of the bill as filed do not bring it under the terms of this act, because it is contended that the bill fails to allege any debt owing plaintiff by the Dresdner Bank, whose assets are alleged to be in the custody of the Treasurer of the United States and of the Alien Property Custodian. It therefore becomes necessary to consider the facts stated in the bill, which are briefly as follows:

That plaintiff is a corporation organized under the National Banking Laws of the United States, and has its principal place of business at Selma, Ala., within this district: that the Dresdner Bank is a corporation organized under the Imperial German Government, and is an alien enemy; that assets of said bank are now in the possession of the Alien Property Custodian and of the Treasurer of the United States, both of whom reside out of this District; that the amount involved in this suit, exclusive of interest and costs, exceeds the sum of $3,000; that plaintiff has filed with the Alien Property Custodian a notice of its claim, as provided for in section 9 of the "Trading with the Enemy Act," a copy of which claim is made an exhibit to the bill; that on June 30, 1910, plaintiff owned a lien to the extent of $80,000 on a large amount of cotton which formerly belonged to the bankrupt firm of Knight-Yancey & Co., who bought this cotton with money advanced by plaintiff in accordance with an agreement giving a lien; and, further, that said cotton was shipped to Bremen, Germany, by Knight-Yancey & Co., who took bills of lading from the Louisville & Nashville Railroad Company to their order, notify Cotton Commission Company, Bremen, Germany; that said bills provided for shipment over the railroad to Pensacola, Fla., thence by steamer to Bremen, Germany; that said bills of lading were then assigned and duly transferred and indorsed to plaintiffs by Knight-Yancey & Co.

The cotton was shipped from Selma, and before the time of its arrival in Bremen, Germany, Knight-Yancey & Co. failed, and were adjudicated bankrupts by the District Court for the Northern District of Alabama, and W. S. Lovell was appointed trustee of said firm, and that thereafter the said Lovell, as trustee, did, by an instrument in writing, transfer and assign to the complainant all of the right, title, interest, and claim of the said bankrupt estate to said cotton.

That upon the arrival of the cotton in Bremen, Germany, certain German firms, all of whom are alien enemies of the United States, and residing in Bremen, Germany, to wit, Knoop & Fabrius, C. A. Gruner

& Co., Gebr Fritzie & Co., claimed said cotton under forged bills of lading, alleged to have been issued by Knight-Yancey & Co., without authority of the Louisville & Nashville Railroad Company, or the steamship company on whose ship said cotton was shipped, and that said cotton was sold in Bremen, Germany, and the proceeds deposited in the branch of the Dresdner Bank at Bremen for the benefit of the owner of said cotton when determined.

[1] Do these allegations show that the Dresdner Bank is indebted to plaintiff?

"It is no longer an open question in this court, since the decision in the cases of Marine Bank v. Fulton Bank [2 Wall. 252, 17 L. Ed. 785], and of Thompson v. Riggs [5 Wall. 663, 18 L. Ed. 704], that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Campbell, in the House of Lords, in the case of Foley v. Hill, and they all concurred in the opinion that the relation between a banker and a customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect." Bank of the Republic v. Mullard, 77 U. S. (10 Wall.) 155, 19 L. Ed. 897; Alston v. State, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659; Batson v. Alexander State Bank, 179 Ala. 490, 60 South. 314.

Under the allegations of this bill, the assignment of the bills of lading to plaintiff vested plaintiff with the title to the cotton, and when this cotton was sold, and its proceeds deposited in the bank for the benefit of the owner of said cotton when determined, this money belonged to the owner, who could sue the bank under indebitatus assumpsit for it.

I am therefore of the opinion that the motion to dismiss should be denied.

[2] I do not feel, however, that I ought to go further at the present time in this case, because, while the allegations of the bill are that the German firms claimed the cotton under forged bills of lading, I cannot anticipate what the proof on this subject may be, and I should not undertake to pass upon the rights of these German firms until peace is declared between the United States and Germany, at which time they can come in and propound their claims and offer their testimony in support thereof. Kaiser Wilhelm, 246 Fed. 786, 159 C. C. A. 88, L. R. A. 1918C, 795; Watts, Watts & Co., Ltd., v. Unione Austriaca Di Navigazione, etc., 248 U. S 9, 39 Sup. Ct. 1, 63 L. Ed. ——.

An order will therefore be entered overruling the motion to dismiss the bill and continuing the cause during the continuance of a state of war between the United States and Germany, and a certified copy of this order will be served on A. Mitchell Palmer, as Alien Property Custodian, and on John Burke, as Treasurer of the United States, as the act requires them to hold the property of the alien enemy until the termination of this suit.

UNITED STATES v. 1,590 CASES OF TOMATO PULP.

(District Court, E. D. Pennsylvania. January 23, 1919.)

No. 5620.

1. FOOD ⟸2—PENAL STATUTE—CONSTRUCTION.
Food and Drugs Act June 30, 1906 (Comp. St. §§ 8717–8728), being highly penal, District Court cannot read into it imposition of anything which partakes of nature of punishment, not to be found in law.

2. COURTS ⟸78—RULES GOVERNING PRACTICE—POWER OF SUPREME COURT.
Supreme Court of United States has statutory authority to indicate and promulgate rules to govern admiralty practice, which power it has exercised.

3. FOOD ⟸24—LIBEL UNDER FOOD AND DRUGS ACT—COSTS.
Under Food and Drugs Act June 30, 1906 (Comp. St. §§ 8717–8728), on libel of tomato pulp by United States, intervening claimants, who did not stipulate to pay costs and expenses, expense of custody having exceeded all money value involved, so that they acquiesced in government's securing decree of destruction, were not subject to decree in personam for costs, despite rule 26 of Supreme Court (29 Sup. Ct. xlii).

Proceeding by the United States against 1,590 Cases of Tomato Pulp. On the government's motion for decree for costs. Motion denied.

Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa.

Chester N. Farr, Jr., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This proceeding is founded upon the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. §§ 8717–8728). The record discloses a libel and answer. The issues thus raised were never determined, because of a very practical situation which arose. The obstacle thus presented to the proceedings being pushed to a conclusion was borne of the fact predicament that the expense of the custody of the things which had been seized exceeded all money value which the questions at issue could possibly have to the respondents. In consequence of this they acquiesced in the government's securing a successful conclusion of the proceedings. The question of expense had by this time become of such practical importance that the United States now asks for a decree in personam against the respondents for costs, included in the taxation of which is the expense to which reference has been made. The respondents deny such personal liability. A working arrangement was then reached by which the proceedings could terminate in a decree in favor of the United States, with this question of the liability of the respondents reserved to be determined by the court. This presents the question involved in the present motion.

The Food and Drugs Act, among its obvious purposes and objects, has in view the condemnation of food articles, if unfit for consumption as food. The act contemplates the seizure of the articles, and eventually their possible destruction after condemnation. There is a provision for the further possible fact situation that the articles, al-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

though properly subject to condemnation because unfit for food consumption, may have a value for other uses, and any claimant of the articles may have possession of them by giving bond that no future use of them will be made which is prohibited by law. The proceedings are initially by libel, and by the tenth section of the act are required to conform "as near as may be" to proceedings in admiralty. There would seem to be no doubt that the proceeding in the first instance is one in rem. The practice indicates this by the libel being filed wholly against the rem.

The question arising in this case does not ordinarily arise, for the reason that, when a claimant intervenes, he accompanies his intervention with a bond, under the conditions of which he has made himself responsible for costs. His liability is in further consequence a contractual liability, and hence no question of its existence arises. In the present case no such bond was given, and its absence is the absence of contractual liability. The question before us, therefore, is not whether the claimant is liable for costs, when he has agreed to be so liable, but whether he is liable without such an agreement; in other words, whether in a proceeding in rem a decree in personam for costs can be entered against him. Notwithstanding that the proceeding in its origin is a proceeding in rem, as under section 10 it is to follow like proceedings in admiralty, and as we have in admiralty practice proceedings both in rem and in personam, and a proceeding which begins as a proceeding in rem may be transformed into a proceeding in personam, the like change may occur in these proceedings.

[1] We thus reach one of the subsidiary questions which arises. The Food and Drugs Act is not only unquestionably a penal statute, but it is highly penal. We therefore cannot read into it the imposition of anything which partakes of the nature of punishment which is not to be found in the law. Moreover, in looking for the meaning of the law in the sense of what was intended by Congress, as it is evidently intended that property may be destroyed, and therefore whatever value it has be lost to the owner, it is fair to assume that, if Congress had intended that, in addition to suffering this loss, the owner should also be at the expense of the proceedings, it would have so enacted in clear terms. It would follow from this that liability for costs, if not to be found directly in the act itself, could not be found by indirect search for it in the admiralty practice.

[2] The Supreme Court has unquestioned statutory authority to enact and promulgate rules to govern admiralty practice. This power it has exercised. A pertinent rule is rule 26 (29 Sup. Ct. xlii). This relates to proceedings in rem. It contemplates that some one may intervene in the person of a claimant of the property libeled, and requires in the making of any such claim that he shall file a stipulation, with sureties, for the payment of costs and expenses, the payment of which by him may ultimately be decreed.

[3] This rule in its terms is of no aid to us, because, in the present case, no such stipulation was entered. Counsel for the United States seem to concede that the liability for costs, if any rests upon the following propositions: The rules promulgated by the Supreme

Court are the equivalent of statutes and have the binding force of such. We are therefore to read into the law the provisions of rule 26. In further consequence a claimant cannot intervene, except upon condition that he stipulates to pay the costs and expenses. When, therefore, he does intervene, he makes this stipulation, and the fact that it is given without sureties, or is not in writing, does not affect the legal result, which is that he has stipulated to pay the costs and expenses.

Aside from the question before suggested of whether a liability which was not in the Food and Drugs Act could be thus inserted into it, the conclusion reached may be characterized as a non sequitur. It is true that the claimant cannot intervene without entering into the stipulation. It is not true, or at least not clear, that if he does intervene he enters into the stipulation. The truth would seem to be that if he does not enter into the stipulation he has not intervened, and if he has not intervened there can be no pretense that he has agreed to pay costs and expenses. The question suggested of what is the real situation may be answered by the test of applying a remedy for the omission. If a petition to intervene be filed without a compliance with rule 26, and a motion were made to strike the petition from the record, or if the claimant should ask leave to withdraw it, such a motion must prevail, and such leave would unquestionably be granted. The latter is in effect just what this claimant has done. He has abandoned his claim and withdrawn it. Had he done this promptly, the question now before us would doubtless not have arisen, and it may be said that leave to withdraw will be granted only on terms. In this view the question would remain. The test would be the same if the motion were to dismiss, and if this prevailed the whole basis for the argument is taken away. We prefer, however, to base the conclusion reached upon the more substantial foundation of the provisions of the Food and Drugs Act itself. As before stated, it has in view the possibility that the thing seized may be sold, and it provides that in such an event the costs and expenses shall be taken out of the proceeds of sale. It also has in view the possibility that the article seized may be decreed to be destroyed, in which event no provision is made for the liability of any one for the costs and expenses. The decree here was to destroy.

The motion for the decree is denied.

THE SANTA BARBARA.

(District Court, E. D. New York. December 26, 1918.)

1. SEAMEN ⊂=29(5)—INJURY—EVIDENCE.
On libel by an ordinary seaman, who was ordered to rig a boatswain's chair to paint a smokestack, and who, being unable to pass a rope through a pulley sheave, became exhausted while climbing down a guy rope and fell, evidence *held* to show that the owners of the vessel failed to supply and maintain in good working order the pulley and chain which the seaman was required to use.

2. SEAMEN ⊂=29(1)—INJURIES TO SEAMAN—DUTIES REQUIRED.
It is improper to require an ordinary seaman, who was a minor, to climb a guy rope hand over hand, and hold fast thereto, while working a rope through a block.

3. SEAMEN ⊂=11—INJURIES TO SEAMAN—MAINTENANCE AND CURE.
Where a seaman, who was injured, was given the best medical attention available, and the advice of physicians was followed, and it did not appear that the ship failed to pay his wages, he was not warranted in leaving the hospital in which he was placed without good reason, and cannot, having removed to his home, recover for maintenance and cure.

4. SEAMEN ⊂=29(1)—INJURIES TO SEAMAN—LIABILITY FOR INJURIES.
Where an ordinary seaman was directed to do the work of an able seaman in climbing a guy rope and passing a rope through a pulley, and the pulley and chain were not in good working order, *held*, that the owner was liable for an injury received by such seaman when, becoming exhausted, he dropped to the deck.

5. DAMAGES ⊂=132(6)—PERSONAL INJURY—MEASURE.
An award of $4,000 in favor of a minor, who shipped as an ordinary seaman and suffered a fractured knee, *held* sufficient compensation for his pain, suffering, and injury; it appearing that he was by no means disabled, although injury was to some extent permanent.

In Admiralty. Libel by Harris Applebaum, as guardian ad litem of Herman Applebaum, against the steamer Santa Barbara, her engines, etc. Decree for libelant for part only of the recovery sought.

Foley & Martin and J. A. Martin, all of New York City, for libelant.
James A. Hatch and Morton L. Fearey, both of New York City, for claimant.

GARVIN, District Judge. The libelant was injured on May 10, 1917, by a fall on the steamer Santa Barbara, while she was at Iquique, Chile. He claims that he was ordered by the boatswain to paint the smokestack of the vessel, which necessitated his climbing the guy leading from the smokestack on the upper deck to pass a rope through a sheave fastened at or near the top of the smokestack, and that in obedience to this order he climbed the guy and endeavored to pass the rope through the sheave, but that the pulley block was old, worn, and rusty, and that he was unable to work the rope through; that he finally became exhausted and started to descend the guy, about half way down falling to the deck and fracturing his knee.

He further claims that he did not receive proper medical attention and care, and that he is entitled to recover from the vessel, or its own-

ers, not only the amount expended for hospital care, medical care, and maintenance from July 19, 1917, and which still continues, but also an additional amount by way of damage in at least the sum of $25,000—all this by reason of the negligence of those who had the boat in charge, her owners, master, officers, and duly authorized agents. Various acts of negligence are specified, among others, knowingly allowing the block and pulley to become rusty, old, and unfit for use, and failing to have a chain run through the pulley block, by which a rope could have been drawn up, to which might be fastened a bo'sun's chain, which could be used by whoever should paint the stack.

The answer denies any negligence on the part of any one connected with the Santa Barbara, and sets forth that the boat was fully equipped with proper appliances and was in all respects seaworthy, and that any accident which occurred was caused by his negligence, or that of his fellow servants, or was due to an obvious risk, which he assumed, or in any event was not caused by negligence on the part of the Santa Barbara, its owners, officers, or crew, or any one for whom they may have been responsible.

It is undisputed that the libelant, an ordinary, not an able, seaman, was ordered by the boatswain to rig a boatswain's chair to paint the smokestack. Work of this character is done by able seamen. The ship itself had been about 18 months in commission, and there is nothing to indicate unseaworthiness, unless the evidence establishes that there was a failure to have the pulley block in working order and properly rigged with a chain or gaunt line.

[1, 2] Considerable testimony was offered by the libelant tending to show that all ships of this character are equipped with chains running through the pulley blocks, and the court is of the opinion that they should have been in place here.

The fact that there were no chains made the accident possible. There was conflicting evidence as to whether the pulley was in order, but the court considers the testimony of the libelant on this point more reliable, because it is natural that a pulley, at the top of the smokestack on a ship which is an oil burner, should become covered and clogged with oil soot. A pulley was received in evidence, but that it is the pulley involved and in the same condition of cleanliness as at the time of the accident cannot be credited. Further, it has been established that the libelant objected to going up the guy rope in order to rig the chain. As he was only an ordinary seaman, he should not have been required to do work of this character. He was ordered to climb this wire guy rope hand over hand, and was required to hold fast thereto, while working a rope through the block. This placed him in a dangerous position, with great likelihood that he would fall, and serious injury would follow.

[3-5] No proof was offered that the ship failed to pay libelant's wages, and there is nothing to justify a recovery for maintenance and cure. He was given the best medical attention available, the advice of the physicians was followed, and he was not warranted in arbitrarily leaving the Marine Hospital, without some good reason, and having treatment at home.

The court is of the opinion that, although libelant cannot recover for maintenance and care, he is entitled to a substantial sum for the injury, on the ground that the owners failed to supply and maintain in good working order the pulley and chain in question. The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; Foster v. Bucknall S. S. Lines, 206 Fed. 415, 124 C. C. A. 297; The Noddleburn (D. C.) 28 Fed. 855; The Ethelred (D. C.) 96 Fed. 446.

The facts in the case of Cook v. Smith, 187 Fed. 538, 109 C. C. A. 304 (while not parallel to those in the case at bar), indicate that where a young boy is injured, as was the libelant here, he is entitled to compensatory damages. He was not guilty of contributory negligence. Cook v. Smith, supra. The libelant appeared in court, and, although his injury is to some extent undoubtedly permanent, he is by no means disabled, and an award, for his pain, suffering, and injury sustained, of $4,000, is sufficient.

Decree accordingly.

UNITED STATES v. ROSENWASSER BROS., Inc., et al.

(District Court, E. D. New York. January 6, 1919.)

1. INDICTMENT AND INFORMATION ⟸121(1)—MOTION FOR BILL OF PARTICULARS —DISCRETION OF COURT.
   A motion by defendant in a criminal case for a bill of particulars is addressed to the sound discretion of the court.
2. CONSPIRACY ⟸43(6)—CRIMINAL CONSPIRACY—INDICTMENT.
   In an indictment for conspiracy to commit an offense, the offense which is intended to be committed as a result of the conspiracy need not be described with the particularity required in an indictment for the substantive offense.
3. INDICTMENT AND INFORMATION ⟸121(2)—BILL OF PARTICULARS.
   A bill of particulars should only be required where the charges of an indictment are so general that they do not advise defendant of the specific acts of which he is accused.

Criminal prosecution by the United States against Rosenwasser Bros., Incorporated, and others. Motions by defendants for bill of particulars. Denied.

See, also, 254 Fed. 171.

Melville J. France, U. S. Atty., of Brooklyn, N. Y.

Fitzgerald, Stapleton & Mahon, of New York City, for defendants.

GARVIN, District Judge. This is a motion for a bill of particulars, made by defendants Rosenwasser Bros., Inc., Morris Rosenwasser, Leo Rosenwasser, Abe Weiss, Jacob Rosenberg, Louis Levy, Harry Gersonovitz, Isaac Merlis, and Abraham Lampert. These, with various other defendants, have been indicted upon a charge of conspiring to defraud the United States of America. The indictment is somewhat voluminous, but the charge is nothing more than that some of the defendants (who had made contracts to supply various articles to the United States), some of their employés, and certain representatives of

the government (inspectors and others), conspired to have defective articles passed by these inspectors as in conformity with the contracts; the result being that the government was defrauded.

[1] This motion is addressed to the sound discretion of the court, and the "motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice." Rosen v. United States, 161 U. S. 29, 40, 16 Sup. Ct. 434, 480, 40 L. Ed. 606, approved in Dunlop v. United States, 165 U. S. 486, 491, 17 Sup. Ct. 375, 41 L. Ed. 799.

[2] At the outset it is to be noted that the defendants are not charged with having defrauded the government, but with having conspired to defraud.

"In such case, the authorities all show that the offense which is intended to be committed as a result of the conspiracy need not be described with the particularity required in an indictment in which such matter was charged as a substantive crime." United States v. United States Brewers' Ass'n (D. C.) 239 Fed. 163, 170.

While the foregoing observations were made in deciding a demurrer to the indictment, they emphasize that the government is not held to the same strict requirements here as in certain other prosecutions.

While the charge is conspiracy, nevertheless, if the government is required to furnish a bill of particulars, it will be strictly limited in proof to the matters therein contained. Kettenbach v. United States, 202 Fed. 377, 120 C. C. A. 505.

[3] A bill should only be allowed "where the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he is accused, and the court feels that the bill should be furnished him, so that he may properly prepare his defense." United States v. Gouled (D. C.) 253 Fed. 239, citing Kettenbach v. United States, supra.

The charges here are lengthy, and 28 overt acts altogether are set forth; but a careful reading of the indictment indicates that each one of the defendants is apprised of the nature of the charge and each is able to fully meet the contention that he participated therein. It may well be that a bill of particulars might enable one or more defendants to secure an acquittal at the expense of a conviction of the others, but such is not intended to be the object of a bill.

The defendants seek to be advised of the specific contracts involved. Defendants Morris Rosenwasser and Rosenwasser Bros., Incorporated, are aware of the contracts made by them with the government; but as a matter of fact what the contracts are in terms or in detail is of no consequence, if there was no conspiracy. The charge is that the defendants entered into a combination to defraud, and the method employed is set forth at great length in the recital of the overt acts involved. The defendants seek to have the government indicate the time and place when they conspired to defraud. The indictment gives the place as the borough of Queens, and the time as during the period between July 15, 1916, and September 19, 1918. This statement, especially when taken in connection with the various dates specified in the recitals of overt acts, is sufficient. The particulars demanded by

this motion (as well as by motions made by other defendants) have been examined, and the court is of the opinion that each is either a matter of evidence, has been sufficiently set forth by the indictment, or is information with respect to acts and conversations of which each defendant "must be in position to have as much information as anybody could have as to whether they did or did not occur." United States v. Gouled, supra, 253 Fed. at page 241. See, also, United States v. Pierce (D. C.) 245 Fed. 878.

In determining this motion, the court is not unmindful of the fact that it is agreed by all that this will be a long trial, continuing for some weeks. It is expected that the trial will start in two weeks, and the defendants will have practically as much time after the trial begins and the evidence of the government is presented to prepare their respective defenses as though a bill were now ordered.

Much of what has been said applies to the motions made by various other defendants for bills of particulars.

In the exercise of discretion, having in mind that the object of a criminal trial is not only to shield the innocent but to convict the guilty, and in the belief that the government would be too seriously hampered and prejudiced if compelled at this time to limit its proof to the statements contained in a bill of particulars furnished by it, and in the further belief that each defendant will be able to prepare for trial adequately without a bill of particulars, the motion is denied. See Evans v. United States, 153 U. S. 584, 590, 14 Sup. Ct. 934, 38 L. Ed. 830.

LOW et al. v. McMASTER.

(District Court, E. D. Pennsylvania. February 3, 1919.)

No. 1785.

COURTS ⊜347—FEDERAL COURTS—MULTIFARIOUSNESS—RULE OF COURT.

Injunction bill by three plaintiffs, based on three patents, one belonging to three plaintiffs, others belonging to but two, *held* not multifarious, though disclosing more than one cause of action; such causes being joint within equity rule 26 (201 Fed. v, 118 C. C. A. v), which is not to be interpreted as prohibitive of anything permissible in chancery before its adoption.

In Equity. Bill for injunction by Arthur B. Low and others against Henry McMaster, doing business as the Presto Patents Company. On motion to dismiss. Motion denied.

H. S. Johnson, of St. Paul, Minn., and Jos. B. Englander and Howson & Howson, both of Philadelphia, Pa., for plaintiffs.

Alfred E. Freeman, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The motion is based upon the averment that the plaintiffs have set forth in their bill of complaint no cause of action. This is because the cause of action stated does not belong to the plaintiffs. More particularly the basis of the motion is

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that there are three causes of action set forth, only one of which belongs to the plaintiffs. In still other words, the position of the counsel for defendant is that the bill is multifarious. This is because, not merely that more than one cause of action is sought to be incorporated in one bill (which it is admitted does not of itself render the bill multifarious), but because there is more than one plaintiff, and the several causes of action are not joint, as they must be in order to have the several injuries complained of redressed in one proceeding.

The real question involved is embraced in the following formulation of the facts and the question arising out of them: Three letters patent have issued, and the defendant has infringed the property rights granted by each patent. One of the patents belongs to A., B., and C. The others belong to A. and B. Can A., B., and C. maintain a bill based upon the complaint of these three several infringements? The pertinent equity rule is 26 (201 Fed. v, 118 C. C. A. v).

To find a beginning to the line of reasoning which leads to the conclusion we have reached, we commence with the finding that the requirement of rule 26 is (as defendant contends) that each cause of action set forth must belong jointly to the plaintiffs in the sense of embracing the thought that each, every, and all of the plaintiffs must have an interest therein. In strictness, and in the sense in which defendant employs the term, all the causes of action which have been joined in this proceeding are not joint. It is, of course, desirable, as counsel for plaintiff urges, to have the controversies between the parties set at rest by one proceeding, instead of resorting to two or more. This may even contribute to the convenience of the defendant, while preserving all its rights. We do not see, however, that these considerations lead to the conclusion at which counsel for plaintiffs aims.

However desirable the result, and however much the proceeding may be to the advantage even of the defendant, we cannot force the hand of the defendant, unless the procedure is in accordance with the accepted practice in equity, and we must leave it free to decide what is for its advantage. The utmost effect such considerations can have is to incline the courts to uphold such procedure when it can be done.

All the plaintiffs in the instant case are jointly interested in the patents with which we are concerned, except Miles. He has such an interest in one of the patents as necessarily to be a party to any proceeding affecting that patent. His interest, although that of the legal owner of the title, is practically that of a pledgee.

Under the averments of the bill the infringing device of the defendant is a trespass upon the rights of all the plaintiffs. The fact may, of course, be found to be that the patent in which the plaintiff Miles is interested has not been infringed. We can, however, view the cause of action only as it is set forth. We have, therefore, a case in which all the parties have a common interest in respect to the points of litigation presented, and in which a decree can be entered binding all. We think this to be the sense in which rule 26 requires that "the causes of action joined must be joint." This must be so, because rule 26 is not to be interpreted as a prohibitive of anything which was before its adoption permissible in chancery practice in the direction of reaching

desirable results. Rules 37, 43, and 44 (198 Fed. xxviii, xxx, 115 C. C. A. xxviii, xxx) throw light upon the propriety of including Miles as a party plaintiff, although they have no direct bearing upon the question here raised, which is not who may become a party plaintiff, but the right of all of them to ask redress in the one proceeding.

Our view is that all the causes of action joined in this bill are joint within the meaning of rule 26, and we are influenced to take this view because the bringing of the bill as it has been brought is in accord with the practice recognized before the promulgation of the present equity rules, and there is nothing in rule 26 which conflicts with the former practice in this respect. Huber v. Myers (C. C.) 34 Fed. 752. Judge Ray's interpretation of the ruling there made confirms us in the view taken. Kaiser v. Bortel (C. C.) 162 Fed. 902.

We do not regard Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923, as in conflict with the practice to which reference has been made. The court below ruled that the bill could not be maintained without joining as plaintiff an assignee of the patent, notwithstanding the fact that such assignment was by way of mortgage. Neither this ruling nor anything in the very clear opinion of Mr. Justice Gray, accompanying the affirmance of the decree dismissing the bill, touches the point now raised.

On the other hand, Brown v. Guarantee Trust Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468, recognizes the propriety of disposing of several causes of action in one bill. Whether, in a given case, it is permissible depends upon the special fact conditions there presented.

We think the fact conditions presented by the bill in the instant case gives to the plaintiffs the right to seek redress for the wrong complained of in one proceeding. Although it be true that in presenting their complaint they disclose more than one cause of action, the bill is not, for this reason, laid open to the objection of being multifarious.

The motion to dismiss is denied.

UNITED STATES v. LAZZARO et al.

(District Court, W. D. Washington, N. D. November 5, 1918.)

No. 4265.

1. INTERNAL REVENUE ⊂⊃4—LIQUOR BUSINESS TAX—OFFENSE FOR VIOLATION—PROHIBITION STATES.

Comp. St. § 5966, declaring the offense of engaging in the liquor business without having paid required revenue tax, which payment section 5970 provides shall not authorize the business in any state contrary to its laws, is applicable in a prohibition state.

2. INTERNAL REVENUE ⊂⊃4—LIQUOR TAX—STATUTES.

The Webb-Kenyon Act (Comp. St. § 8739), merely reinforcing the state statutes with relation to illicit liquor dealers, and the Reed Amendment of March 3, 1917 (Comp. St. 1918, §§ 8739a, 10387a–10387c), giving federal cognizance and fixing a penalty for violation, are merely cumulative, and not out of harmony with applicability of Comp. St. § 5966, the primary purpose of which is revenue, to prohibition states.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Dominick Lazzaro and others demur to indictment charging violation of Internal Revenue Law, as to liquor business tax. Demurrer overruled.

Robert C. Saunders, U. S. Dist. Atty., and Ben L. Moore, Asst. U. S. Dist. Atty., both of Seattle, Wash.

George H. Rummens and Walter B. Allen, both of Seattle, Wash., for defendants.

NETERER, District Judge. The defendant is charged with violating the Act of February 8, 1875, c. 36, § 16, 18 Stat. 310 (U. S. Comp. Stat. § 5966).

[1, 2] Counsel challenge the sufficiency of the indictment. It is contended by the defendants that the laws of the state of Washington declare the public policy of the state, and, since the sale of intoxicating liquor is prohibited, the government of the United States would not issue a permit or license in contravention of this law, becoming thereby a party to this violation.

The provisions of section 5970, U. S. Comp. Stat., requiring the payment of special tax, does not authorize the carrying on of the business in violation of state laws. The contention that effect must be given to the license against the law of the state must fail. McGuire v. Massachusetts, 3 Wall. (70 U. S.) 387, 18 L. Ed. 164.

Where Congress has power to regulate trade, of course it may do so by license, and, when so regulated, the license carries with it authority to do what its terms provide. This would apply to interstate commerce, etc., and "every other power of Congress to the exercise of which the granting of licenses may be incident." License Tax Cases, 5 Wall. (72 U. S.) 462, 18 L. Ed. 497.

The state has exclusive power over domestic trade of the states. The Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699 (section 8739, U. S. Comp. Stat.), merely reinforces the state statute with relation to illicit liquor dealers, and the Reed Amendment of March 3, 1917, c. 162, 39 Stat. 1069 (Comp. St. 1918, §§ 8739a, 10387a–10387c), gives federal cognizance and fixes a penalty for the violation.

These acts are merely cumulative and not out of harmony with the Revenue Act, supra, whose primary purpose is to raise revenue.

This act, as stated, does not grant a right to carry on business, but fixes a penalty for engaging in business without having paid the tax, and this applies uniformly to all the states and territories.

The demurrer is overruled.

The following cases are cited by defendants: Ledbetter v. U. S., 170 U. S. 610, 18 Sup. Ct. 774, 42 L. Ed. 1162; U. S. v. Rennecke (D. C.) 28 Fed. 847; U. S. v. Jackson, Fed. Cas. No. 15,455, 1 Hughes, 531; U. S. v. Logan, Fed. Cas. No. 15,624; U. S. v. Bonham (D. C.) 31 Fed. 808; U. S. v. Angell (C. C.) 11 Fed. 34.

In re GRAFF et al.

Petition of PEOPLE'S TRUST CO.

(District Court, E. D. New York. August 9, 1918.)

BANKRUPTCY ⊂=228—REVIEW OF ORDER OF REFEREE—SCOPE.
On a petition to review an order of a referee, the court will not review the order under which the matter was referred to the referee for hearing.

In Bankruptcy. In the matter of G. Edward Graff and Thomas F. Nevins, individually and as copartners as G. Edward Graff & Co., bankrupts. On motion to confirm order of referee and petition of the People's Trust Company to revise said order. Motion to confirm granted.

Petition to revise dismissed 255 Fed. 241, — C. C. A. —.

See, also, 242 Fed. 577; 250 Fed. 997, — C. C. A. —.

J. Herbert Watson and Michael M. Helfgott, both of Brooklyn, N. Y., for the motion.

Walter H. Merritt and David W. Kahn, both of New York City, opposed.

GARVIN, District Judge. This is a motion to confirm a report and order made by Virtus L. Haines, Esq., referee in bankruptcy, finding that the People's Trust Company, as executor of Edward Johnson, deceased, is not a creditor of the bankrupt herein; that such property of the former bankrupt Nevins as may have come into the hands of the trustee is surplus property to be disposed of as provided by the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585–9656]), and directing the trustee to deliver to Thomas F. Nevins, the former bankrupt, such property of the latter as may have come into his possession, and for that purpose to execute and deliver all necessary instruments to effectuate such transfer.

In 1901 Graff and Nevins became bankrupts, and thereafter in 1903 the estate was closed and the trustee and the bankrupts were discharged. Johnson, while the estate was being administered, became the owner by assignment of every claim filed except one (for $12) which was paid, and, subject to the payment of the expenses of administration, received all the property of the estate in the hands of the trustee, which was not sufficient to pay in full the filed claims. In 1916 the People's Trust Company, claiming to be a creditor of the bankrupt, as executor of Edward Johnson, then deceased, made an application to reopen the estate, alleging that there were assets still in the hands of Nevins which should have been scheduled in the bankruptcy proceeding and delivered to the trustee. The court denied the application to reopen, finding that Johnson was not a creditor of the bankrupt's estate, and in the order of denial directed that the former trustee execute a document validating the title of Nevins to the assets which were in his hands. On appeal, the Circuit Court of Appeals, after holding that the finding of the court below that Johnson was

not a creditor was warranted, reversed the order, except as to the portion thereof denying the motion to reopen—in that respect, affirming the order. 250 Fed. 997, —— C. C. A. ——.

Thereafter Nevins made an application for an order opening this proceeding and for the election of a trustee to administer the assets owned by him (Nevins) at the time of his bankruptcy and not scheduled by him, subject to the order and control of this court. This motion was granted, and an order made opening the proceeding for the purpose of proceeding therein according to law and directing that the proceeding be referred to Virtus L. Haines, Esq., as referee, to take such action as may be necessary in the premises, to conduct the proceeding, and to administer the assets according to law. The referee, after appointing a trustee, made an order finding that the People's Trust Company, acting as executor of the estate of Edward Johnson, deceased, is not a creditor and has no right to file a proof of claim, and therefore had no right to examine the bankrupt or witnesses, and that such property of the bankrupt Nevins as may have come into the hands of the trustee, is surplus property, to be disposed of as provided for by the Bankruptcy Act, and directing that the trustee be authorized to deliver such property of the former bankrupt Nevins as may have come into his possession, subject to the payment of the expenses of this proceeding, to said Nevins, or such other person from whom the same was received, and for that purpose that he execute and deliver all necessary instruments to effectuate such purpose. The former bankrupt Nevins has now moved to confirm this order, while the People's Trust Company has filed a petition that the order be reviewed, claiming that the referee had no power to appoint a trustee. All these facts appear to have been before the court when the order opening the proceeding was made. Whether or not I would have made an order opening the proceeding under such circumstances, I am of the opinion that orderly procedure requires that I should not make any order which would in effect review an order already made. There could have been no reason for opening the proceeding and referring the matter to the referee, except to permit the latter to make such an order as is now before the court.

Accordingly the motion is granted, and the order made by the referee, directing the trustee to turn over property, is affirmed.

In re GRAFF et al.

Petition of PEOPLE'S TRUST CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 91.

BANKRUPTCY ⟸372—COURTS OF BANKRUPTCY—POWER TO REOPEN ESTATES.

It is within the power of a bankruptcy court to reopen a bankruptcy proceeding on petition of the bankrupt, although settlement has been made with all creditors, if satisfied that there are unadministered assets which should be administered for his benefit.

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of G. Edward Graff and Thomas F. Nevins, individually and as partners, bankrupts. On petition of the People's Trust Company as executor, to revise order of District Court (255 Fed. 239). Petition dismissed.

See, also, 250 Fed. 997, — C. C. A. —.

Walter H. Merritt, of New York City (David W. Kahn, of New York City, of counsel), for petitioner.

J. Herbert Watson, of Brooklyn, N. Y. (Michael M. Helfgott, of Brooklyn, N. Y., of counsel), for bankrupts.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a petition by the People's Trust Company, as executor of Edward Johnson, deceased, to revise an order of Judge Garvin, affirming the order of the referee (255 Fed. 239), to whom the matter had been referred, reopening the bankruptcy of G. Edward Graff and Thomas F. Nevins, individually and as copartners composing the firm of G. Edward Graff & Co., bankrupts, appointing a trustee and directing him to turn over to Thomas F. Nevins, one of the former bankrupts, certain unadministered assets belonging to him, which he alleges were inadvertently omitted from his schedules, notably 412 shares of stock in the Brooklyn Citizen standing in his name.

The People's Trust Company as executor of Johnson, had previously filed a petition to reopen the estate for the purpose of having this same property administered, which petition Nevins opposed and Judge Chatfield denied. His order in this respect was affirmed by us on the ground that neither Johnson, deceased, nor the People's Trust Company, his executor, were creditors of the bankrupts. 41 Am. Bankr. Rep. 32, 250 Fed. 997, — C. C. A. —. We have no disposition to depart from our former decision, and it being res adjudicata between the parties is enough to justify dismissal of this petition to revise.

But we think it proper to consider the petitioner's contention that the District Court was without power to reopen the estate upon the application of the bankrupt, if there were no creditors before the court

to be benefited. We think it within the power of the court to reopen a bankruptcy proceeding, if satisfied that there are unadministered assets which should be administered for the benefit of the bankrupt. Applications to reopen are almost always made by creditors, but we have no doubt the court may in a proper case exercise its discretion, when the fact is presented by the bankrupt. It appeared in the former case, the record of which is made a part of the present record, that a settlement was made with the creditors all of whose claims were vested in Johnson, as trustee. The method of carrying out the settlement was informal and irregular, but we are satisfied that the creditors received all they were entitled to. Mutual releases were exchanged between Johnson, their trustee, and the former bankrupts; both the trustee and the bankrupts being discharged and the estate wound up. The bankrupt Nevins was therefore entitled to any surplus of assets belonging to him. In his petition to reopen now under consideration he states that the assets in question were inadvertently omitted from the schedules. If they had been scheduled, it would have been the duty of the original trustee to transfer them to him. The result is that his title is clouded, and is denied by the Brooklyn Citizen, which sets up the defense in a pending suit that the stock belongs to the trustee in bankruptcy. Nevins v. Brooklyn Citizen, 171 App. Div. 643, 157 N. Y. Supp. 155. In this way, and perhaps only in this way, can the former bankrupt get the benefit of his property, to which no one else has any claim.

The petition to revise is dismissed.

SAMPLINER v. MOTION PICTURE PATENTS CO. et al.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 13.

1. TRIAL ⟸177—EFFECT OF MOTIONS BY BOTH PARTIES FOR DIRECTION OF VERDICT—FINDING OF FACTS.

   Motions by both parties for a directed verdict are equivalent to a request for a finding of facts by the court, and both are concluded on the facts so found by direction of a verdict for one of them.

2. CHAMPERTY AND MAINTENANCE ⟸6(1)—PURCHASE OF CLAIM BY ATTORNEY FROM CLIENT.

   A purchase by an attorney from his client of a right of action for tort, with intent to sue thereon, is champertous and void, and the purchaser cannot maintain an action on the assigned cause of action.

3. CONTRACTS ⟸108(1)—LEGALITY—PUBLIC POLICY.

   The question whether a contract is void, as contrary to public policy, is to be determined by its general tendency, and if that is opposed to the interests of the public the contract is void, even though in the particular case the intent of the parties may have been good, and no injury to the public may have resulted.

4. CHAMPERTY AND MAINTENANCE ⟸1—TERMS DISTINGUISHED.

   In "maintenance" no personal profit is expected or stipulated, the motive being simply to aid a party, with money or otherwise, to prosecute or defend his suit; while in "champerty" there is a bargain with the

plaintiff or defendant by which the champertor is to carry on the suit at his own expense, and is to derive some profit out of the thing sued for, if he prevails.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Champerty; Maintenance.]

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Joseph H. Sampliner against the Motion Picture Patents Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

For opinion below, see 243 Fed. 277. Rehearing denied 257 Fed. —, — C. C. A. —.

The action is brought by the plaintiff as assignee of the Lake Shore Film & Supply Company (hereinafter called the Lake Shore Company) under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]), to recover treble damages for injuries alleged to have been sustained by the business and property of the Lake Shore Company. The plaintiff is a citizen of the state of Ohio, and is and has been for the last 25 years an attorney at law practicing in the courts of that state.

The Lake Shore Company is a corporation organized under the laws of the state of Ohio, having its principal place of business in the city of Cleveland. Since its incorporation it has been engaged in the business of dealing in positive motion picture films or subjects, and also in projecting machines and appliances, used, sold, and leased in connection with motion picture exhibitions.

The bill of complaint is long and complicated, and occupies 60 printed pages of the record. It narrates the various steps taken by the defendants in their alleged attempt to drive the Lake Shore Company out of business, and to ruin and destroy its good will and its assets. It is alleged that because of this conspiracy it became necessary for the Lake Shore Company to employ legal assistance and that it became obligated to pay $5,000. On December 28, 1911, the Lake Shore Company assigned to the plaintiff all of its right, title, and interest in any and all of its claims for damages against the defendants, or any of them, by reason of their acts and conduct.

The plaintiff sues as an assignee of the Lake Shore Company to recover $750,000, alleging that the company had been injured in its business up to December 28, 1911, to the extent of $250,000, and that by reason thereof he is entitled under the Sherman Anti-Trust Act of July 2, 1890, and the Act of Congress of Oct. 15, 1914 (38 Stat. 730, c. 323), amendatory thereof, to treble damages, making the sum of $750,000.

The defendants in their answer set up two affirmative defenses—the statute of limitations and champerty. As respects the latter it "alleges, upon information and belief, that at the time of said alleged purchase, it was, and is now, the law of the state of Ohio that an attorney who purchased a demand with full knowledge and notice that the same was contested and would be litigated, and with the intent and for the purpose of bringing an action thereon, was guilty of maintenance and champerty, and got no title to such demand by such purchase which could be enforced either at law or in equity, and that the same was at said time, and still is, the law of the state of New York; alleges, upon information and belief, that the plaintiff purchased the demand set forth in the complaint with full knowledge and notice that the same was contested and would be litigated, and with the intent and for the purpose of bringing action thereon."

On May 22, 1917, an order was entered granting a separate trial on the issue of champerty, and providing that, if the judgment of the court or the verdict of the jury on that issue should be in favor of the plaintiff, the trial of the other issues should be set for the June or October term. The case came on for trial on the issue of champerty on May 29, 1917. Testimony was taken on behalf of the plaintiff, and at the conclusion thereof the defendants moved for the direction of a verdict, on the ground that the agreement under which the plaintiff brought his action is champertous and void. The plaintiff

also asked for a direction of a verdict. The court directed a verdict for the defendant. Judgment was entered accordingly on July 12, 1917, which was in certain particulars amended on September 5, 1917.

The plaintiff brings the case here on writ of error. He assigns 63 errors, and the assignment of errors covers 104 printed pages of the record.

Rogers & Rogers, of New York City (Gustavus A. Rogers and Saul E. Rogers, both of New York City, John G. White, of Cleveland, Ohio, and C. A. Neff, Joseph Walker Magrauth, and Nathan Frankel, all of New York City, of counsel), for plaintiff in error.

Seabury, Massey & Lowe, of New York City (Samuel Seabury, William M. Seabury, and Frank de R. Storey, all of New York City, of counsel), for defendants in error Smith and Vitagraph Co. of America.

George F. Scull, of New York City (Robert H. McCarter, of Newark, N. J., of counsel), for defendants in error Thomas A. Edison, Inc., Dyer, and Pelzer.

Coudert Bros., of New York City (Samuel Seabury and Charles B. Samuels, both of New York City, of counsel), for defendants in error Berst and Pathe Frères.

Charles F. Kingsley, of New York City, for defendants in error Motion Picture Patents Co., Kennedy, Marvin, and Biograph Co.

Gifford, Hobbs & Beard, of New York City (Alfred P. W. Seaman, of New York City, of counsel), for defendant in error Kalem Co., Inc.

Dwight McDonald, of New York City, for defendant in error Waters.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The only question it is necessary for us to consider is whether the assignment of December 28, 1911, is champertous and void. If it is void, the plaintiff cannot maintain his action. If it is not void, the judgment must be reversed. The assignment states that—

"For value received the Lake Shore * * * Company * * * hereby sells, assigns, and transfers to J. H. Sampliner all of its rights and interests in and to any and all damages which it has sustained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in and as a result of the unlawful agreement by and between the Motion Picture Patents Company; * * * all of said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore * * * Company, and contrary to and in violation of the Sherman Anti-trust Act. * * *"

The testimony shows that the plaintiff had rendered legal services to the assignor as its general counsel in connection with the difficulties in which it found itself with the defendants, and that those services extended over a period from July, 1910, to December, 1911. The plaintiff regarded the reasonable value of his services as worth from $8,000 to $10,000. On December 10, 1911, he was asked by the president of the Lake Shore Company whether he would be willing to bring suit against the defendants, and that he replied that he would bring

the suit, being satisfied that the company had a valid claim, and that it would cost from $8,000 to $10,000. He was informed by the president of the company that it had been losing money very heavily, and it was absolutely impossible for it to undertake any litigation of that kind. He was asked what the company already owed him, and replied in the neighborhood of $9,000 or $10,000. He was told the company did not have the money and could not pay him, and thereupon he said that, if the company would pay him $5,000 in cash, he would cancel the indebtedness. After some reflection the president, Mr. Mandelbaum, told him that the corporation would transfer to him all rights it had against the defendants, if he would be willing to accept it as a satisfaction of the company's indebtedness to him. The plaintiff told him that he would think it over and give him an answer. After a few days' reflection the plaintiff expressed a willingness to accept the assignment, and was told that the board of directors wanted to know whether, if they made the assignment, the plaintiff would as a part of the consideration defend the company and its officers in case any suit was brought against them in matters growing out of their difficulties with the defendants. He agreed to do this, and the assignment was executed.

It appears, therefore, that the assignment originated, not with the plaintiff, but with the Lake Shore Company, and that the consideration for the agreement involved the payment of a past indebtedness, as well as for future services of a professional character. It is also to be noted that the invalidity of the assignment is set up, not by the client, the assignor, who has at no time sought to repudiate it, but by third parties, between whom and the plaintiff no fiduciary relations have existed.

At common law no right of action, whether a right in rem or a right in personam, whether it arose ex contractu or ex delicto, was assignable. Lord Coke wrongly attributed the rule to the doctrine of maintenance and the aversion to the "multiplying of contentions and suits." Lampets' Case, 10 Rep. 48a. The rule is older than the doctrine of maintenance in English law. As Professor Ames, in his Lectures on Legal History, 211, 212, pointed out, the reason for the rule is in the fact that a chose in action always presupposes a personal relation between two individuals and that personal relation cannot be assigned. And see Pollock on Contracts (5th Ed.) 206; Holmes, Common Law, 340, 341; 2 Spence, Eq. Jur. 850. But the courts of equity always recognized the assignment of choses in action, and in England and in this country generally statutes have been passed which have modified the rule that choses in action are not assignable at law. So that now rights of action arising ex contractu and those arising ex delicto, but not for personal torts, are assignable. The right of action which the Lake Shore Company claimed to have for the damages it sustained by reason of the tortious acts of the defendants was assignable. In United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574, 577, 146 C. C. A. 532, this court held that a right of action for property injuries based on a violation of the Sherman Act, and brought under section 7 for treble damages, is assignable.

But, assuming that the right is assignable, was there anything in the relations existing between the Lake Shore Company and the plaintiff which made it nonassignable as between them. It appears that a suit was brought in the District Court of the United States for the Northern District of Ohio to restrain the prosecution of any action based upon the assignment, it being claimed that the cause of action was nonassignable, and that relief was refused on the ground that if it were nonassignable as claimed the defense was as available at law as in equity. This was carried on appeal to the Circuit Court of the Sixth Circuit, which affirmed the court below. General Film Co. v. Sampliner, 252 Fed. 443, — C. C. A. —.

While there is a liberty of contract, which in this country is protected by constitutional provisions, yet the right of parties to make contracts may be in a measure restricted by the relations which exist between them as in the case of a trustee and cestui que trust, guardian and ward, parent and child, and attorney and client. The general rule of public policy which discountenances transactions between persons who are situated in a confidential relation towards each other is regarded as applying with particular force to attorneys at law, and they are restricted in dealing with those with whose interests they are intrusted. This is not only because they are officers of the court, but also because of the fiduciary relation in which they stand to their clients and the great influence they exert over their minds. The courts in some cases have gone so far as to say that a gift from a client to his attorney during the continuance of the relation is absolutely void. These cases go, not upon the ground of the inability of the client to make the gift, but upon the inability of the attorney to accept it. Holman v. Loynes, 4 De G., M & G. 270; Morgan v. Minott, 6 Ch. Div. 638; Powell v. Powell (1900) 1 Ch. 243; Greenfield's Estate, 14 Pa. 489, 506. In other cases the gift has not been regarded as void ipso facto, but it has been viewed with the greatest suspicion, and the burden has been placed on the attorney to show the utmost good faith and freedom from all undue influence. Nesbit v. Lockman, 34 N. Y. 167; Bolles v. O'Brien, 63 Fla. 342, 354, 59 South. 133; Whipple v. Barton, 63 N. H. 613, 3 Atl. 922.

The law is well settled that if an attorney purchases any property belonging to his client—not property which is at the time in litigation—the transaction is viewed with suspicion, and he assumes the heavy burden of proving that the transaction is characterized by the utmost fairness and good faith, and not tainted with fraud or undue influence, and that the client acted upon the fullest information and advice. But when he acquires the title to property which is at the time in litigation, or which is about to come into litigation, it is a still more serious matter.

The common law from a very early period made it a crime, designated as common barratry, to induce others to commence even just suits, if done with an oppressive motive, and it punished the offender by fine and imprisonment. And by St. 12 Geo. I, c. 29, it was enacted that if any one who was convicted of common barratry practiced as an attorney or solicitor in any suit he should be transported

for seven years. And so the common law also punished as a crime the offense of maintenance, which is described by Blackstone as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it." 4 Blackstone, 135. This he declares is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. Champerty, a species of maintenance, was also punished by the common law.

"It signifies," Blackstone says, "the purchasing of a suit, or right of suing: a practice so much abhorred by our law that it is one main reason why a chose in action, or thing of which one hath the right, but not the possession, is not assignable at common law, because no man should purchase any pretense to sue in another's right. These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law; 'Qui improbe coeunt in alienam litem, ut quic quid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur.' Those who knavishly interfere in other men's suits, for the purpose of sharing whatever may be awarded by the verdict, are liable to the Julian law de vi privata (of secret influence); and they were punished by the forfeiture of a third part of their goods, and perpetual infamy."

In Sherman's Roman Law in the Modern World, vol. 2, p. 456, it is said:

"An agreement with a client that remuneration for conducting his law suit should be a certain portion of the proceeds (pactum de quota litis) was forbidden; an advocate making such an agreement was disbarred. This Roman prohibition, designed to uphold the honor of the legal profession, has exerted a strong influence in modern law."

And see Mackenzie's Roman Law, p. 446.

[4] In maintenance no personal profit is expected or stipulated. The motive is simply to aid a party, with money or otherwise, to prosecute or defend his suit. Spicer v. Jarrett, 61 Tenn. (2 Baxt.) 454, 457. And in champerty there is a bargain with the plaintiff or defendant by which the champertor is to carry on the suit at his own expense and is to derive some profit out of the thing sued for if he prevails. Roberts v. Cooper, 20 How. 467, 484, 15 L. Ed. 969; Breeden v. Frankford Marine, etc., Insurance Co., 220 Mo. 327, 119 S. W. 576. And see 11 C. J. 234. And a champertous agreement is of course void and unenforceable.

In Peck v. Heurich (1897) 167 U. S. 624, 630, 17 Sup. Ct. 927, 929 (42 L. Ed. 302), the Supreme Court declared that—

"According to the common law, as generally recognized in the United States, wherever it has not been modified by statute, and certainly as prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover, is contrary to public policy, unlawful, and void, as tending to stir up baseless litigation."

The plaintiff contended in this court that, as his assignor was not objecting to the validity of the assignment on the ground of inade-

quacy of consideration, the objection certainly could not be raised by a third party. We may concede that ordinarily the validity of an assignment cannot be attacked by third parties on the ground of inadequacy of consideration. As between an assignor and an assignee, if the inadequacy of the consideration is sufficient to shock the conscience of a chancellor, it may be in some cases sufficient ground for setting a transaction aside. But the wrong in such cases is a private wrong to the assignor, and third parties are without standing to complain. And if assignor and assignee stand in a fiduciary relation there is still no right in third persons to allege the invalidity of the assignment solely on that ground. But the weakness of this contention in this case lies in the fact that the question here is not between the plaintiff and the defendants alone. If it were, the argument advanced might be conclusive. The question is one of public policy, and upon that ground the decision rests.

The plaintiff argued in this court and in the court below that the consideration for the assignment of the Lake Shore Company's cause of action was the extinguishment of a precedent debt due from the assignor and that therefore the assignment was valid and not champertous. If his premise is correct, there is very respectable authority which would support his conclusion. Professor Ames in his Lectures on Legal History, 258, note 1, states that—

"The distinction was established at an early period, that the grant of a power of attorney to a creditor was not maintenance while a similar grant to a purchaser or donee was maintenance. 34 Hen. VI, 30, 15; 37 Hen. VI, 13–3; 15 Hen. VII, 2–3; South v. Marsh (1590) 3 Leon. 234; Harvey v. Beekman (1600) Noy, 52. As late as 1667–1672, the same distinction prevailed also in equity."

In 1 Bacon's Abridg. 360, 361, referring to champerty it is said that—

"A grant of part of a thing in suit, made in consideration of a precedent debt is not within the meaning of the statute, but such only as is made in consideration of maintenance."

And again:

"But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain * * * are within the meaning of the statute."

In 11 C. J. 247, the law is stated as follows:

"A grant or assignment of an interest in the subject-matter of the suit, made by the client to his attorney in consideration of a precedent debt, is not contrary to public policy or champertous. Nor is it made so by a statute which prohibits an attorney from buying a thing in action with intent to bring an action thereon, except in payment for services rendered."

In Tapley v. Coffin, 12 Gray (Mass.) 420 (1859), an attorney and client agreed that the attorney was entitled to $1,240 for past services and that he should have $400 in full satisfaction for future services in certain suits. And in order to secure the payment of these sums the client assigned to the attorney his share in his father's estate then under administration, and it was agreed that the attorney should collect and receive the same and after deducting the necessary ex-

penses and sums of $1,240 and $400 pass over to the client the residue. The court sustained the legality of the agreement and said:

"It does not present a case of champerty or maintenance."

In Jordan v. Gillen, 44 N. H. 424 (1862), the client assigned to his attorney a cause of action sounding in tort, the consideration being the discharge of a precedent debt due from the client to the attorney. The transaction was held to be not invalid and that the attorney would have the right to enforce the claim.

The New York statute laws of 1818 made the purchase of a chose in action by an attorney a ground of defense against a suit upon it, but where it was received bona fide in payment of an antecedent debt it was allowed by a proviso in the statute. See Watson's Executors v. McLaren, 19 Wend. (N. Y.) 557, 565 (1838), affirmed in 26 Wend. (N. Y.) 425, 37 Am. Dec. 260.

[1] But the difficulty with all this is that this court cannot accept the plaintiff's premise and hold that the consideration for this assignment was a precedent debt which was thereby extinguished. At the close of the plaintiff's case in the court below, when counsel for defendants rested and asked for the direction of a verdict, the plaintiff's counsel stated to the court the issue as follows:

"The defense is that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, that it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation."

This being the issue as the plaintiff's counsel understood it, and which was not controverted by defendants, the plaintiff and defendants each moved for a directed verdict in their favor. There was the plaintiff's testimony which, if the court accepted it, would have justified a finding that the cause of action was assigned for an antecedent indebtedness. There was other testimony from which a court might infer otherwise. No bill had ever been rendered by the plaintiff to the Lake Shore Company for the legal services the plaintiff says he rendered between July, 1908, and December, 1911, and no demand of payment had been at any time made. No entry had been made in the Lake Shore Company's minute book, either of the making of this assignment or of a meeting of the directors at which this assignment was discussed or authorized. No disclosure of this assignment was made to the Mutual Film Company to which, in March, 1912, the Lake Shore Company sold all its assets, notwithstanding the fact that the president of the latter company entered the employ of the Mutual Film Company as general manager at that time, and remained with it in that capacity until March, 1913. The above facts are disclosed by the testimony of the plaintiff's own witnesses. The weight to be given to the testimony and the inferences to be drawn from it were for the court to determine, in view of the request made by each side to direct a verdict in their favor. This was equivalent to a request for a finding of fact and as the court directed the jury to find a verdict for one of them, both are concluded on the facts so found. Beuttell v. Ma-

gone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654. In the case at bar the trial court said:

"Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon."

He accordingly directed a verdict for the defendants.

[2] This court is therefore not at liberty to review the trial court's findings of fact, but is as much concluded as it would be by a verdict of the jury. Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Runkle v. Burnham, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694. And we must dispose of this case upon the theory that the plaintiff did not in fact take this assignment to extinguish a precedent debt, but that he purchased it for the purpose of suing on it; that he, an attorney at law, purchased from his client for $5,000 a cause of action which he values at $750,000. The question we must answer, therefore, is whether the law sanctions such a transaction between parties standing in the confidential relation of attorney and client. We are satisfied that the common law does not sanction it.

In Tyrrell v. Bank of London, 10 H. L. Cas. 26, 44, Lord Chancellor Westbury used language which this court heartily approves and gladly adopts.

"There is no relation known to society," he said, "of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honorable observance, than the relation between solicitor and client; and I earnestly hope that this case will be one of the many which vindicate that rule of duty which has always been laid down, namely, that a solicitor shall not, in any way whatever, in respect to the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled."

In 1823 Chief Justice Swift, of Connecticut, published Swift's Digest, a famous work in its time, and in volume 2, p. 57, said that the purchase of a lawsuit by an attorney is champerty in its most odious form. And he added that—

"As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character to speculate in lawsuits."

It is said, however, that this assignment was made in Ohio; that the assignor was an Ohio corporation; that the assignee was domiciled in Ohio; that apparently there was at the time no intention of bringing suit on the assignment elsewhere than in Ohio; that whether the lex loci contractus or the lex loci solutionis is to determine the validity of the assignment that law in this case is the law of Ohio. There is no disagreement on either side on this phase of the subject. We have examined the cases in Ohio, and we have been unable to discover that the question which this case presents has been passed upon by the courts of that state, or that there is anything in the statutes of the state or in the decisions of its highest court which should lead us to think that by the law of that state the assignment is valid. The case of Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L. R. A. 723 (1892) is certainly clearly

distinguishable in its facts from the case at bar. The agreement the attorney and client made in that case involved an assignment by the client to the attorney of a judgment obtained by the attorney for the client; it being agreed that the attorney should render legal services in an effort to collect the judgment, and that he would advance costs and expenses involved in the proceeding, one-half of which was to be repaid by the client in case of failure, and in case of success the net proceeds of the judgment were to be equally divided between them. It is apparent that the assignment was for the purpose of security and to provide for the payment of the costs and expenses, including the attorney fees. It does not appear what the proportion was between the consideration advanced by the attorney and the share of the judgment he was to receive as a fee. The agreement was held valid and not champertous. But the opinion of the court clearly indicates we think that it would not have sustained such an agreement as the one now in suit. For the court used the following language:

"The conduct of attorneys is subject to proper scrutiny by the courts. The maintenance of a high character for dignity and integrity on their part, is essential to the security of community, and the due administration of justice. Any infraction of the letter of this statute [the penal statute of February 10, 1824] would entail its penal consequences upon an offending attorney, and the courts would not hesitate to hold void any contract violative of its spirit, whether coming within the strict letter or not. So, too, the courts have been, and continue to be, careful not to sanction contracts which appear to encourage a gambling spirit, one leading to the prosecution of pretended or obsolete claims, for a possible high reward."

In Davy v. Fidelity & Casualty Ins. Co., 78 Ohio St. 256, 85 N. E. 504, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694 (1908), the court held that, while a contract for an attorney's fee contingent on the amount to be recovered is ordinarily valid in that state, still if the contract is such as will prevent the client from settling his claim without the consent of the attorney, it is champertous and voidable at the option of the client, and its illegality will avail in any action against a third party which is based on the contract.

And the courts of Ohio hold that a contract is champertous and void where a client and his attorney agree that the latter may prosecute the suit in his own name and at his own risk and cost, and which deprives the client of the right to control or compromise the suit, and which gives the attorney a contingent fee to be deducted from the proceeds of the suit and is dependent upon the success thereof. Brown v. Ginn, 66 Ohio St. 316, 64 N. E. 123. See Steward v. Welch, 41 Ohio St. 483; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 5, 29 N. E. 573, 14 L. R. A. 785; Railroad Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924.

[3] The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interests of the public, the agreement is void, even though in the particular case the intent of the parties may have been good and no injury to the public may have resulted. Woodstock Iron Co. v. Richmond, etc., Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; Oscanyan v. Winchester Repeat-

ing Arms Co., 103 U. S. 261, 26 L. Ed. 539; Meguire v. Corwine, 101 U. S. 108, 25 L. Ed. 899. As was said by Chief Justice Prentice in Connors v. Connolly, 86 Conn. 641, 656, 86 Atl. 600, 605 (45 L. R. A. [N. S.] 564):

"It matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The law looks to the general tendency of such contracts."

See Greenhood on Public Policy, p. 5; Richardson v. Crandall, 48 N. Y. 348. And Mr. Justice Field said in Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868:

"The law looks to the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country."

It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance no injury results. Palmbaum v. Magulsky, 217 Mass. 306, 308, 104 N. E. 746, Ann. Cas. 1915D, 799.

The general tendency of such agreements as the attorney and client made in this case is contrary to the public interests. The agreement concerns the administration of justice in the courts, and it is made by an officer of the courts, who undertakes to speculate in his client's suit. The attorney knows much better than his client can possibly know the value of a particular cause of action and the chances as to its successful prosecution in the particular case, and even if there is a full and honest disclosure to the client there are strong reasons which should forbid the purchase. It would be a gross impropriety in a judge to buy a lawsuit. The impropriety may be less in degree, but it is none the less an impropriety for an attorney, who is an officer of the court and a minister of justice, to speculate in the suits of his client. It would tend to impair public confidence in the profession and in the administration of justice itself.

Judgment affirmed.

UNITED STATES v. ROMAINE et al.

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

No. 3153.

1. EVIDENCE ⟸383(9)—MAPS—UNITED STATES COAST SURVEY.
Hydrographic maps of the United States Coast and Geodetic Survey are entitled to full credence as evidence, and are to be taken as absolutely establishing the truth of all that they purport to show.

2. INDIANS ⟸12—RESERVATION—BOUNDARY—EVIDENCE.
Evidence *held* to sustain the contention of the government as to the boundary of the Lummi Indian reservation established by treaty in 1855, and later by presidential proclamation, and fixing as a corner the mouth of a river which later changed its position.

3. INDIANS ⟸12—RESERVATIONS—BOUNDARY.
Whatever may be the general rule of the state or common law as to boundaries of lands on streams or other waters, the government has power to include tidelands in an Indian reservation.

4. INDIANS ⟸11—RESERVATION—TITLE TO LANDS.
Indians do not acquire title to the lands in a reservation through the treaty of cession, but hold under their original title; such lands being reserved from the cession.

5. INDIANS ⟸12—RESERVATION—ERROR IN SURVEY.
An error in the survey of an Indian reservation cannot prejudice the rights of the Indians therein.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in equity by the United States against J. W. Romaine and others. Decree for defendants, and complainant appeals. Reversed.

The United States brought suit to quiet the title of the Indians of the Lummi Indian reservation to certain lands alleged to be within the boundaries of the reservation, but which had been sold to the defendants as tidelands by the state of Washington. On January 22, 1855, the United States by treaty with certain Indian tribes, in consideration of their relinquishment of larger tracts of land, set apart to them, among other lands, "the island called Chahchoo-sen, situated in the Lummi river at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia, all of which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use." 12 Stat. 928. On November 22, 1873, President Grant made proclamation establishing the Lummi Indian reservation in the following terms: "It is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians, viz.: Commencing at the eastern mouth of Lummi river; thence up said river to the point where it is intersected by the line between section 7 and 8 of township 38, range 2 east of the Willamette meridian; thence due north on said section line to the township line between townships 38 and 39; thence west along said township line to the low-water mark on the shore of the Gulf of Georgia; then southerly and easterly along the said shore, with the meanders thereof, across the western mouth of Lummi river and around Point Francis; thence northeasterly to the place of beginning—so much thereof as lies south of the West fork of the Lummi river being a part of the island already set

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

apart by the second article of the treaty with the Dwamish and other allied tribes of Indians made and concluded January 22, 1857."

The controversy involves the question of the true location of the mouth of the East fork of the Lummi river, later called the Nooksack. The appellant contends that the mouth of the river at the time of the treaty was at or near a point marked by a conspicuous rock called by the Indians "Treaty Rock." The appellees contend that the mouth of the river was at a point now marked by two cottonwood trees, nearly opposite the old church, about a mile and a half or two miles westerly from Treaty Rock. Upon the evidence the court below sustained the contention of the appellees and dismissed the bill. From that decree the appeal is taken.

Robert C. Saunders, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., both of Seattle, Wash.

J. W. Romaine, C. E. Abrams, A. M. Hadley, and W. H. Abbott, all of Bellingham, Wash., for appellees.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

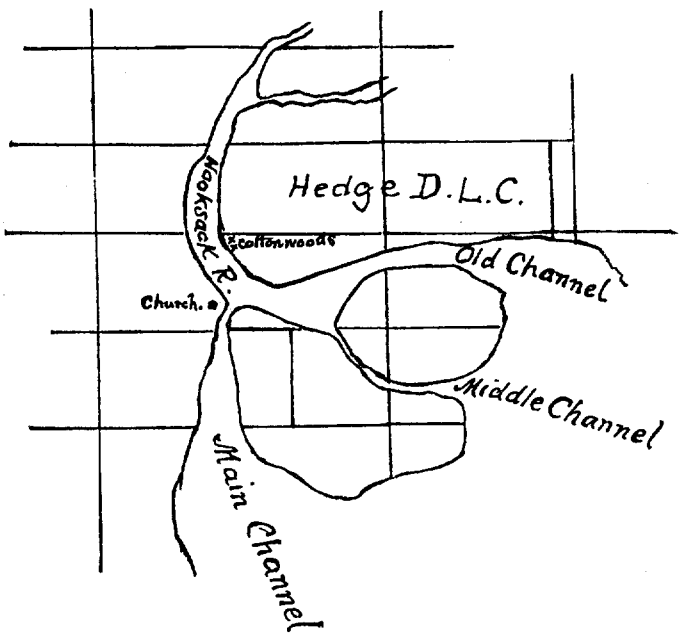
GILBERT, Circuit Judge (after stating the facts as above). The appellant introduced in evidence certain hydrographic maps made by the United States Coast and Geodetic Survey, one in 1856 and one in 1887. The court below disregarded these maps, saying, "I do not think that the hydrographic maps are of any weight in this testimony in contradiction to the evidence that is presented"; and, relying upon the testimony of certain white witnesses, the court reached the conclusion that the testimony of the Indian witnesses and the other evidence adduced by the appellant were insufficient to sustain its contention.

[1] We are unable to agree with the trial court as to the effect which should be given to the hydrographic maps of the United States Coast and Geodetic Survey as evidence in this case. We think the maps should be given full credence, and should be taken as absolutely establishing the truth of all that they purport to show. The map of 1856 indicates a large area of tideland at the mouth of the Nooksack river, and the river flowing in an easterly direction past the land which subsequently became the Hedge donation claim. The map of the survey made in 1887 shows the main channel of the river flowing along the south boundary of the Hedge donation claim, and thence easterly and in the direction of Treaty Rock, and, while it shows two or more small streams diverging therefrom and passing through the lands in controversy near the center thereof, it shows that there was no channel or stream whatever at or near the westerly side of the lands. Capt. George R. Campbell, United States engineer and hydrographic surveyor, testified to the accuracy of official hydrographic maps, stating that all the features connecting the shores with the water are accurately outlined and surveyed and tied to permanent landmarks, that these surveys are made with extreme accuracy, and that all are worked on an astronomical basis and are chained and taped a number of times, and that the government is always careful to do as accurate work as is possible on a coast line and in its marine coast survey work. Such testimony was hardly necessary, we think, for the

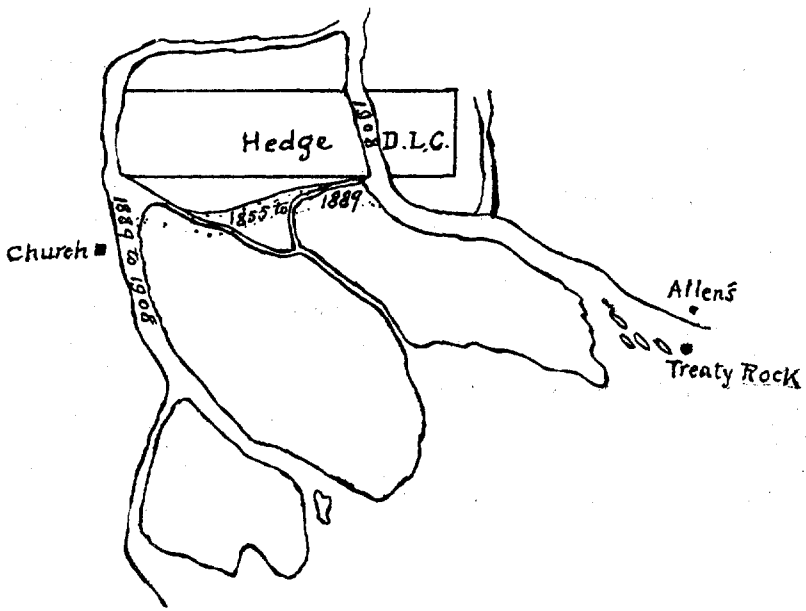
court might properly take judicial notice of the accuracy of the official plats of the United States Coast and Geodetic Survey.

[2] The evidence shows that in the interval since the date of the treaty the position of the mouth of the river has not always been the same; that from 1855 to 1888 the main channel ran past the cottonwoods and easterly along the south side of the Hedge donation claim, and thence southeasterly to a point near Treaty Rock; that in 1889 the river cut through the south bank near the cottonwoods, and flowed thence into the bay in a southerly direction; that in 1908 the river made a new channel through the low-lying lands of sections 8 and 17, cutting in twain the east half of the Hedge donation land claim, and flowing thence, as it still continues to flow, southeasterly in the old channel of 1855; that during these periods there was a small intermediate channel between the old channel of 1855 and the new channel of 1889, containing in different seasons varying amounts of water, and there is evidence to indicate that 8 or 10 years before 1889 there were times when a quantity of water ran substantially in the line which became the main channel of the years 1889 to 1908.

A. R. Campbell, who was employed by the United States to survey portions of the Lummi Indian reservation in the year 1905, produced a plat of the survey, which was admitted in evidence. He testified, and it is conceded, that at that time the main channel was west of the lands in controversy. His instructions were to survey that portion of the reservation lying east of the main channel of the Nooksack river as it existed at that time, and south of the old channel. The outlines of his map are shown in the following diagram:



Capt. George R. Campbell testified that in 1917, in pursuance of instructions from Washington, he surveyed the northeast boundaries of the Lummi Indian reservation, and the map of his survey was received in evidence. He testified that an old channel, which he marked on the map "1855 to 1888," was traceable on the ground, and that the same was marked by old stumps of trees on the bank. A diagram of the outlines of his map is subjoined:



Several of the Indians of the Lummi reservation testified as to the understanding of the Indians at the time of the treaty, and the position at that time of the eastern mouth of the Nooksack river. George Tsilano, in his 100th year, who was 38 years of age at the time of the treaty, testified that Gov. Stevens, on behalf of the government, pointed out to the Indians the ground which would be given to them, and told them that the eastern side of the reservation would be a line running from Point Francis to Treaty Rock. He testified that it was always understood that the big rock would be the eastern boundary of the reservation, and that the eastern boundary line was from Point Francis to that rock; that he remembered very accurately the location of the mouth of the Nooksack river in 1855, and that it was a little bit above the rock; that there was a well-defined bank on the south bank of the river; that the river was deep, and that there was a large body of land south and west of it, always exposed at high tide. Henry Kavina, an Indian, who was 15 years of age at the time of the treaty, testified that he was present at the making of the treaty, that his father was one of the chiefs who participated in making it, that the easterly boundary line ran from Treaty Rock down to Point Francis, and that the mouth of the river was near Treaty Rock. Albert Descanum,

who was 18 years of age at the time of the treaty, testified that Henry Kavina's father, who was an old chief, and a number of other old men who were at the treaty, all had said that the eastern line of the reservation was from Point Francis out to Treaty Rock; that the mouth of the river was at that time between McDonough's wharf and Treaty Rock, and that it had no other mouth. George Warbes, 15 years old at the time of the treaty, heard Kavina's father and other Indians speak of the eastern boundary of Chah-choo-sen, and they all said that the big rock is where the line would be on the eastern side of the reservation. There were younger Indians who testified as to the same understanding, an understanding which they had received from the old men of the tribe.

George Bremner testified that he came to the reservation in 1880; that at that time the mouth of the river was a little distance above Treaty Rock; that he came again to the reservation in 1893, and found that the river was then flowing on the other side of the land in controversy; that in the year 1908 he went to the reservation to teach; that he knew Henry Kavina's father, the old chief, and many other old men, now dead, who lived on the reservation, and talked with them many times, and had always heard them refer to the mouth of the Nooksack river when the reservation was established as located at Treaty Rock; and that it was the understanding through the treaty negotiations that the eastern line of the reservation was to extend from Point Francis to Treaty Rock. Peter James, an Indian, testified that he began to reside on the reservation in 1886; that he arrived in a canoe, and went past Treaty Rock and McDonough's on to the Indian village; that this was the only river at that time, and that there was no other channel to enter the Nooksack; that he had heard the old people on the reservation talk about the location of the mouth of the river, and that they always placed it near Treaty Rock. Thomas Jefferson, an Indian, testified that he had resided continuously on the reservation since 1874; that the mouth of the river, when he first saw it in that year, was at Allen's place, opposite Treaty Rock. Solomon Balch, an Indian, testified that he first came to the reservation in 1884; that he followed a course up the old channel, and that the mouth of the river was opposite Allen's; that a number of old Indians, now dead, said that the mouth of the old river was out at Treaty Rock, opposite Allen's.

On the part of the appellees a number of white men testified as to the condition of the river at different periods between 1868 and the time of the trial. One witness testified that as early as 1868, when he was 6 years of age, he went up the river, and that there was a channel running down past the cottonwood trees into the bay, and another along the old channel, and that the water went both ways, leaving an island between, and that the same so continued to his knowledge until 1873. Another testified to being on the river in a canoe as early as 1872 or 1873, when he was a boy 11 or 12 years of age, and that his recollection is that he came down the main flow of the river that had the greatest volume of water, past the Indian village and the cottonwoods, and south into the bay. He testified to being on the river in

later years up to 1882, and that the main channel remained the same, although some water continued to flow in the old channel past the Hedge donation claim. Another witness testified that as a deck hand on a steamer he occasionally entered the Nooksack river as early as 1882; that when the tide was out there was very little water in the channel near the Hedge claim; that if the tide was high the boat would enter by that channel, but if it was low it would enter the main channel on the west side of the land in controversy. A woman testified to going up the river by canoe at times in the years 1870, 1872, and up to 1876, and that she entered the river at some point below the church on the reservation, and that she never observed a channel making off to the eastward. Another witness was engaged in occasionally carrying passengers and freight on the river for a period of 4 years, beginning with the year 1870. He testified that the mouth of the river was near the church, but that the other channel was also used. "We would go in first in one channel and then in another. Sometimes one would have greater water than the other, very changeable." Another testified that in 1876 there were two channels, and that he could not say which was the largest or which was most used.

The appellees mainly rely upon the testimony and the map of John M. Snow, who, in the year 1873, under the direction of the surveyor general, surveyed the reservation. The map of the survey omits the land in controversy and fixes the eastern boundary of the reservation along the shore of the channel running south from the cottonwood trees. Snow's contract was to mark the exterior boundaries of the reservation and subdivide all the arable lands into 40-acre tracts. He testified that he was not concerned with anything below the meander line, and that he was not concerned with fixing the mouth of the Nooksack river. He testified that the mouth of the main channel of the river was at that time in the neighborhood of the church. On the map of his survey appear dotted lines surrounding two parcels in the bay at the mouth of the river, which lines, he testified, would indicate mud flats. He denied, however, that he had made the lines, and he testified that he could not explain their presence on the map. The dotted lines suggest the presence of a channel in front of the Hedge claim, and a middle channel, as well as the channel which Snow testified was the main channel in 1873.

The conclusion of the court below was influenced also by an entry in the field notes of the survey of the Hedge donation land claim, made in March, 1861, which tends to indicate that at that time the mouth of the river was at the southwest corner of the Hedge donation claim. It is true that the field notes place the southwest corner of the donation claim "at the mouth of the Lummi river, and doubtless the surveyor was of the opinion that the mouth of the river was at the shoreward boundary of the lands which are in controversy in this suit. He made other field notes, however, which indicate that he considered the old channel, running eastward and along the south front of the Hedge donation claim, a continuation of the Lummi river. Thus in establishing the southeast corner of the claim, which is a mile eastward from the southwest corner, his field notes say:

"This corner is under water at high tide, and is overflowed at times by the river."

Again, in the field notes of a survey of sections 7, 8, 17, and 18, township 38, made by the same surveyor in 1859, he set "meander post on bank of bay or river" for corner to fractions 17 and 18 south of the Hedge donation claim and about midway along its southern boundary.

It is to be observed that in all the evidence produced by the appellees, no information is furnished as to the location of the mouth of the river at any time prior to the year 1868. The appellants, on the other hand, have produced evidence of its position in the year 1855, the year in which the treaty was made. That evidence, uncontradicted and unimpeached, and sustained as it is by the hydrographic maps which the court below, erroneously as we think, discredited, together with the proof of the general understanding of the Indians that the treaty fixed the eastern line of their reservation on a line running from Point Francis to Treaty Rock, is sufficient to sustain the contention of the appellant that the eastern mouth of the river was in 1855 at or near Treaty Rock.

[3] The appellees invoke the rule that grants by the government of public lands bounded on streams or other waters without reservation or restriction are to be construed in accordance with the laws of the state if the land lies within a state, or in accordance with the common law if it lies within a territory, and contend that a reservation to Indians of land on tidewater in Washington Territory is presumed to extend to high-water mark only. But it is not disputed that the government had the power to grant for Indian reservations or for other purposes lands to low-water mark. In Shively v. Bowlby, 152 U. S. 1, 48, 14 Sup. Ct. 548, 566 (38 L. Ed. 331), the court said:

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory."

In Heckman v. Sutter, 119 Fed. 83, 55 C. C. A. 635, this court said:

"The prohibition contained in the act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tidelands as well as lands above high-water mark. * * * The fact that at that time the Indians and other occupants of the country largely made their living by fishing was no doubt well known to the legislative branch of the government."

The intention to reserve to the Indians the possession of the land to low-water mark is made evident by the terms of the proclamation, for one of the courses on the west side of the island runs "to the low-water mark on the shore of the Gulf of Georgia, then southerly and easterly along the said shore with the meanders thereof, across the western mouth of Lummi river, and around Point Francis." The next course is "thence northeasterly to the place of beginning." There

was no occasion to mention low-water mark on the east side of the island, for if, as we have found, the place of beginning was in fact at Treaty Rock, the last line of the description includes within the boundaries all the lands here in controversy.

[4] It is not to be supposed that in making the treaty the government intended to take from the Indians any of the rights they had theretofore enjoyed in the island of Chah-choo-sen. In Gaines v. Nicholson, 9 How. 356, 364 (13 L. Ed. 172), the court said of the Indians' right of occupancy in such a reservation:

"It was so much carved out of the territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the Government in the act of agreeing to the reservation."

In United States v. Winans, 198 U. S. 371, 383, 25 Sup. Ct. 662, 49 L. Ed. 1089, the court held that the right of taking fish in the Columbia river and the right of erecting temporary buildings for curing them, reserved to the Yakima Indians by treaty, was not a grant of right to the Indians, but a reservation by them of rights already possessed and not granted away by them. In the Enabling Act, by which the territory of Washington was admitted into the Union (Act Feb. 22, 1889, c. 180, § 4, 25 Stat. 676), the people of the newly created state were required to agree and declare that they forever disclaim all right and title—

"to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

[5] We are unable to assent to the proposition that, because article 7 of the treaty reserves to the President at his discretion the power thereafter to remove the Indians from the reservation, the official survey of 1873 was in effect a removal of the Indians from the lands in controversy. The power to survey the lands so reserved in the treaty was the power to cause the whole or any portion of the reserved lands to be surveyed into lots, and to assign the same to individuals or families for permanent homes. The land in controversy was not adapted to such individual use, and there was no occasion to survey it, or to take from the Indians on the reservation the common right to use it for the purposes of fishing and digging shellfish, or other purposes, and the surveyor general, in causing the survey to be made, had no authority to exclude any of the reserved lands from the boundaries of the reservation. The error in failing to extend the survey so as to include the lands in controversy cannot prejudice the rights of the Indians. Moss v. Ramey, 239 U. S. 538, 36 Sup. Ct. 183, 60 L. Ed. 425; Scott v. Lattig, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; United States v. Hutchings (D. C.) 252 Fed. 341.

The decree is reversed, and the cause is remanded, with instructions to enter a decree as prayed for in the appellant's bill.

DELAWARE, L. & W. R. CO. v. PECK.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 16.

1. COMMERCE ⊜27(7)—INJURY IN "INTERSTATE COMMERCE."
Employé, in a local switching crew at station in New Jersey, injured while setting brake on open coal car being switched between sidings, car having come from Pennsylvania consigned to company in New Jersey, *held* not engaged in "interstate commerce," to bring his case within federal Safety Appliance Act (Comp. St. § 8605 et seq.).
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COURTS ⊜489(9½)—MASTER AND SERVANT ⊜351, 396—INJURIES TO RAILROAD SERVANT—FEDERAL SAFETY APPLIANCE ACT—WORKMEN'S COMPENSATION ACT.
Member of railroad's local switching crew, injured in intrastate commerce in New Jersey, while setting brake on car, *held* entitled to recover against railroad under federal Safety Appliance Act (Comp. St. § 8605 et seq.), not in the federal court under the federal Employers' Liability Act, but only in the court of common pleas of the county of New Jersey which would have jurisdiction in a civil cause, there having been no provision in contract of employment that Workmen's Compensation Act of New Jersey (P. L. 1911, p. 134), as amended by Act N. J. April 1, 1913 (P. L. p. 302), should not apply, and he having given no such notice to railroad before accident.

3. MASTER AND SERVANT ⊜111(1)—FEDERAL SAFETY APPLIANCE ACT—ACTION FOR DAMAGES.
Failure to comply with federal act requiring hand brakes (Comp. St. § 8618) renders railroad company liable for injuries to a switchman resulting from such violation, though the only punishment fixed by the statute is a penalty recoverable at the suit of the United States.

In Error to the District Court of the United States for the Southern District of New York.

Action by Richard G. Peck against the Delaware, Lackawanna & Western Railroad Company. To review judgment for plaintiff, defendant brings error. Reversed.

A. J. McMahon and William S. Jenney, both of New York City (Douglas Swift, of New York City, of counsel), for plaintiff in error.

Edwin J. McCrossin and Vine H. Smith, both of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment upon the verdict of a jury in favor of the plaintiff for damages and costs in the sum of $25,057.31, for loss of left hand and of left leg below the knee, sustained by him while in the defendant's employment. The action is brought under the federal Employers' Liability Act (Comp. St. §§ 8657–8665). At the time he sustained the injuries in question the plaintiff was one of the local switching crew at Delawanna Station, N. J., and was setting the brake on an open coal car which was being switched from a siding back of the station known as the "Old Switch" to another siding on the other side of the main tracks known

as the "Hart Siding." The plaintiff alleged that the brake and brake step of the coal car were defective, which made the defendant absolutely liable under the federal Safety Appliance Act (Comp. St. § 8605 et seq.), and also liable under the federal Employers' Liability Act because of the negligence of the engineer in giving the car a violent lurch. We will assume that the plaintiff has established all his charges of negligence.

[1] The first question to be considered is whether the plaintiff was at the time in question engaged in interstate commerce. The car came from Knoxdale, Pa., consigned to the Thomas A. Hart Company at Delawanna. That company was building a highway crossing for the defendant under a contract which required the defendant to transport and deliver to the company all materials to be used in the work, free of freight charges; the company to pay all demurrage charges in accordance with the defendant's rules.

Saturday morning, September 16, 1916, at 5 a. m., the car arrived at Delawanna and was put on a siding known as the "Old Switch." Between 9:30 and 10 a. m. the superintendent of the Hart Company directed the car to be placed at the stub end of that switch, which was done.

On Monday, September 18, the superintendent directed the car to be moved to Hart's Siding and the accident happened while this was being done. These movements were within the yard limits of Delawanna. The Hart Company receipted for the coal September 16 and paid demurrage in accordance with the defendant's rules of one dollar a day after the expiration of 48 hours from 7 a. m. of that date until the car was unloaded. Upon the undisputed facts we think the plaintiff was not engaged in interstate commerce, that the interstate journey had ended at least when the car was placed by the direction of the Hart Company at the stub end of the old switch, and that the judge should have so held as matter of law. All switching thereafter in the yard for the convenience of the consignee was intrastate commerce. This is in accordance with our understanding of the decision of the Supreme Court in Lehigh Valley Railroad Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070, reversing the decision of the Court of Appeals of the state of New York; Mr. Justice McReynolds saying:

"Basing his claim upon the federal Employers' Liability Act, defendant in error sought damages for personal injuries. The New York Court of Appeals affirmed a judgment in his favor (214 N. Y. 116 [107 N. E. 814]), and the question now presented is whether there is evidence tending to show that he was injured while engaging in interstate commerce. The accident occurred July 27, 1912, when, as member of a switching crew, he was assisting in placing three cars containing supply coal for plaintiff in error on an unloading trestle within its yards at Cortland, N. Y. These cars belonged to it and with their contents had passed over its line from Sayre, Pa. After being received in the Cortland yards—one July 3 and two July 10—they remained there upon sidings and switches until removed to the trestle on the 27th.

"We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce. The essential facts in Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177 [36 Sup. Ct. 517, 60 L. Ed. 941], did not materially differ from those now presented. There we sustained a recovery by

an employé, holding he was not engaged in interstate commerce; and that decision is in conflict with the conclusion of the Court of Appeals. The judgment under review must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion."

The plaintiff relies greatly on Penna. v. Donat, 239 U. S. 50, 36 Sup. Ct. 4, 60 L. Ed. 139, which was decided on motion to dismiss or affirm, on authority of New York Central & Hudson River R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298. The report is very brief, but an examination of the record in the Circuit Court of Appeals discloses that the plaintiff, a yard conductor in charge of a switching crew, was directed to take two interstate cars from a train and place them upon Olds' private switch track connecting with the yard. To do this it was necessary to remove from that switch two empty cars which had been used in interstate commerce. While the plaintiff was arranging for this at 11 o'clock at night, he fell into an unguarded and unlighted hole, and the court left it to the jury to say whether he was, under all the circumstances, engaged at the time in interstate commerce. This was on the principle, stated by Mr. Justice Lamar in the Carr Case, that railroad employés frequently pass on the same day from intra to inter state commerce and vice versa under circumstances under which it is difficult to draw the line. We do not think this applies to the present case.

[2, 3] But it is contended that, even if the plaintiff were engaged in intrastate commerce, the defendant is absolutely liable under the federal Safety Appliance Act, without regard to any question of negligence, because the car was not equipped with an efficient hand brake and proper brake step. This act laid down requirements as to railroad equipment with which all carriers engaged in interstate commerce must comply under the penalty of $100 for each and every violation. Of course, one of the class intended to be protected by the act injured by the failure of a carrier to comply with it is entitled to recover damages (Texas & Pacific Railway Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874), but not under the federal Employers' Liability Act, unless he were at the time engaged in interstate commerce, which this plaintiff was not.

The plaintiff's employment and injury both took place in the state of New Jersey. His theory is that for injuries resulting from a violation of this act he may recover damages in a common-law action brought wherever he can serve the defendant. But master and servant together constitute a relation or status, which involves many mutual rights and duties not expressed in the specific contract of employment. That contract fixes, among other things, the kind, place, and time of employment, and the compensation. The definition and extent of the relation itself are fixed by the law of the state where it was established, but Congress has written into it, in the case of railroad companies and their employés, this additional feature on which the plaintiff relies. The state of New Jersey has defined the rights and duties of the relation of master and servant by the Workmen's Compensation Act (chapter 95, Laws 1911, as amended by chapter 174, Laws 1913), which we regard as excluding all other jurisdictions.

Section II regulates elective compensation without regard to the negligence of the employer, and subsection 9 provides that every contract of hiring shall be presumed to have been made with reference to section II unless there be an express statement in writing as a part of the contract or by either party to the other prior to any accident that it is not intended to apply. So also either party may terminate the application of section II by giving 60 days' notice in writing to the other before any accident.

The answer sets up this act as a defense, and alleges that there was no provision in the contract that section II should not apply, and that the plaintiff had given no such notice to the defendant before the accident; wherefore he could not maintain the action. At the trial the defendant offered to prove these allegations, but the court refused to permit it, and the defendant excepted. We think this was error. The New Jersey act creates a system to be enforced by the court of common pleas of the county of New Jersey which would have jurisdiction in a civil case. The employé is required to give notice of the injury to the employer within a fixed time. The compensation to be paid for the loss of a leg or of a hand is a fixed proportion of the employé's daily wages for a fixed number of weeks, and this compensation may be commuted by the court of common pleas into one or more lump sums. That court is also to settle, at the request of either of the parties, any dispute about compensation. For these reasons we are of the opinion that the plaintiff cannot maintain this action in the District Court for the Southern District of New York. There are some decisions of the courts of New York to a similar effect. Albanese v. Stewart, 78 Misc. Rep. 581, 138 N. Y. Supp. 942; Lehmann v. Ramo Films, Inc., 92 Misc. Rep. 418, 155 N. Y. Supp. 1032; McCarthy v. McAllister Steamboat Co., 94 Misc. Rep. 692, 158 N. Y. Supp. 563; Verdicchio v. McNab, 178 App. Div. 48, 164 N. Y. Supp. 290.

The judgment is reversed.

JELKE v. UNITED STATES and eight other cases.

(Circuit Court of Appeals, Seventh Circuit. March 2, 1918. Rehearing Denied December 10, 1918.)

Nos. 2168, 2170–2176, 2220.

1. CONSPIRACY ⟸43(10)—INDICTMENT—SUFFICIENCY.
An indictment for conspiracy to defraud the United States of the special tax of 10 cents per pound, imposed on manufacturers of colored oleomargarine, considered, and *held* sufficient.

2. INDICTMENT AND INFORMATION ⟸55—RULES OF CONSTRUCTION.
By modern decisions the rules governing criminal pleadings have become less technical and more practical, but no less protective to the accused.

3. INDICTMENT AND INFORMATION ⟸110(4)—SUFFICIENCY—CHARGING OFFENSE IN LANGUAGE OF STATUTE.
An indictment is sufficient which charges a statutory crime substantially in the words of the statute, except in cases where other prece-

dents have been firmly established in analogous offenses at common law, or where such a charge would not fairly inform the accused of the nature of the charge against him.

4. INDICTMENT AND INFORMATION ⟸110(10)—STATUTORY LANGUAGE—CONSPIRACY.
An indictment for conspiracy under Criminal Code, § 37 (Comp. St. § 10201), is sufficient if it follows the language of the statute and contains a sufficient statement of an overt act, except when the object of the conspiracy is in itself lawful, where the means must be set forth with such particularity as to disclose their illegality and the criminal intent, and except also where the conspiracy is to defraud the government in such manner that a detailed statement of the means and time and place is necessary to fairly inform defendant of the character of the offense.

5. CONSPIRACY ⟸43(6)—INDICTMENT—SUFFICIENCY.
A crime which is the object of a conspiracy need not be described with the same particularity in an indictment for the conspiracy as in an indictment for such crime itself.

6. INDICTMENT AND INFORMATION ⟸111(1)—INDICTMENT—NEGATIVING EXCEPTIONS IN STATUTE.
An indictment for conspiracy to violate a statute need not negative an exception created by a proviso in the statute.

7. CONSPIRACY ⟸47—CRIMINAL PROSECUTION—EVIDENCE.
In conspiracy cases the proof must, from the nature of the charge, consist largely of circumstantial evidence, and the conspiracy may be established by inferences to be fairly drawn from the facts proved.

8. CRIMINAL LAW ⟸829(1)—TRIAL—INSTRUCTIONS.
The refusal of requested instructions, although stating correct propositions, is not reversible error, where the charge given fairly and correctly presents the issues.

9. CRIMINAL LAW ⟸822(12)—INSTRUCTIONS AS A WHOLE.
Instructions relating to testimony of accomplices, viewed in the light of the entire charge, *held* to contain no reversible error.

10. CRIMINAL LAW ⟸371(1, 12)—OTHER ACTS—MOTIVE—INTENT.
In a prosecution for conspiracy to violate a statute, it was within the discretion of the court to admit evidence of acts by defendants prior to the taking effect of the particular statute to show motive and intent, where they were closely connected with and were similar to subsequent acts, and where a similar statute was then in force.

11. CRIMINAL LAW ⟸371(1)—OTHER ACTS—EVIDENCE OF INTENT.
In a prosecution for conspiracy to defraud the government of taxes on oleomargarine, a state statute prohibiting the sale of colored oleomargarine *held* admissible as throwing light on defendants' intent, in connection with evidence that defendants sold to certain retailers inconsiderable quantities of colored oleomargarine, and further evidence tending to show that they subsequently sold to the same purchasers large quantities of uncolored, which the purchasers colored and used to refill the original higher tax stamped packages.

12. WITNESSES ⟸267—CROSS-EXAMINATION—DISCRETION.
The extent to which cross-examination of witnesses should be allowed in a criminal case is largely within the discretion of the trial judge.

13. WITNESSES ⟸260, 263—EXAMINATION—CALLING ATTENTION TO FORMER TESTIMONY.
When the court, in the trial of a criminal case, is convinced that a witness is "conveniently forgetful" of matters to which he testified before the grand jury, the trial judge is justified on his own motion in having the previous testimony read to the witness, not in the presence of the jury, and again placing him on the stand.

Mack, Circuit Judge, dissenting.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Criminal prosecution by the United States against John F. Jelke, Harry E. Hitchins, William M. Steele, Hugh D. Cameron, William L. Lillard, William P. Jackson, Fred Rapp, L. B. Tullis, Francis M. Lowry, and four others. From judgments of conviction, the defendants named separately bring error. Affirmed.

The nine plaintiffs in error and four others were indicted by the grand jury, charged with the crime of conspiracy to defraud the United States out of the ten cents per pound tax due by law upon certain colored oleomargarine, using means set forth in the indictment and hereinafter more particularly described.

Of the thirteen defendants jointly charged with the offense, one, Philemon Berry, was never apprehended; the defendant Harvey P. McFarland was acquitted by the jury, and the two defendants Abner D. Mize and O. S. Martin were dismissed upon order of the court. The remaining defendants were found guilty by the jury, and each was sentenced to pay a heavy fine. The defendants Francis M. Lowry and John F. Jelke were also sentenced to the penitentiary for the terms of one and two years respectively.

Each plaintiff in error separately obtained a writ of error to review this judgment.

The indictment is as follows (the paragraphing is arbitrary, and for convenience sake follows the copy as it appears in the brief of plaintiffs in error):

"The Indictment.

Section.

1 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

Northern District of Illinois, Eastern Division—Set.

The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Northern District of Illinois, and inquiring in and for the Eastern Division of said Northern District, upon their oath present that,

2 upon the first day of January, in the year nineteen hundred and three, and continuously from that day to the date of the return of this indictment into open court, and therefore continuously from the first day of August, in the year nineteen hundred and eight, to the first day of July, in the year nineteen hundred and eleven,

3 one John F. Jelke, one Francis M. Lowry, one Abner D. Mize, one Philemon Berry, one Harry E. Hitchins, one William M. Steele, one Harvey P. McFarland, one Hugh D. Cameron, one William L. Lillard, one William P. Jackson, one Fred Rapp, one L. B. Tullis (whose Christian name is to the said grand jurors unknown), and one O. S. Martin (whose Christian name is to the said grand jurors unknown), each late of the city of Chicago,

4 in said Eastern Division of the Northern District of Illinois, hereinafter in this indictment referred to as the defendants, at the city of Chicago, in the said division and district,

5 unlawfully, willfully, knowingly, and feloniously have combined, conspired, confederated and agreed together to defraud the said United States of the tax by law provided to become due to the said United States of ten cents per pound upon certain oleomargarine, artificially colored to look like butter of a shade of yellow,

6 which the defendants, throughout said period of time, agreed they should cause to be manufactured, produced and sold, and removed for consumption and use from the place of manufacture,

7 which oleomargarine the defendants agreed and intended they would cause to be manufactured by the addition to and the mixing with oleomargarine which was subject by law to a tax of one-fourth of one cent per pound, (commonly called white oleomargarine or white goods), of artificial coloration which would cause it to look like butter of a shade of yellow,

Section.

8 and, as a part of said conspiracy, the said defendants agreed that they would cause divers individuals, to wit, William A. Dwan, Benjamin Balch, Henry F. Marhoefer, Charles R. Kenyon, Charles R. Zurn, Anton T. Peterson, Frank S. Goll, William A. Schaefer, Edward Marhoefer, Harry H. Kendall, Sherwood W. Alger, Eugene Salvo, Fred Marhoefer, and J. G. Paule (whose Christian name is to the said grand jurors unknown), and other persons too numerous to be here named,

9 at divers times and on divers days throughout said period of time,

10 to add to and mix with the said white oleomargarine artificial coloration to cause it to look like butter of a shade of yellow,

11 which white oleomargarine and which artificial coloring matter to cause it to look like butter of a shade of yellow,

12 the said defendants agreed among themselves to furnish and cause to be furnished

13 to the said William A. Dwan, Benjamin Balch, Henry F. Marhoefer, Charles R. Kenyon, Charles R. Zurn, Anton T. Peterson, Frank S. Goll, William A. Schaefer, Edward Marhoefer, Harry H. Kendall, Sherwood W. Alger, Eugene Salvo, Fred Marhoefer, and J. G. Paule (whose Christian name is to the said grand jurors unknown), and other persons too numerous to be here named,

14 and further as a part of said conspiracy, the defendants agreed among themselves

15 (a) to furnish to the said individuals last above named and referred to, tub liners to be used by the said individuals last above named and referred to in packing in tubs the said oleomargarine after the addition of artificial coloration causing it to look like butter of a shade of yellow as aforesaid, and wrappers of paper to be used by the said individuals last named and referred to in packing in pound packages and packages of other weight the said oleomargarine after it had been artificially colored, as aforesaid,

16 and further as a part of said conspiracy,

17 (b) to cause the said individuals last named and referred to to sell and furnish for profit to consumers and persons other than their own families and remove for consumption and use from the place where such coloring matter was added to and mixed with said oleomargarine, the said oleomargarine thus artificially colored,

18 without paying and causing to be paid,

19 and intending that they, the defendants, and the said individuals, last hereinabove named and referred to, should not pay to the United States, and intending that no payment whatever should be made by any person, firm or corporation to the said United States of, the tax, which would then, to wit, at the time of such removal for sale and for consumption and use, as aforesaid, become due to the said United States, to wit, the tax of ten cents per pound, as provided by law,

20 and intending that the said United States should be defrauded out of the money by law due the said United States for such tax.

21 And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said conspiracy and in order to effect the object of the same, the said defendants* on, to wit, the eleventh day of October, in the year nineteen hundred and nine, at the city of Chicago, in the division and district aforesaid, knowingly, willfully and feloniously delivered and caused to be delivered to the said William A. Dwan, a large quantity, to wit, nine hundred and sixty pounds, of white oleomargarine and sufficient coloring matter to color the same to look like butter of a shade of yellow.

22 (Same as section 21 down to star), on, to wit, the eleventh day of October, in the year nineteen hundred and nine, at the city of Chicago, in the division and district aforesaid, knowingly, willfully, and feloniously delivered and caused to be delivered to the said Benjamin Balch, a large quantity, to wit, eighty pounds of white oleomargarine and sufficient coloring matter to color the same to look like butter of a shade of yellow."

Paragraphs 23 to 38, inclusive, allege defendants at different times and at different places delivered large quantities of white oleomargarine with free coloring material to divers persons named therein.

Section.

39 "(Same as in section 37 down to the star) the said Harvey P. McFarland (defendant herein) on, to wit, the twenty-sixth day of August, in the year nineteen hundred and nine, at the city of Chicago, in the division and district aforesaid, knowingly, willfully and feloniously did prepare and cause to be prepared a certain writing and ticket called a sales ticket, which was of the tenor following, to wit:

John F. Jelke Co. City Sales 40 Date, 8/26/09. No. 4844.
Chicago.
Sold to New City Creamery
4803 Ashland Ave. Ch'k'd by A. W.

.....Fig. by.....	905	0
Via .....Salesman F.....	109	35

Original 3213.

Packages Oleo.	Packages Misc.	Packages Weight	Pounds Misc.	Pounds Oleo.	Price	
1 tub	1st Prize			60#	24¢	14.85
10 tubs	Fancy	60" ea		600	15	90.00
1 crate	5# Fibre boxes					4.00
200	60 paper circles				2.50 M	.50
						109.35

Paragraphs 40 and 41 are similar in purport to paragraph 39 and charge McFarland with having prepared a sales ticket to the New City Creamery on a date different than that set forth in paragraph 39.

42 "And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said John F. Jelke, Francis M. Lowry, Abner D. Mize, Philemon Berry, Harry E. Hitchins, William M. Steele, Harvey P. McFarland, Hugh D. Cameron, William L. Lillard, William P. Jackson, Fred Rapp, L. B. Tullis, and O. S. Martin, in the manner and form aforesaid throughout the period of time from the first day of January in the year nineteen hundred and three to the first day of July, in the year nineteen hundred and eleven, continuously have conspired, combined, confederated and agreed together to defraud the said United States in the manner as aforesaid; against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided."

Assignments of error numbering 127 for a single plaintiff in error, covering some 79 pages of the record, will be divided into five heads and set forth in the fore part of the statement of facts, in order that it may be better understood.

Plaintiffs in error complain of the ruling of the court: (a) In holding the indictment sufficient. (b) In denying motion of plaintiffs in error to dismiss each defendant upon the ground that the evidence was not sufficient to justify a conviction. (c) In admitting evidence against the objection of the plaintiffs in error, and in rejecting evidence offered by plaintiffs in error. (d) In giving instructions to the jury to which exceptions were taken, and in refusing instructions proposed by plaintiffs in error. (e) In making adverse rulings during the trial upon various unusual questions and not covered by any one of the other assignments.

It is impossible to accurately and briefly picture the record because of its length. The trial lasted weeks, and testimony covering thousands of pages was taken. A more detailed statement of the facts necessary to the consideration of each question raised will appear in the opinion, while a brief general statement only is here attempted.

The Oleomargarine Act (Act Aug. 2, 1886, c. 840, 24 Stat. 209) as amended (Act May 9, 1902, c. 784, 32 Stat. 193), went into effect July 1, 1902, and its constitutionality was sustained in the case of McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. Generally speaking, this act as amended imposed a tax of ten cents per pound upon oleomargarine artificially colored to look like butter, and one-fourth cent per pound upon white oleomargarine. Prior to the passage of this act a flat tax of two cents a pound was imposed on all oleomargarine, colored or uncolored.

The more important sections, so far as this case is concerned, are here quoted:

"Section 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard-oil, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter." Comp. St. § 6216.

"Section 3. That special taxes are imposed as follows: Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine.

"And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said Act, and subject to the provisions thereof.

"Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. * * *

"Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine. * * *" Comp. St. § 5977.

"Section 5. That every manufacturer of oleomargarine shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of materials and products, shall put up such signs and affix such number of his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five thousand dollars; and the sum of said bond may be increased from time to time, and additional sureties required at the discretion of the collector, or under instructions of the Commissioner of Internal Revenue."

"Section 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: Provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section." Comp. St. § 6217.

"Section 16. That oleomargarine may be removed from the place of manufacture for export to a foreign country without payment of tax or affixing stamps thereto, under such regulations and the filing of such bonds and other security as the Commissioner of Internal Revenue, with the approval

of the Secretary of the Treasury, may prescribe. Every person who shall export oleomargarine shall brand upon every tub, firkin, or other package containing such article the word 'Oleomargarine,' in plain Roman letters not less than one-half inch square." Comp. St. § 6228.

"Section 20. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act." Comp. St. § 6232.

In 1897 the state of Illinois passed a statute (Laws 1897, p. 3) prohibiting the manufacture of colored oleomargarine in Illinois, and in the course of this trial this statute was, against the objection of the plaintiffs in error, read in evidence. Two of the important sections of this state law read as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly, that for the purpose of this act, every article, substitute or compound, other than [that] which is produced from pure milk or cream therefrom, made in the semblance of butter *and designed to be used as a substitute for butter* made from pure milk or its cream, is hereby declared to be imitation butter: Provided, that the use of salt and harmless coloring matter for coloring the product of pure milk or cream shall not be construed to render such product an imitation.

"Section 2. No person shall coat, powder or color with annatto, or any coloring matter whatever, any substance designed as a substitute for butter, whereby such substitute or product so colored or compounded shall be made to resemble butter, the product of the dairy."

The John F. Jelke Company was organized as an Illinois corporation in 1889, the stockholders being George P. Braun, John F. Jelke, and L. V. Fitts; they were also directors and officers. The corporate name of the company at this time was Braun & Fitts Company, and it succeeded to the business and purchased the assets of Braun & Fitts, a partnership. John F. Jelke increased his holdings in the company, and plaintiff in error F. M. Lowry became its secretary in 1902, and continued in that position thereafter, and was so acting at the time of the trial. The change in name of the corporation occurred in 1907.

The George P. Braun Company is an Illinois corporation, and was organized December 5, 1904. In 1908 John F. Jelke became the owner of a large share of stock of this corporation, and shortly thereafter the directors were Ferdinand F. Jelke, F. M. Lowry, John F. Jelke, Jr., William M. Steele, and John F. Jelke. The record shows that both of these companies transacted a very large business, and that their principal place of business was at Chicago, Ill.

Plaintiffs in error were all connected in some way with one of these two companies. John F. Jelke was secretary-treasurer and director of the Braun & Fitts Company, later general manager, and still later president and practically the sole owner of the stock. His relations to the company were the same after it changed its name to the John F. Jelke Company. He also was the owner of over 80 per cent. of the stock of George P. Braun Company and was director thereof; his son being president. Francis M. Lowry was secretary of the Braun & Fitts Company, later known as the John F. Jelke Company, and was secretary and director and stockholder of George P. Braun Company. Prior to his official connection with the Braun & Fitts Company, he was credit man and assistant manager of the company. Plaintiff in error William M. Steele was office and sales manager of John F. Jelke Company from 1908 to the time of the indictment, and was director and stockholder in George P. Braun Company. William P. Jackson was manager of George P. Braun Company from May 11, 1898, to June 30, 1911. Harry E. Hitchins was salesman for Braun & Fitts Company, later known as the John F. Jelke Company, from May, 1902, to 1910. Hugh D. Cameron, was a former internal revenue officer, and then became salesman for Braun & Fitts Company, and remained in that capacity from 1905 to 1910. William L. Lillard was salesman for the John F. Jelke Company from 1907 to 1909. L. B. Tullis was salesman for Braun & Fitts Company for about nine years. Fred Rapp was salesman for George P. Braun Company from 1907 to 1911.

Abner D. Mize became a salesman for Braun & Fitts in 1900, and left that employment in 1906. O. S. Martin, a former internal revenue agent, became a salesman for the Braun & Fitts Company in 1901, later taking charge of the

New York branch of that company. Both Martin and Mize were discharged by the court on the ground that the statute of limitations had run against the offense so far as they were concerned. Philemon Berry, a former internal revenue collector, was for several years a salesman for the John F. Jelke Company, but he was never apprehended. Harvey P. McFarland was assistant and later chief shipping clerk for Braun & Fitts Company, serving in that capacity from 1900 to the date of the indictment. He was found not guilty by the jury.

To establish its charge of conspiracy, the government attempted to show, and claims the evidence clearly established, a motive on the part of the plaintiffs in error to commit the crime set forth in the indictment. It is claimed that this motive was established by showing: (a) That all of the plaintiffs in error were interested in increasing the sales of oleomargarine produced by the factories of the Jelke companies. All of the plaintiffs in error were either interested as stockholders or were salesmen who received commissions on sales made. (b) The testimony shows that in 1902, when the amended Oleomargarine Act went into force, there was no developed business in uncolored oleomargarine; that the factories engaged in manufacturing this product had previously turned out colored oleomargarine; that the consuming public was not at this time disposed to purchase the uncolored product. (c) That at certain seasons of the year, when the price of butter was at its lowest, it was impossible to manufacture oleomargarine and sell it in competition with butter and at the same time pay a ten cents per pound tax. In other words, colored oleomargarine could not compete in the market with butter in the summer time and pay a ten cent per pound tax.

Having established the motive, the government produced evidence tending to show a systematic and purposeful co-operation among the plaintiffs in error, as well as a common plan and very similar means, to get the colored oleomargarine produced by the Jelke factories upon the market without the payment of the tax of ten cents per pound thereon.

This proof came from the lips of many witnesses, the majority of whom were at one time or another engaged in selling colored oleomargarine to consumers, in violation of the law. It is claimed that the evidence establishes a well-defined plan on the part of the plaintiffs in error to develop the business which was so uniformly followed as to indicate it was preconcerted, and consisted of salesmen of the Jelke Company (one or more of the plaintiffs in error) approaching a retail merchant engaged in handling butter and similar products and proposing to him that he buy uncolored oleomargarine from the factory and engage in what was generally known, and throughout the testimony was described, as "moonshining"—that is, coloring oleomargarine without paying the ten cents per pound tax thereon.

The government further claims that the testimony showed the plaintiffs in error, as well as the John F. Jelke Company and George P. Braun Company, participated actively in carrying out the conspiracy and provided the means by which the object of such conspiracy might be attained. These means, among others, were: (1) The free distribution of coloring matter in bottles and cans to all purchasers of white oleomargarine. (2) The free distribution of tub liners and top and bottom circles with the sale of white oleomargarine. (3) The delivery of white oleomargarine in soft and pliable condition, making it possible for the "moonshiner" to more readily color his purchase. At the same time the colored oleomargarine was delivered in a hard state. (4) The delivery of white oleomargarine in tubs containing two pounds less than the tubs ordinarily carried. This permitted coloring matter to be mixed with the white oleomargarine and the weight would then correspond to the usual weight, thereby more effectually preventing detection. (5) The uncanceled stamps on tubs containing colored oleomargarine were so protected as to permit the "moonshiner" to fill and refill the same tub and prevent detection in case a government inspector appeared. (6) The Jelke companies made false reports to the government as to the names of the actual purchasers of white oleomargarine and the amounts thus purchased. The names of bakeries, not requiring a government license, were given as large purchasers, when in fact no purchases by such bakeries were made. This, it is claimed, was to prevent the government from tracing the output or successfully prose-

cuting the "moonshiner." (7) "Moonshiners," arrested for violation of the law, were provided with bondsmen, legal counsel, and were assisted in other ways. (8) Delivery of oleomargarine in cheese boxes in place of oleomargarine tubs; the delivery of goods in wagons bearing no name; the transfer of goods en route from factory wagons to other wagons; warning sent the "moonshiner" of prospective visits from revenue agents; detailed instructions and advice to men known to be engaged in the "moonshining" business as to the best methods and means of coloring white oleomargarine.

The government contends that these various means were adopted by the plaintiffs in error, and were used by them singly and sometimes jointly, very generally for several years. It is claimed that each and every one of the plaintiffs in error participated, not once, but many times, in accomplishing the end of the alleged conspiracy by the means indicated, and the statements made by the various co-conspirators to the "moonshiners" who testified in the case established the preconcerted common plan, means and purpose as related above.

The government further contends that the evidence showed that the officers of the Jelke companies called the salesmen together regularly (it is claimed on Saturday afternoons) where the plan of extending the business was discussed; that such plan called for a constantly increasing number of customers through the means heretofore set forth, and the salesmen were instructed to advance, if necessary, the difference between the retailer's license fee for selling colored oleomargarine over the license fee charged for selling uncolored oleomargarine.

None of the plaintiffs in error testified upon the trial in their own behalf either to dispute the statements made or to explain those susceptible of two inferences. On behalf of the plaintiffs in error, however, it is contended that each and every one of the so-called means or acts involving one or more of such plaintiffs in error, is explainable on the theory of the innocence of the plaintiffs in error of the crime charged. The government conceded that Braun & Fitts, the John F. Jelke Company, and the George P. Braun Company had at all times paid license fees as manufacturers and the ten cent and one-quarter cent per pound on all oleomargarine manufactured and sold by them, and that all the goods purchased by the "moonshiners" from such companies were tax paid according to law, and had been purchased and paid for at the time the "moonshiners" colored the oleomargarine. Plaintiffs in error showed that the furnishing of free coloring fluid to retailers was not illegal, but was in fact sanctioned by the rulings of the Commissioner of Internal Revenue.

The plaintiffs in error assailed the credibility of the government witnesses and showed that many of them had been retail dealers who had colored oleomargarine and sold it in violation of the law. It appeared from the testimony that many of the government witnesses had been granted immunity, others had pleaded guilty and were awaiting sentence, while still others were serving their time in the penitentiary. Such further statement of the facts as may be pertinent to the questions considered will appear in the opinion.

John Barton Payne and William S. Forrest, both of Chicago, Ill., for plaintiffs in error.

Charles F. Clyne and Henry W. Freeman, both of Chicago, Ill., for defendant in error.

Before KOHLSAAT, MACK, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). Is the indictment sufficient?

Plaintiffs in error appropriately and timely raised this question, and now claim that the "allegations set forth in the indictment do not constitute a conspiracy to defraud the United States." The indictment is assailed:

(A) Because of the defects in the allegations wherein it is sought to describe the conspiracy, and

(B) Because of the defects in the allegations wherein it is sought to describe acts which are therein alleged to have been done to effect the object of the conspiracy.

[1] Contending that the specific allegations following the general charge of conspiracy in paragraph 5 of the indictment, limit and control the general allegations therein found, it is claimed the indictment is insufficient in so far as it attempts to charge the conspiracy for the following reasons: (a) Because not one of the defendants is alleged to be a manufacturer of oleomargarine as defined by section 3 of the act. (b) Because not one of the individuals named or unnamed therein was capable of defrauding or had the power to defraud the United States out of the tax of ten cents per pound. (c) Because the indictment lacks an allegation showing that the tax mentioned in section 19 of the indictment was the tax to become due upon the oleomargarine thus artificially colored, or, if this be not accepted, it does not appear but what the divers persons and individuals referred to in section 17 did not intend to pay the tax. (d) Because the series of these successive acts do not show the defendants agreed among themselves to cause the individuals to do the things named in the indictment at a certain place or certain places within the territory of the United States. (e) Because the indictment does not allege the period of time through which or the times which the said oleomargarine thus artificially colored was to be sold by the divers individuals. (f) Because of the uncertainty as to the meaning of the verb "to cause," it having been used with different meanings in the same indictment; likewise because of the uncertainty of the verb "to furnish," and because of the uncertainty as to whether the profit accruing from the sale of artificially colored oleomargarine was to be for the profit of the defendants or of the divers individuals, and because of the uncertainty arising out of the omission of the words "the defendants" or the words "said individuals" in section 18 of the indictment, and because from all of the averments it is uncertain what is described in section 5 of the indictment as "certain oleomargarine artificially colored to look like butter of the shade of yellow," or what was referred to in section 17 of the indictment as "said oleomargarine thus artificially colored."

(B) The sufficiency of the indictment is also attacked because: (a) No act therein alleged to be "an act done to effect the object of the conspiracy" is shown to be such an act within the rule laid down in Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. (b) Because it does not appear that any one of such overt acts was done after the conspiracy was formed. (c) Because the overt acts alleged to have been committed in furtherance of such conspiracy were not sufficiently described or particularized, in that they failed to identify the particular places or buildings in or at which the white oleomargarine and the coloring matter were delivered.

The foregoing statement follows the order and analysis of the learned counsel for plaintiffs in error. In support of these criticisms of the indictment under consideration, we have been favored with a lengthy and elaborate brief, evidencing much learning and great industry, and containing a most complete collection of decisions bearing on the imperfections of indictments and the construction and definition of words and phrases, which in turn has invited a discussion by the court, which, if accepted, would result in an opinion unjustifiable in length and involve the discussion of legal questions that are no longer moot. While perhaps instructive, we are convinced that many of the criticisms made are hypercritical and evidence scholastic ingenuity, but if adopted in this case, or applied to the average indictment, "would rightly bring odium upon the administration of justice in the minds of all sensible people, whether learned in the law or not."

[2] Decisions that reject technical objections to criminal indictments are not now the exception, and an overwhelming array of authorities may be found that call for liberal construction of criminal pleadings. A few are herewith collected. Harper v. United States, 170 Fed. 385, 392, 95 C. C. A. 555; Ex parte Pierce (C. C.) 155 Fed. 663, 665; Peters v. United States, 94 Fed. 127, 131, 36 C. C. A. 105; United States v. Clark (C. C.) 37 Fed. 106, 107, 108; Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; United States v. Ehrgott (C. C.) 182 Fed. 267, 270; Warren v. United States, 183 Fed. 718, 721, 106 C. C. A. 156, 33 L. R. A. (N. S.) 800; Alkon v. United States, 163 Fed. 810, 812, 90 C. C. A. 116; Coffin v. United States, 156 U. S. 432, 449, 15 Sup. Ct. 394, 39 L. Ed. 481; Ulmer v. United States, 219 Fed. 641, 134 C. C. A. 127.

The rule by which the sufficiency of this indictment must be measured is well set forth in Harper v. United States, 170 Fed. 385, 392, 95 C. C. A. 555, 562:

"The rules governing criminal pleadings have become less technical and more practical, but no less protective to the accused, since the Supreme Court in a series of cases beginning in the year 1893, notably Dealy v. United States, 152 U. S. 539 [14 Sup. Ct. 680, 38 L. Ed. 545]; Evans v. United States, 153 U. S. 584 [14 Sup. Ct. 934, 38 L. Ed. 830]; Dunbar v. United States, 156 U. S. 185 [15 Sup. Ct. 325, 39 L. Ed. 390]; Cochran & Sayre v. United States, 157 U. S. 286 [15 Sup. Ct. 628, 39 L. Ed. 704]; and Rosen v. United States, 161 U. S. 29 [16 Sup. Ct. 434, 480, 40 L. Ed. 606]—has under various circumstances declared that allegations in an indictment are sufficient if their meaning is 'clear to the common understanding'; that 'no impracticable standards of particularity should be set up'; that 'few indictments under the national banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel'; and that 'the entire indictment is to be considered in determining whether the offense is fairly stated.' The liberal tendency of the doctrine so announced has been followed by this court in Clement v. United States, 149 Fed. 305 [79 C. C. A. 243], Rinker v. United States, 151 Fed. 755 [81 C. C. A. 379], Stearns v. United States, 152 Fed. 900 [82 C. C. A. 48], and Morris v. United States, 161 Fed. 672 [88 C. C. A. 532]."

Section 37 of the Criminal Code, formerly section 5440, R. S., and now section 10201, U. S. Comp. St. 1916, reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any

purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The sufficiency of the allegations appearing in indictments attempting to charge a violation of this section has been challenged in the federal courts in so many cases that it is unnecessary to search elsewhere for precedents. The following leading cases throw much light upon the questions here under consideration, and an examination of them leads to the deduction of several general rules that go far toward solving the objections made by the plaintiffs in error: See United States v. Moore (C. C.) 173 Fed. 122; Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545; United States v. Keitel, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230; United States v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211; United States v. Hirsch, 100 U. S. 33, 25 L. Ed. 539; Curley v. United States, 130 Fed. 1, 64 C. C. A. 369; United States v. Gooding, 12 Wheat. 460, 6 L. Ed. 693; Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Pettibone v. United States, 148 U. S. 198, 13 Sup. Ct. 542, 37 L. Ed. 419; Perrin v. United States, 169 Fed. 17, 94 C. C. A. 385; Dunbar v. United States, 156 U. S. 195, 15 Sup. Ct. 325, 39 L. Ed. 390; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135; United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; United States v. Munday (C. C.) 186 Fed. 375; United States v. Munday, 222 U. S. 175, 32 Sup. Ct. 53, 56 L. Ed. 149.

The general conclusions deducible from these cases are: (a) The conspiracy statute creates and defines an independent crime, and an offense against the statute is committed when "two or more persons conspire" either (a) "to commit any offense against the United States," or (b) "to defraud the United States in any manner or for any purpose" etc., and (c) an overt act by one of the conspirators follows.

[3] (b) An indictment is generally sufficient which charges a statutory crime substantially in the words of the statute, except in such cases where other precedents have been firmly established in analogous offenses at common law, or where such a charge would not fairly inform the accused of the nature of the charge preferred against him.

[4] (c) An indictment attempting to charge conspiracy is sufficient if it follows the language of the statute and contains a sufficient statement of an overt act to effect the object of the conspiracy, excepting where the object of the conspiracy is in itself lawful, and in such case the means must be set forth with such particularity as to disclose their illegality and the intended criminal intent, and except also those cases where the conspiracy is to defraud the government in a manner that would not permit of the defendants being fairly and reasonably informed of the character of the offense without such detailed statement of the means and the time and place being set forth.

[5] (d) The antecedent crime, if any, which is the end and object of the conspiracy, need not be described with the same particularity in

the conspiracy charge as in an indictment where the crime itself and not the conspiracy to commit it is the offense charged.

A wide difference between opposing counsel over two propositions explains much of the variance in their contentions.

(a) The government contends that paragraphs 6–20 of the indictment set forth the means by which the conspiracy described in paragraph 5 was to be effected, while plaintiffs in error contend these sections contain a more specific and detailed statement of the conspiracy, and therefore control and limit the general charge of conspiracy found in section 5.

(b) Plaintiffs in error attack the sufficiency of the allegations in paragraphs 6–20, even if the court should conclude that they are but a statement of the means which the plaintiffs in error adopted to carry their conspiracy into effect, and base their attack upon the omissions heretofore pointed out. The government, on the other hand, contends that these "means" (paragraphs 6–20), were not necessary allegations, but were inserted to more fully apprise the plaintiffs in error of the character of the charge preferred against them.

Construing the whole indictment, we are of the opinion that such allegations as appear in paragraphs 6–20 set forth the means by which the general conspiracy was to be effected.

We cannot escape the conclusion that the fair intendment of the pleading was to set forth the conspiracy in paragraph 5, the means by which it was to be carried out appearing in paragraphs 6–20. The overt acts in furtherance thereof (21 in number) appear in paragraphs 21–41.

The second question is determined by conclusion (c) heretofore set forth.

While counsel for plaintiffs in error strenuously contend that this rule no longer prevails in the federal courts, we are convinced that the great weight of authority supports it.

In United States v. Dennee, Fed. Cas. No. 14,948, Judge Woods, in overruling an indictment, used this language:

"A somewhat careful consideration of the authorities convinces me that the better reason is with those who deny the necessity of setting out the means by which the conspiracy was to be carried into effect. But it seems clear that the statute upon which this indictment is based was intended to relieve the pleader from any supposed necessity of setting out the means agreed upon to carry out the conspiracy, by requiring him to aver some act done in furtherance of the conspiracy, and making such act a necessary ingredient of the offense. In the case of Com. v. Shedd, 7 Cush. [Mass.] 514, the court said, that 'the great difficulty in giving effect to the allegation of overt acts in an indictment for conspiracy on a motion in arrest of judgment for insufficiency of the indictment, is this, that overt acts are merely alleged by way of aggravation of the offense, and though alleged, they need not be proved, and the alleged conspiracy might be found by the jury without proof of the precise overt acts charged to have been done in pursuance of the conspiracy.' That difficulty does not exist here, for the overt act is a part of the offense, and must be proved, as laid in the indictment. The reason given in the case just quoted from, why the averment of overt acts cannot have effect in the indictment for conspiracy, does not apply. In my opinion, therefore, this indictment which avers the conspiracy, and then sets out the overt act done to carry it into effect, is sufficient, and it is not necessary to aver the means agreed on to effect the conspiracy. The averment of acts done to effect the

object of the conspiracy, and which must be proven to sustain the indictment, is more than the equivalent of an averment of means agreed on to carry it into effect. This objection to the indictment is not well taken."

In United States v. Goldman, Fed. Cas. No. 15,225, this language appears:

"1. With respect to the statements of the charge in an indictment for conspiracy, it may be observed that though it is usual to state the conspiracy, and then show that in pursuance of it certain overt acts were done, it is sufficient to state the conspiracy alone. And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration. * * *"

In Bannon and Mulkey v. United States, 156 U. S. 468, 15 Sup. Ct. 469, 39 L. Ed. 494, the rule is thus announced:

"At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with a particular of his charges. Rex v. Gill, 2 B. & Ald. 204; Rex v. Hamilton, 7 Carr. & P. 448; United States v. Walsh, 5 Dillon, 58 [Fed. Cas. No. 16,636]. But this general form of indictment has not met with the approval of the courts in this country, and in most of the states an overt act must be alleged. The statute in question changes the common law only in requiring an overt act to be alleged and proved."

In Perrin v. United States, 169 Fed. 17, 21, 94 C. C. A. 385, 389, the rule is stated in the following language:

"The unlawful combination is sufficiently charged in the indictment in the allegation that the defendants conspired together 'to defraud the United States of the title and possession of large tracts of land' described in the indictment. It is not necessary to aver the means employed to carry the unlawful combination into effect. * * * Having averred the use of such means as would clearly apprise the defendant of the offense of which he is charged. we think the allegations are sufficient."

See 5 Ruling Case Law, p. 1080.

Mr. Justice Cooley, speaking for the Michigan Supreme Court, in the case of People v. Arnold, 46 Mich. 268, 9 N. W. 406, announced the rule in the following language, citing many cases:

"It is conceded that if the act which the conspirators combine to perform is unlawful, it is not necessary to set out in the information the means intended to be employed in accomplishing it. * * * But if the end in view is lawful or indifferent and the conspiracy only becomes criminal by reason of the unlawful means whereby it is to be accomplished, it becomes necessary to show the criminality by setting out the unlawful means."

See, also, United States v. Dustin, 25 Fed. Cas. No. 15,011; United States v. Benson, 70 Fed. 591, 17 C. C. A. 293; United States v. Gordon (D. C.) 22 Fed. 250. For collection of state cases, see People v. Arnold, supra.

We have not overlooked the contention of counsel for plaintiffs in error that this rule is contrary to the holding of the Supreme Court, as announced in United States v. Cruikshank, 92 U. S. 542, 557–559, 23 L. Ed. 588, and Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; but we are not persuaded that a different rule of pleading in the Federal courts was there announced.

In the Cruikshank Case, the defendants were indicted on numerous counts and charged with conspiring to injure, oppress, and intimidate certain colored citizens with the intention of preventing them from freely exercising and enjoying the rights and privileges granted them by the Constitution and laws of the United States. The indictment failed to assert any specific right which it was claimed the defendants had invaded, and the court held it bad, because unable to say that a crime in fact had been charged.

The case of Evans v. United States, supra, is not out of harmony with the conclusion here reached. Quoting from Wharton's Criminal Law, the court there says:

"'The means of effecting the criminal intent,' says Mr. Wharton, 'or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment.'"

Having disposed of the general objections that underlie the specific criticisms heretofore set forth, we deem it unnecessary to discuss all of the various questions raised at length.

(A, a) It was not necessary to charge in the indictment that the defendants were manufacturers of oleomargarine. Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; United States v. Keitel, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230. Moreover the fair and legitimate inference from the entire indictment is that the plaintiffs in error were manufacturers of oleomargarine within the definition of the Act. See sections 7, 13, 15, 17, 19.

(A, b) The criticism that the indictment was insufficient because the individuals named or unnamed were not capable of defrauding the United States out of the tax, must likewise be rejected. The crime of conspiracy may be fully committed without the name of a single person who was to color the oleomargarine without paying a tax thereon, being agreed upon. United States v. Holte, 236 U. S. 140, 144, 35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915D, 281; United States v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211; Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.

(A, c) The criticism under this heading is refuted by an examination of the indictment. In determining the sufficiency of the allegations in an indictment, the court cannot look at one paragraph alone, but each must be read in the light of its associate paragraphs.

(A, d) This criticism is met by the case of Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, where the court says:

"In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential. Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands, subject to homestead entry, at the given office in the named county, the crime of conspiracy was complete even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified."

See, also, Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162.

(A, f) For similar use of the verbs "to cause" and "to furnish," see United States v. Rabinowich, 238 U. S. 88, 35 Sup. Ct. 682, 59 L. Ed. 1211; United States v. Keitel, 211 U. S. 370, 390, 29 Sup. Ct. 123, 53 L. Ed. 230; section 4746, R. S. (Comp. St. § 9079).

We are convinced that the indictment, giving to all of the words their fair meaning in view of the entire context, thoroughly and with reasonable definiteness apprised the plaintiffs in error of the offense with which they were charged, as well as the means by which, and the places and the time where, the object of the conspiracy was to be consummated.

[6] The failure of the indictment to negative the exception found in section 16 of the Oleomargarine Act, does not subject the indictment to demurrer. The correct rule is laid down in United States v. Denver & R. G. R. Co., 163 Fed. 519, 520, 90 C. C. A. 329, 330, as follows:

"The first of these [objections] is that the plaintiff does not negative the matter of the exception created by the proviso to section 6 of the Act of March 2, 1893, as amended by the Act of April 1, 1896, which gives the right of action for the penalty. This objection must fail, because it is opposed to the settled rule that an exception created by a proviso or other distinct or substantive clause, whether in the same section or elsewhere, is defensive, and need not be negatived by one suing under the general clause."

See, also, Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; Schlemmer v. Buffalo, etc., Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; Smith v. United States, 157 Fed. 721, 85 C. C. A. 353; s. c., 208 U. S. 618, 28 Sup. Ct. 569, 52 L. Ed. 647; Joplin Mercantile Co. v. United States, 213 Fed. 926, p. 933, 131 C. C. A. 160, Ann. Cas. 1916C, 470; s. c., 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705; United States v. Cook, 17 Wall. 168, 21 L. Ed. 538.

Indictments charging violation of the Oleomargarine Act but which did not negative any of the exceptions found in the act have been sustained. Enders v. United States, 187 Fed. 754, 109 C. C. A. 502; Hardesty v. United States, 168 Fed. 25, 93 C. C. A. 417; May v. United States, 199 Fed. 42, 117 C. C. A. 420.

B. The various criticisms of the indictment appearing under this head will be considered together. Much of the argument in support of these objections is based upon the erroneous contention that paragraphs 6–20 set forth the conspiracy, and not the means by which the conspiracy was to be accomplished. We have been unable to accept the contention of the plaintiffs in error in this respect, and likewise reject the objections now made pertaining to the overt act. In United States v. Rabinowich, supra, the court said:

"There must be an overt act; but this need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy."

Paragraph 21, the material portion of which is repeated in each of the 21 overt acts, states:

"That in pursuance of the said conspiracy and in order to effect the object of the same, the said defendants," etc.

This language answers the contention that the indictment is bad because it does not appear that the overt acts followed the forming of the conspiracy.

We conclude that the indictment describes acts by one or more of the parties to the conspiracy to effect the object of the conspiracy within the definition of the Conspiracy Act. See Houston v. United States, 217 Fed. 854, 133 C. C. A. 562; Witte v. Shelton, 240 Fed. 265, 273, 153 C. C. A. 191.

[7] Does the evidence support the verdict?

Plaintiffs in error, and each of them, strenuously insist that the court erred in refusing to take the case from the jury: (1) Because the evidence failed to establish the alleged conspiracy. (2) Because there was no proof that any of the plaintiffs in error committed any one of the overt acts charged in paragraphs 21–40.

In conspiracy cases, the proof must, from the very nature of the charge, consist largely of circumstantial evidence. Rarely can the government find documentary proof of any unlawful combination to defraud it or to violate its laws. The test of the sufficiency of the evidence to support a conviction under this section has not infrequently been set forth. See Marrash v. United States, 168 Fed. 226, 229, 93 C. C. A. 511; Alkon v. United States, 163 Fed. 811, 812, 90 C. C. A. 116; Wharton's Criminal Law (10th Ed.) § 1401; 2 Bishop's New Criminal Law, § 227; United States v. Hamilton, Fed. Cas. No. 15,288; United States v. Lancaster (C. C.) 44 Fed. 896, 10 L. R. A. 333.

In the present case the question whether the proof is sufficient to sustain a conviction is one that has required careful study. Many violations of the oleomargarine law are clearly shown. Participation in these violations by salesmen of the Jelke Company, including the plaintiffs in error, is likewise clearly established, but the proof of the unlawful combination—the conspiracy charged—rests solely upon the deduction and inferences from facts established on the trial.

After examining all of the testimony carefully from the standpoint of each of the plaintiffs in error, we are convinced that there was evidence sufficient to support the conviction. The claims of the government, set forth in the statement of facts, find support in the evidence.

Single isolated instances tending to establish the conspiracy charged are explainable upon the theory of each of the plaintiff's innocence, but all of the evidence leads the mind logically to the conclusion that the plaintiffs in error, prompted by a desire to profit through increased sales of oleomargarine, conspired to accomplish their purpose by a violation of the Oleomargarine Act. The extent of the operations, and the similarity with which the illegal practices were conducted, invites the belief and justifies the conclusion that it was the result of a premeditated plan. Because of the common interest and continued participation in various illegal acts by the same parties, the plaintiffs in

error, the jury was justified in finding there was a premeditated plan, a conspiracy to which all the plaintiffs in error were parties.

Nor should it be conceded that all of the individual acts standing alone were perfectly consistent with the innocence of the plaintiffs in error. Some of these isolated facts are so suggestive of criminality and consistent with the charge of the indictment as to shake, if not to entirely remove, the presumption of innocence upon which the plaintiffs in error throughout the trial so persistently rested. To illustrate: It appears that one of the plaintiffs in error sought out a butter and egg retailer and gave him the name of a baker, that he might use and advised him to purchase white oleomargarine in this baker's name from the John F. Jelke Company. In a single year the Jelke Company sold this "moonshiner" under a fictitious baker's name 183,576 pounds of white oleomargarine.

Bakers were excepted from certain provisions of the law (see section 16), and in order to get the advantage of these exceptions and to prevent the government from detecting the "moonshiner's" business, the various plaintiffs in error advised retailers to make cash purchases of white oleomargarine from the Jelke factory in the name of a nearby baker. In six months the names of 12 bakers appeared on the books of the company as having purchased 34,034 pounds of white oleomargarine. Upon the trial it was proven that 11 of these bakers had not purchased a pound of white oleomargarine during that period, while one had purchased 72 pounds.

Another "moonshiner" was advised to purchase in the name of Heins and to give his street number as 5102 Elizabeth street. The Jelke Company books showed that Mr. Heins purchased on January 7, 1908, 7,500 pounds of white oleomargarine, the street number being 5102 Elizabeth street. Upon the trial it appeared that Heins was a fictitious person and that at 5102 Elizabeth street there was a little cottage occupied by a widow, Mrs. Schmidt.

These were but a few of the many instances of fraud that were practiced upon the government. Nor does the record fail to connect the plaintiffs in error with these transactions. Frequently not one, but two or three of them, on various occasions, participated in the "moonshining" business, and invariably, according to the testimony, the "moonshiner's" entry into the illegal business was brought about through persuasion by one or more of the plaintiffs in error.

This is not a case where an uncorroborated statement of an accomplice stands contradicted by the sworn testimony of the defendant. It is a case where the testimony of many alleged accomplices, corroborated by other evidence, stands undisputed by the statement of any one of the plaintiffs in error. Notwithstanding the jury was required to find the conspiracy from deductions and inferences drawn from undisputed facts, we are convinced that the record justifies the ruling of the court in denying the motion of the plaintiffs in error to direct a verdict in their favor, based on insufficiency of the evidence.

Plaintiffs in error further contend that the proof fails to connect any one of them with the overt acts charged in the indictment. It is claimed that the deliveries of white oleomargarine specified in the in-

dictment were made by the John F. Jelke Company, and not by any of the plaintiffs in error. It appears that some of the plaintiffs in error were officers, directors, and stockholders of the John F. Jelke Company. An examination of the indictment (paragraphs 21–22) shows that the pleader did not restrict the government to proof of actual delivery of white oleomargarine by one of the co-conspirators but included in all the overt acts the statement that one of the co-conspirators "*caused to be delivered* * * * a large quantity * * * of white oleomargarine," etc. We conclude that the evidence is in strict accord with the allegations of the indictment.

Motion to Elect.—At the close of the trial each of the defendants moved the court to compel the government to elect "to proceed to the jury on only one of the several conspiracies joined in the indictment." The court's refusal to grant the motion is assigned as error. This motion is based upon the position of the plaintiffs in error. heretofore considered, that the indictment charged a conspiracy to conspire followed by numerous charges of conspiracy entered into between the plaintiffs in error and each of the "divers individuals" named and unnamed and therein referred to. We are unable to accept this contention. The indictment charged but one conspiracy, and that appeared in paragraph 5. There being but one charge of conspiracy, the court properly denied the motion of plaintiffs in error.

[8] *Instructions.*—An examination of the record in this case well illustrates the impracticability, if not the impossibility, of the trial judge giving each requested instruction correctly stated. The requested instructions in this case were innumerable. If printed in the ordinary brief, they would cover 100 pages. The proposed instructions that were refused, and to which exceptions were taken, and which constituted a very small part of the requested instructions, cover 23 pages.

The trial judge covered the substance of much of these requested instructions, and clearly and succinctly and with reasonable elaboration presented the issues which were involved in this trial.

Only a few of the criticisms will be separately considered, although we have endeavored, in view of the importance of this case, to carefully consider each and every assignment of error and all the contentions in respect thereto. We are not justified in setting forth the entire charge of the court to the jury, because of its length, although it would be but fair to the learned trial judge that this be done.

[9] The most serious criticism presented by plaintiffs in error arose out of the court's use of the following language:

"*It is the position of the defendants that many of these witnesses were fellow wrongdoers with the defendants;* that they helped to commit a crime and that, therefore, their testimony should be rejected in this case."

Plaintiffs' particular attack is directed to the words printed in italics. We agree with counsel for plaintiffs in error that this language was unfortunate, and, standing alone, misstated the defendants' position. It was not the defendants' position that they were wrongdoers, nor did they admit that they were *fellow* wrongdoers with any of the government witnesses.

But this criticism, like many others, must be viewed in the light of the entire charge. The sentence complained of was given when the court was obviously speaking of the testimony of accomplices, and when he was pointing out the dangers of predicating a conviction upon the testimony of men who were themselves wrongdoers. He said:

"I shall also at this time refer to the situation of many of the witnesses. They have been referred to by counsel in arguments both to the court and to you as 'accomplices.'

"It is the position of the defendants that many of these witnesses were fellow wrongdoers with the defendants, that they helped to commit a crime, and that, therefore, their testimony should be rejected in this case.

"It is the law that the uncorroborated testimony of an accomplice is subject to rejection, and when, therefore, in a case it appears to you that the witness in testifying discloses the fact he is an accomplice, you are not at liberty at the outset to reject his testimony, but it simply advances to you to inquire respecting the question of whether his testimony stands alone, whether there is proof in the case which corroborates him in respect to what he testifies to; and if you find there is proof acceptable to you, which is corroborated, then you are not at liberty to reject his testimony solely because he was an accomplice, but you are required then to proceed with an analysis of his testimony as you proceed with the analysis of the testimony of other witnesses respecting whom that infirmity does not exist."

The following further reference to the testimony of an accomplice was made by the court:

"If you find any witness has deliberately sworn falsely as to any material matter in the case, you are at liberty to reject the whole of his testimony, unless you find it is corroborated by other credible evidence."

We cannot believe that any of the defendants were prejudiced by the criticized portions of the charge when read in the light of all the instructions quoted. The impression which the court conveyed to the jury by this language was unfavorable to those witnesses who testified for the government, and who were referred to as "accomplices." The court intended by this language to warn the jury against conviction upon the testimony of accomplices. It was a further elaboration of his charge previously made bearing upon the weakness of testimony given by co-conspirators.

Plaintiffs in error complain because of the court's definition of the words "reasonable doubt," and because of the language used by the court in reference to the burden of proof. They further complain because the court ignored the rule which makes the presumption of innocence evidence upon which a reasonable doubt may be based. The first paragraph of the charge clearly made the presumption of innocence in favor of each one of the defendants a fact in evidence which the jury was required to consider and weigh on *each* and *every one* of the issues presented. The language used in defining reasonable doubt is supported by many authorities and is in harmony with the language usually used on similar occasions.

The criticism directed to the court's definition of an overt act is answered by the case of Witte v. Shelton, supra.

Criticism is made of the following language used by the court:

"While the fact is for you to find, gentlemen, I express to you the opinion, you need not accept it if you do not care to, and if your judgment leads you to the contrary you may reject it; but I express to you the opinion that, aside from the alleged disclosures made by these defendants, there is corroborative evidence in the case."

This was not error. Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; Vicksburg & Railroad Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; United States v. Philadelphia & Reading R. R., 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138.

In fact, upon all of the evidence in this case it would not have been error for the court to charge the jury as a matter of law that there was corroborative evidence supporting the alleged declarations of the plaintiffs in error.

The government contends that no proper exception was taken by plaintiffs in error to present the various questions raised by the court's charge to the jury, or its failure to charge as requested, and reliance is placed upon the case of Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91. We have chosen, however, to examine the charge fully, as well as the requested instructions, to determine whether the trial judge held the scales of justice in even balance, saying all that was necessary to guard the rights of the accused. We find no reversible error.

[10] *Evidence.*—Error is assigned because the court admitted evidence of transactions occurring prior to July 1, 1902, when the Oleomargarine Act went into force.

In this respect the trial judge possessed much discretion as to the period of time during which he would allow the government to produce testimony showing, or tending to show, the motive for the conspiracy, as well as the intent with which the acts were committed. Heike v. United States, 227 U. S. 131, 33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128.

The history of this industry, as well as the laws affecting it, were receivable in evidence, in order that the jury might better understand the claims of the respective parties.

But it is contended that numerous specific acts of fraudulent transactions prior to July 1, 1902, were received in evidence for no other purpose than to prejudice the jury against the plaintiffs in error. If the purpose and the sole purport of this testimony was merely to show the defendants were willing to violate the laws of the land, it was, of course, erroneously admitted. On the other hand, this evidence was admissible if the acts described were closely connected with and involved in the object of the conspiracy, and were quite similar to the subsequent acts of the conspirators, of which the government complains.

Prior to July 1, 1902, there was an oleomargarine act in force. Although the tax on colored oleomargarine was increased under the latter act, and the incentive to violate the law through illegal marketing of their product was greater, it was nevertheless the same motive

(differing only in degree) that actuated plaintiffs in error prior to 1902 as it was subsequent to 1902.

The conspiracy was not established by any written documentary proof, but was deducible from the facts and circumstances heretofore related. Many of these acts of themselves were innocent and harmless. Whether these various acts tended to establish the unlawful conspiracy, or were mere innocent acts of the defendants, depended upon the intent and purpose with which they were committed. As throwing light upon this question of intent, the court rightly permitted the government a wide range. Whether innocently committed or performed with criminal intent to accomplish the ends of the conspiracy might well be established by proof of acts of a similar character practiced by the same parties even though they occurred prior to 1902. To illustrate: The government claims that prior to 1902 the defendants caused tubs to be made with an extra hoop, upon which revenue stamps were placed; that the retailer immediately removed the extra hoop without canceling the stamps; that such practice on the part of retailers was approved by, and in fact suggested by, defendants. It was in reference to this testimony, showing the use of this extra hoop prior to 1902, that most of the complaint of the plaintiffs in error under this heading is made.

Obviously, the use of a tub with three hoops is not of itself an act that would invite suspicion or point to guilt on the part of the defendants. But if it appeared that one of the hoops was an extra hoop, used for no other purpose than to carry the revenue stamps, and was in fact placed on the tub for the purpose of assisting the retailer in avoiding the revenue law, its presence was no longer consistent with the theory of innocence. After 1902, similar means (see subdivision 5 of statement of means in statement of facts) were adopted, which of themselves were perfectly innocent. The protection of revenue stamps upon the tubs containing colored oleomargarine may have been practiced with no criminal intent, but if they were placed there so as to permit the "moonshiners" to fill and refill the same tubs, and to prevent detection in case a government inspector appeared, a different deduction followed. The practice of providing the extra removable hoop to carry the revenue stamp, that the retailer might avoid the provisions of the revenue act prior to 1902, is so similar in character to the practice of providing the revenue stamp with a protection that would permit the retailer to violate a similar law (followed after the act of 1902) as to justify the admission in evidence of the former practice in order to throw light upon the intention of the same parties under the later practice.

The rule applicable is well laid down in Wood v. United States, 16 Pet. 358, 10 L. Ed. 987:

"* * * Where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of like charac-

ter and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

See, also, Wharton on Criminal Evidence (10th Ed.) p. 145; Williamson v. United States, 207 U. S. 451, 28 Sup. Ct. 163, 52 L. Ed. 278; Van Gesner v. United States, 153 Fed. 55, 82 C. C. A. 180; Chitwood v. United States, 153 Fed. 553, 82 C. C. A. 505, 11 Ann. Cas. 804; Exchange Bank v. Moses, 149 Fed. 340, 342, 79 C. C. A. 278; Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237; Clune v. United States, 159 U. S. 592, 16 Sup. Ct. 125, 40 L. Ed. 269; Heike v. United States, 227 U. S. 145, 33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128.

[11] *Illinois Statute.*—The court, against objection, admitted the Illinois statute prohibiting the sale of colored oleomargarine in Illinois, a portion of which statute is quoted in the statement of facts. The government contends that its purpose in offering this statute was the same as it had when offering evidence of transactions prior to 1902.

It appeared that the amount of colored oleomargarine sold to the "moonshiners" was inconsiderable as compared to the amount of uncolored oleomargarine thus sold. The profit upon a pound was the same to the Jelke companies, whether the oleomargarine was colored or uncolored. Plaintiffs in error asserted that under the federal law they were strictly within their rights in selling either colored or uncolored oleomargarine provided the government tax was paid on each sale. In other words, they claimed that this "means" was perfectly consistent with innocence on their part. The government, on the other hand, contended that the sale of colored oleomargarine under certain circumstances shown in the case, while of itself lawful under the federal law, was nevertheless not made by the plaintiffs in error innocently, but was merely one of the "means" used in connection with many others by which plaintiffs in error assisted "moonshiners" in avoiding prosecution. It was for the purpose of throwing light upon the intent of the plaintiffs in error in causing these sales of colored oleomargarine to be made, and for no other purpose, that the existence of the Illinois statute became relevant.

It is quite apparent that the manufacturers, without any greater profit accruing from the sale of colored oleomargarine than was obtainable from selling a like quantity of uncolored oleomargarine, would not have risked the possibility of arrest and conviction for violation of the state law, unless they hoped to increase their total sales by helping the "moonshiners" develop the illegal business. It was by reason of the concurrence of several acts, heretofore termed "means," that the intent of the plaintiffs in error in selling "moonshiners" colored oleomargarine became important.

This deduction is strengthened when the record is examined to ascertain the actual amount of colored oleomargarine thus sold to the recognized or professional "moonshiners." The sales of colored product were so small (and the profits necessarily so limited) that one questions the sincerity of the assertion that plaintiffs in error were in-

nocent of any intent to provide means by which the "moonshiners" might evade the law. One can hardly escape the conclusion that the plaintiffs in error would never have taken the chance of prosecution by the state authorities in view of the small sales of colored oleomargarine to these recognized "moonshiners," if it were not for the fact that the sale of a single tub of colored oleomargarine made it possible for the plaintiffs in error to sell thousands of pounds of uncolored oleomargarine to the same purchaser.

We conclude that, under the circumstances disclosed in this case, the Illinois statute was relevant on the question of intent of the plaintiffs in error in selling colored oleomargarine to certain "moonshiners." See cases cited under last heading.

Nor can we agree with the statement of counsel for plaintiffs in error that the state law was in direct conflict with the federal law. The positions of the state and federal governments were somewhat analogous to the positions of the United States government and some states on the liquor traffic. The imposition of a federal tax upon retail liquor dealers is not inconsistent with the act of any state or community which prohibits the sale of liquor.

In the present case it appeared that the state of Illinois prohibited the manufacture and sale of colored oleomargarine, but did not prohibit the manufacture and sale of uncolored oleomargarine. The federal law imposed a tax (almost, but not quite, prohibitive) upon colored oleomargarine, while the tax upon uncolored oleomargarine was nominal. It is obvious that the two laws were not repugnant to each other.

That the position of the government was understood by the court and jury is shown by the following statement of the counsel for the government made on trial:

"It is their [defendants'] intention which is the subject of examination, because your honor will charge the jury if all these things were done innocently—in the ordinary and usual course of business of these defendants, they cannot bring in a verdict of guilty. They can base and predicate a verdict of guilty only upon a finding that these various acts [means] were done with a criminal intent."

Again, it is doubtful if the mere reception in evidence of the Illinois statute under any circumstances constituted reversible error. The trial occurred in Illinois. The court and jury were presumed to know the law, and were required to take judicial notice of this statute.

Nor does the record show that all of the Illinois statutes complained of were read to the jury by the government's attorney. At least a portion of the law, not bearing on any portion read by the government's attorney, was read to the jury by the defendant's attorneys.

[12] *Cross-Examination.*—It is claimed the court unduly restricted counsel for plaintiffs in error in their cross-examination of government witnesses. In considering this assignment of error, we must bear in mind that there were many defendants, and many able attorneys representing them. The government witnesses were numerous, and a situation was disclosed by many of them that was not disputed. Their testimony given on direct examination, in some instances at least, was

not such as to call for long cross-examinations. Many of them admitted they had been convicted of criminal offenses or were under indictment. Some admitted that immunity had been offered them. These discrediting facts being admitted, the ends of justice could hardly be furthered by humiliating these witnesses. There is certainly a limit to the extent that a witness may be cross-examined. Nor is it proper for an able counsel to convert a cross-examination into an argument to the jury.

The trial judge is in the best position to determine how far the cross-examination should proceed, and, when convinced that the facts are all presented and fairly before the jury, the examination of a witness, either on direct or cross examination, should cease.

[13] Complaint is also made because it is claimed the court permitted the government to cross-examine its own witnesses. It appears from the record that the court upon its own motion, but not in the presence of the jury, directed the attorneys for the government to take certain witnesses into the adjoining room and read to them the testimony of such witnesses given before the grand jury, and then recall them and renew certain questions that had previously been answered evasively. The following appears in the record:

"The Court: Now, these two witnesses Salvo and Paule—of course, I am not particularly interested in what testimony goes in, what its quality is; but if the government claims that these two witnesses have definitely committed themselves before the grand jury to conversations that they now happen not to recall, in my judgment their attention should be called definitely in some way to those conversations. *They appear to be rather conveniently forgetful.*

"Mr. Wilkerson: We ought to have a chance to straighten out their testimony, because we will have to deal with them on the theory that they testified falsely here, if they do not; that is all.

"The Court: I feel that is why I wanted these witnesses to state—if the government has the record of the grand jury and claim those men did definitely commit themselves to conversations, which, according to the ordinary course of human events a man would not forget so readily. I think the attention of the witnesses should be called to that testimony.

* * * * * * * * * *

"The Court: I don't mean in open court. I mean take a number of these witnesses into the District Attorney's office—I don't care whether it is in your presence or not—and read that to them and then recall them to the stand and ask them whether, since the testimony has been called to their attention, they still adhere to what has been said on the stand.

* * * * * * * * * *

"The Court: I don't like a witness to leave the stand under the condition these witnesses did."

The testimony given by these witnesses before the grand jury was thereafter read to them, and the witnesses were recalled, and conversations which they had previously stated they had forgotten were then related.

Is this error? We think not. When a witness upon the trial of any case, whether criminal or civil, convinces the court that he is "conveniently forgetful," the trial judge is amply justified in taking matters into his own hands, and on his own motion taking such steps as will lead to the ascertainment of the truth.

It is true that trials in criminal cases should be so conducted as to

insure the acquittal of the innocent, but it must not be forgotten that they are also conducted for the purpose of convicting the guilty, and in all cases the court should endeavor to get the real facts—the truth. When the judge is convinced that a witness is conveniently hiding behind the answer, "I can't recall," or "I don't remember," which is tantamount to perjury, he fails in his duty if he does not take such necessary steps as will reawaken the witness' conscience and his memory.

In the present case, in respect to the matter under consideration, the action of the trial court is to be commended rather than criticized.

Many other objections to the ruling of the court in admitting evidence appear in the briefs of plaintiffs in error. They need not be separately considered. Some are, for want of proper objections, not properly before us. Others must be overruled because plaintiffs in error misconstrue the court's ruling. Still others pertain to testimony that had no bearing upon the outcome of the case.

We fail to discover reversible error in the admission of evidence over the timely and proper objections of plaintiffs in error.

The case has been fully and we believe fairly tried. We find no reversible error.

Judgment is affirmed.

MACK, Circuit Judge (dissenting). Proof of earlier similar acts is admissible for the purpose of establishing the motive, design, or intent which accompanied the later and alleged criminal transactions. That such evidence may be prejudicial to a defendant by establishing that he committed other crimes does not make it inadmissible; it compels, however, the exercise of caution on the part of the court in receiving it, and in instructing the jury as to its proper scope, and on counsel in using it in argument.

In this case, such proof would be admissible to show that the later acts, susceptible of an innocent or criminal interpretation, were done with criminal intent; specifically, in furtherance of a conspiracy to defraud the government out of the ten cents per pound tax levied on the sale of colored oleomargarine.

Motive, however, is in no manner involved; if defendants, with criminal intent, did what they are charged with having done, the motive, money making, was apparent from the transactions themselves. That they had a like motive in earlier criminal transactions is immaterial; proof, therefore, of such other dealings, merely to show a readiness to violate the law of the land in order to increase their business and the profits thereof, is inadmissible. Its only tendency is to prejudice the jury.

The Illinois statute forbidding the sale of colored oleomargarine had no bearing whatever on the innocence or guilt of defendants or on their motive, design, or intent in committing the acts charged against them. The evidence is clear that defendants, like all other oleomargarine manufacturers, sold very much more white than colored goods, both before and after the federal act of 1902 had imposed a heavy tax on the sale of colored oleomargarine. Every such

sale was in violation of the Illinois law; proof of the law and sales thereunder demonstrated only that defendants, for a commercial profit, were ready to risk an Illinois criminal prosecution both before and after 1902.

The only inference to be drawn therefrom bearing on the present charge is that, as defendants were ready to violate Illinois law in order to make money, they were also ready to conspire to commit a federal crime for the same purpose. As well might proof of the law forbidding larcenies and embezzlements and of the violation thereof be admitted; the inference would be equally cogent.

While the federal court takes judicial notice of state statutes, and while, of course, proof of the sale of colored goods after 1902, as part of the present case, is admissible, even though it necessarily shows a violation of Illinois law, the introduction of the statute itself and the proof of its violation prior to 1902 was, in my judgment, without justification. Whatever the purpose of the government's counsel, the necessary effect of this serious error was to prejudice the jury; an effect greatly enhanced by the use of the evidence in the argument and in no wise mitigated by any instruction.

The evidence as to the use before 1902 of extra hoops on tubs to facilitate the destruction of the revenue stamp was, in my judgment, also inadmissible. It tended to show a conspiracy between some of the defendants to defraud the public by enabling tax-paid oleomargarine to be sold as butter and to defraud the government by evading payment of the wholesale oleomargarine dealers' license.

The acts charged against defendants in the carrying out of the present alleged conspiracy are of a different character and have a different purpose. No swindling of the public is involved; the alleged criminal intent is not to defraud generally, or even to defraud the government generally, but specifically to defraud it by evading payment of the new and totally different tax on colored oleomargarine.

The effect of this evidence, too, was necessarily prejudicial to defendants. As counsel said in argument to the jury:

"The dealer could sell this oleomargarine as butter. That was the state of mind of John F. Jelke prior to 1902. He was willing to violate the law, without respect or regard to the laws of the United States. He made these tubs and put them up in such a way that his customers could defraud the people whom they were selling the goods to by selling this oleomargarine to them as butter, and made it possible for these dealers to defraud this government out of the whole license, by fixing the tubs up so that they could sell as butter, thereby deceiving the revenue officers.

"Ah, gentlemen, that situation shows the state of mind of John F. Jelke away back prior to 1902, and if at that time John F. Jelke would violate the law, John F. Jelke would assist these various dealers and customers of his in violating the law for the purpose of making a market for his oleomargarine, there is no reason to think that John F. Jelke would not violate the law in 1902, 1903, and 1906. * * *

"That transaction back in 1900, gentlemen of the jury, is for the purpose of showing the motive and state of mind towards the United States, and the enforcement of the law, of the defendant John F. Jelke."

While in my judgment the court erred in unduly limiting the cross-examination, it is unnecessary to enlarge upon this point, especially as, in itself, it might not constitute reversible error.

While agreeing, as I do, with much of the majority opinion, especially as to the validity of the indictment, I am impelled to the conclusion that, for the errors specified, the judgment should be reversed, and a new trial granted.

SWIFT & CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. December 5, 1918.)

No. 2482.

1. CARRIERS ⟸38 — FREIGHT RATES — CARLOADS — PARTIAL UNLOADING IN TRANSIT.
   Under rules contained in the published tariff of a railroad company that (a) "cars containing freight which is waybilled at carload rates will be stopped in transit to complete loading of car or to partly unload contents of car," and (b) "the charge for stopping off cars for the purpose of unloading a portion of the contents, or completing loads, will be $3 per car for each stop," a shipper of a carload to a single consignee at a designated station is not subject to the extra charge of $3 per car, because the consignee unloads portions of the contents at intermediate stations, where the car is not taken from the train.
2. CARRIERS ⟸38—PUBLISHED FREIGHT SCHEDULES—CONSTRUCTION.
   The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative; they are supposed to be expressed in plain terms, and a shipper who consults them has a right to rely upon their obvious meaning.
3. CARRIERS ⟸38—FREIGHT SHIPMENT—CHARACTER OF RATE.
   The character of a freight shipment must be determined at the time the shipment begins and cannot be changed, so far as the application of rates is concerned, by the subsequent conduct of either consignor or consignee.
4. CARRIERS ⟸38—OFFENSES BY CARRIER—CARLOAD SHIPMENTS—RATES.
   A shipper making shipments in carload lots has the right to bill to a single consignee, though the contents of the car may be intended for different individuals.

In Error to the District Court of the United States, for the Eastern Division of the Northern District of Illinois.

Criminal prosecution by the United States against Swift & Co. Judgment of conviction, and defendant brings error. Reversed.

Plaintiff in error, indicted upon 29 counts, was found guilty on all of them and sentenced to pay a fine of $60,000 upon 28 of them, 1 having been dismissed. The charges preferred against it may be divided into two classes. Counts 1 to 25 dealt with section 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [Comp. St. § 8597]). The last 4 counts charged plaintiff in error with a violation of section 10 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [Comp. St. § 8574]). All the offenses arose out of four shipments.

One of the customers of the plaintiff in error was the Saginaw Beef Company. This company purchased some goods outright, while other products were shipped to it to be sold on a commission basis. The Saginaw Beef Company, through its employés, solicited various retail merchants between Alberta and Owosso, Mich., on the Ann Arbor Railroad, for orders which were later filled by plaintiff in error and billed to the Saginaw Beef Company. Plaintiff in error did not appear in the transactions between the Saginaw Beef Company and the retailer.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

When the territory had been covered and the orders secured, the Saginaw Beef Company sent its order to plaintiff in error. Shipments were made in carloads, routed Chicago to Owosso, Mich., via the Chicago & North Western Railroad to Manitowoc, thence via the car ferry operated by the Ann Arbor Railroad to Frankfort, Mich., thence by the Ann Arbor road to Owosso. It appears that four cars were thus shipped at different dates. The seals remained intact until the cars reached a distributing point in Michigan, where representatives of the Saginaw Beef Company boarded the car, and at each station where customers resided the meat was taken by these representatives and delivered to the retailer, or placed in the depot for the retailer. Plaintiff in error paid the freight charges upon the basis of carload shipments to Owosso.

James M. Sheean, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and J. J. Hickey, for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). Although several assignments of error are presented, only one need be considered. For it is admitted by both sides that the judgment cannot stand if the shipper was entitled to carload rates for each of the four shipments mentioned. Plaintiff in error admits that its right to carload rates is dependent upon certain rules appearing in the published tariff sheets of the Ann Arbor road in force at the time of the shipments; that, if these rules do not furnish support for the carload rate, then it obtained a reduced rate on each of its four shipments. The case therefore turns upon the construction and the application of these rules to the facts as stated.

[1] These rules appearing under the general head of "Charges for Stopping Cars in Transit to Complete Loading or Partly Unload" read as follows:

(A) Cars containing freight which is waybilled at carload rates will be stopped in transit to complete loading of car, or to partly unload contents of car (except as otherwise specifically provided).

(B) The charge for stopping off cars for the purpose of unloading a portion of the contents, or completing loads, will be $3 per car for each stop.

These rules obviously pertain to carload shipments. They deal with and recognize the rights of shippers who are shipping freight in carload lots. The first one may have been unusual, but it was conceded on the trial that it was on file with the Interstate Commerce Commission and was in force on the Ann Arbor line at the time of the shipments in question.

Nor can there be much dispute as to the meaning of the words "stop in transit to complete loading of car or to partly unload contents of car," as used in rule A, especially in view of the language "stop off cars in transit" adopted in rule B. If a shipper under these rules asked to have his car "stop off in transit" (put on a side track or left at a station to be taken by a later train), he was charged $3 for each such stop. If the shipper wished to take on freight to fill the car, or partly unload the car (there being no necessity for holding the car

for a later train), rule A governed, and no charge was made. Not only is this construction the only rational one, but it is in complete harmony with the understanding of the officials of the Ann Arbor road, as shown by their testimony, and it is in harmony with the practice of the road as carried on when shipments by other parties of a similar character were made.

[2] Had experts given testimony tending to dispute this construction, we think the shipper would still be bound only by a fair and reasonable construction of these rules. The correct rule of construction in a situation like this is announced in Newton Gum Co. v. C., B. & Q. R. R. Co., 16 Interst. Com. Com'n R. 346 as follows:

"The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative. A shipper who consults them has a right to rely upon their obvious meaning. He cannot be charged with knowledge of the intention of the framers or the carrier's canons of construction or of some other tariff not even referred to in the one carrying the rate. The public posting of tariffs will be largely useless if the carrier's interpretation is to be dependent upon tradition and the arbitrary practices of a general freight office. * * *

"A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and, in connection with the rate sheets, can determine for himself what he can be lawfully charged for transportation."

But it is claimed that these rules must yield to rule 11 of the Official Classification No. 38 which reads as follows:

"In no case will the charge for a consignment of freight (shipped at one time by one consignor to one consignee and destination) when loaded by shipper, on or in one car be greater when computed at actual or estimated weight and L. C. L. rate than on basis of C. L. rate and minimum carload weight; nor will the charge for a full carload when loaded by shipper be greater at C. L. rate and mimimum carload weight than on basis of L. C. L. rate and actual or estimated weight."

By adding $3 for each stop to the carload rate the government contends that a rate greater than the L. C. L. charge was obtained, and therefore, under this last-quoted rule, the L. C. L. rate applied.

This position is well answered by referring to a rule governing Official Classification No. 38 and reading as follows:

"A tariff is not governed by a classification or exceptions thereto, except when and to the extent stated on the tariff."

Inasmuch as this classification rule was not set forth in the tariff sheets of the Ann Arbor Railroad from which quotation has been made, it cannot govern over a contrary rule therein appearing.

But a further reason for not applying this rule 11 of the Official Classification No. 38 lies in the fact that the shipper was not subject to a charge of $3 for every stop, and therefore the carload rates plus the charge for stopping did not in fact exceed the L. C. L. rate.

[3] We are also convinced that still another reason exists for not applying this rule to this case. The character of this shipment, or any freight shipment, must be determined at the time the shipment begins, and cannot be changed, so far as the application of rates is concerned, by the subsequent conduct of either the consignor or the con-

signee. Consignor's exercise of his right to stop a shipment in transit cannot relieve him of his obligation to pay the freight charges based upon the character of the shipment as it was originally begun. Nor would consignor's determination, after a shipment has begun, to handle the freight differently from what it was originally billed, change the character of the shipment.

The government further contends that the L. C. L. rate should have been applied because each carload shipment was not a single shipment, but in reality was from the plaintiff in error as consignor to the various retailers to whom the Saginaw Beef Company made sales as consignees. This appears to be the theory of the indictment, as each such shipment is made the basis of a separate count.

This theory totally ignores, not only the bill of lading, wherein but one consignee, the Saginaw Beef Company, is named, the undisputed testimony that plaintff in error was a stranger to the transactions between the retailer and the Beef Company, but it also ignores the two rules above quoted.

The right of plaintiff in error to ship fresh meats in carload lots from Chicago to Owosso or to intermediate points was affirmatively established on the trial by the introduction of freight tariff sheets, circulars of the Interstate Commerce Commission and the Official Classification in force at the time of the shipments. In fact, this right to make carload shipments between these points is fully conceded by the government.

This same documentary proof recognized, and in fact established, the shipper's right to the benefit of transit privileges on connecting lines. In other words, a shipper making a carload shipment from Chicago to Owosso was entitled to all the transit privileges which the tariff sheets of the Ann Arbor road permitted. Among these transit privileges was the shipper's right to stop in transit as defined in these two rules A and B.

[4] The shipment having lost none of its carload character by its various stops, the shipper was free to bill the car to one consignee to be delivered, when unloaded, to various parties. A shipper making shipments in carload lots has the right to bill to a single consignee though the contents of the car may be intended for different individuals. I. C. C. v. D., L. & W. R. R. Co., 220 U. S. 236, 31 Sup. Ct. 392, 55 L. Ed. 448.

It is finally claimed by the government that the character of the shipment should be determined by the fact that employés of the Ann Arbor road helped unload the freight and that inasmuch as carload shipments are unloaded by the consignee, an inference arises that the parties (the shipper and the carrier) intended the shipment as an L. C. L. shipment.

Ignoring for the moment the government's failure to show plaintiff in error had knowledge of this fact, we find from an examination of the evidence that the government's claim in this respect is not supported by the proof. In three of the cars at least, the consignee unloaded the cars unaided by the carrier's employés. In one car only is there an inference that the railroad employés helped the consignee

to unload the freight. It appears clearly that the consignee provided men to unload the cars; that it paid the passenger fares of these employés whose duty it was to handle the freight. If any assistance was given by the train brakeman, it was merely by way of accommodation, or perhaps to make possible an earlier departure from the station.

If any inference can be drawn from this record on this phase of the case, it must therefore be unfavorable to the government; for if local shipments were to be handled by the carrier, and only in case of carload shipments was the consignee required to handle the freight, what conclusion must we draw from the fact that the consignee provided two men to unload each car of freight?

But this contention is conclusively answered by further reference to the rules in question. Neither rule forbids an employé of the railroad from helping the shipper to unload the freight.

It follows, from what has been said, that plaintiff in error was entitled to a carload rate on each of its four shipments and the charges set forth in the indictment are unsupported by the evidence.

The judgment is reversed, and a new trial ordered.

CITY OF SALEM et al. v. SALEM WATER, LIGHT & POWER CO.

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919. Rehearing Denied March 10, 1919.)

No. 3198.

WATERS AND WATER COURSES ⊜203(11)—CONTRACT WITH WATER COMPANY—CHARGES—MODIFICATION BY STATE COMMISSION.

A city may agree that the state, through its Public Service Commission, may modify a contract between itself and a water company respecting rates to be charged by the company, and is bound by any modification so made with the consent of the company, especially where the city sought readjustment of the rates.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by the Salem Water, Light & Power Company against the City of Salem, Walter E. Keyes, its Mayor, and C. O. Rice, Treasurer. Judgment for plaintiff, and defendants bring error. Affirmed.

This is an action by the Salem Water, Light & Power Company to recover for fire hydrant service furnished to the municipality. The water company's demand is based upon a hydrant charge fixed by an order of the Public Service Commission of Oregon, published in August, 1914, and not upon a lower maximum rate named in the franchise granted by the city to the water company in 1891.

The city of Salem, in Oregon, was incorporated by legislative act in 1862 under a constitutional provision (section 2, art. 11, of the Constitution of Oregon) which authorized corporations to be formed under general laws, and not by special laws, except for municipal purposes, and also provided that all laws passed pursuant to the section could be amended or repealed, but not so as to impair or destroy any vested corporate rights. The act of incorporation (Special Laws of Oregon, 1862, p. 3) under which Ordinance No.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

207, enacted in April, 1891, the franchise ordinance here involved, was passed, has these provisions:

"Sec. 6. The mayor and aldermen shall comprise the common council of said city, and at any meeting shall have exclusive power—

"To provide for lighting the streets and furnishing the city and the inhabitants thereof with gas or other light, and with pure and wholesome water, and for such purposes may construct such water, gas or other works, within or without the city limits, as may be necessary or convenient therefor: Provided, that the council may grant and allow the use of the streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and the inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe.

"26. * * * To permit and regulate the use of the streets, alleys and public grounds of the city for laying down and repairing gas and water mains, for building and repairing sewers and the erection of gas or other lights; to preserve the streets, alleys, side and cross walks, bridges and public grounds from injury, and prevent the unlawful use of the same, and to regulate their use, to fix the maximum rate of wharfage, rates for gas or other lights, for carrying passengers on street railways, and water rates."

In section 4 of the Ordinance No. 207 it was provided that the Salem Water Company shall not charge at any time "higher rates for water than is customarily allowed for water in towns or cities of like population on the Pacific Coast; but the Salem Water Company, its successors or assigns, shall not at any time charge more than one dollar and eighty-two cents ($1.82) per month for each hydrant or cistern actually supplied. And the right is hereby reserved by the city of Salem to continue or discontinue to connect or disconnect any or all hydrants or cisterns connected, or which may hereafter be connected with said works; and the city of Salem shall not pay for said hydrants or cisterns while the same are disconnected or discontinued."

In May, 1913, the city filed a complaint with the Public Service Commission of the state of Oregon against the water company, wherein the city set forth that the water company as a public utility was subject to the provisions of chapter 279 of the Laws of Oregon of 1911, and that the distributing system of the water company was inadequate to supply the demands of the residents of the city, and that the water supply was inadequate, and that the rates charged were unequal; wherefore the city prayed that the commission should make such orders as were necessary for extending the distributing mains and that the rates of the water company should be adjusted and equalized, "so that the same shall be uniform and equal and that said rates may be reduced so that the charges may return to the defendant [water company] a reasonable return upon its investment."

After filing the complaint with the Public Service Commission, and about March, 1914, the city council adopted a resolution (No. 1294) in substance as follows: That the Commission, in adjusting the rates of the water company for the city on the private users, take into consideration the price "at which the hydrants should be charged to make an equitable rate for the private user, and, if the rate now charged the city for hydrants by the water company is too high or too low, that it be adjusted accordingly."

After public hearing about August 19, 1914, the commission found that the rate of $1.82 charged by the water company to the city for its fire hydrants put an undue burden upon the other users of water, and that the city should pay to the water company $2.50 per hydrant per month for all hydrants to which water was furnished by the water company, the new rate to be effective October 1, 1914. Thereafter the water company furnished to the city and to the fire hydrants water, and the city accepted the service without dissent. Bills for water are payable in advance, but the city has refused to pay for the service, and there is a large amount claimed to be due.

The city, in its answer, sets up that the Public Service Commission was created in 1911, and subsequent to the acts of incorporation of the water company and to the various amendments to the act creating the city of Salem, and subsequent to the amendment to section 2 of article 11 of the Constitution of Oregon, as amended in November, 1910, and subsequent to the adoption of section 1a of article 4 of the Constitution of Oregon, and to certain legisla-

tive enactments which need not be here fully cited. One of the amendments of 1903 added a new subdivision to section 6, and provided that the mayor and aldermen, comprising the common council, should have exclusive power (subdivision 41): To license, regulate, and tax water and power companies, and to fix the maximum rates to be charged by any person, company, or corporation for water or power supplied by such person or company to private or public consumers within the city.

The city alleges that the charges made by the water company for supplying water to the inhabitants of the city were unreasonable, unjust, and unequal as between different patrons and consumers, and alleges that to secure an appraisement of the value of the property and equipment, and for the purpose of having a determination by the Public Service Commission whether or not the city was charging its patrons unjust tariffs for the private use of water, the city filed a complaint with the Public Service Commission, and later the resolution hereinbefore referred to was passed. It is admitted that the city has declined to accept the orders of the Public Service Commission in so far as they increased the rates for water service for hydrants.

B. W. Macy, of Salem, Or., and Wm. P. Lord, of Portland, Or., for plaintiffs in error.

Wood, Montague, Hunt & Cookingham, Isaac D. Hunt, and M. M. Matthiessen, all of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). We will not stop to analyze the question whether the franchise which was accepted constituted a contract between the city and the water company and its predecessors, for we will accept the premise that it was a contractual relationship which could not be impaired without the consent of the water company. This assumption brings us, then, directly to inquire what is the effect where the Public Service Commission of the state and the utility corporation agree to changes in the contract and the municipality alone objects.

In Hunter v. Pittsburgh, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151, the Supreme Court established that neither the charter nor any law conferring governmental power, or vesting in a city property to be used for governmental purposes, or authorizing it to hold or manage such property, or exempting it from taxation upon it, constitutes a contract with the state within the meaning of the federal Constitution, but that the state at its pleasure can modify or withdraw all such powers, can take without compensation the property, hold it itself, expand or contract the territorial area, or even repeal the charter and destroy the corporation. The court held that the state is supreme in respect to such matters, and the Legislature, conforming its action to the Constitution of the state, may do as it will, unrestrained by any provision of the Constitution of the United States.

In Portland v. Public Service Commission, 173 Pac. 1178, the Supreme Court of Oregon discussed the question of the relationship existing between the Public Service Commission and the state, and regarded the commission as the agent of the state, endowed by the state with plenary power, capable of consenting to a change in a contract between a city and a street railroad, whereby the company was allowed to charge an increased rate or fare. The court, limiting its

views, said that, whatever rules might prevail if one of the parties to the contract should attempt to change the terms without the consent of the other, they were not applicable to a situation where the contracting parties themselves agreed to the change.

It is said, however, that these cases are to be distinguished, in that here the right to obtain hydrant service at rates not to exceed those specified in the franchise was held by the city purely in its proprietary capacity. But as the municipal corporation is but a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department, it is our opinion that the city had no absolute property right to demand continued hydrant service at a given rate as against the right of the state to modify such rates of service with the consent of the water company, notwithstanding the fact that as to the water company itself the contract might be unalterable except with its consent.

In Worcester v. Worcester Consolidated Street Ry. Co., 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591, the railway company had been granted a franchise on the condition that certain pavement be maintained between the rails for the entire distance covered by the tracks. When the franchise was negotiated the city council had authority to grant locations for the laying of a railroad under such restrictions as they deemed the interests of the public might require, and there was legislation in the state requiring that the paving of streets occupied by railroad tracks should be kept in repair by the railroad companies. Afterwards the Legislature passed a law designed to relieve street railway companies of the obligation to keep paving between tracks in repair, and the street railway company refused to repair the paving between its tracks, with the result that the city made the repairs and attempted to hold the street railway company liable. The contention of the city was that the legislation which purported to relieve the street railway company from the obligation to keep the paving in repair was invalid, because the effect was to impair the obligation of the contract between the city and the railway company. The Supreme Court said it had no doubt that the Legislature of the state had the power to abrogate the provisions of the contract between the city and the railway company with the assent of the railway company, and concluded that the asserted right of the city to demand the continuance of the obligation to pave and repair streets did not amount to a property right held by the corporation, which the Legislature was unable to touch either by way of limitation or extinguishment. The court said:

"If these restrictions or conditions are to be regarded as a contract, we think the Legislature would have the same right to terminate it, with the consent of the railroad company, that the city itself would have."

The court, approving the doctrine of New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943, was of the opinion that a municipal corporation is in no contract relations with its sovereign, at whose pleasure its charter may be amended, changed, or revoked without the impairment of any constitutional ob-

ligation, and furthermore that, while a municipal corporation may own private property not of a public or governmental nature, and that such property may be entitled to constitutional protection, still the asserted right in that case to demand the continuance of an obligation to pave and repair streets did not amount to property held by the corporation which the Legislature was unable to touch either by way of limitation or extinguishment. But, furthermore, the court held that, even if the restrictions or conditions contained in the orders of the board of aldermen examined in the case were to be regarded as a contract, still the Legislature had the same right to terminate it with the consent of the railroad company that the city itself would have.

In Woodburn v. Public Service Comm., 82 Or. 114, 161 Pac. 391, L. R. A. 1917C, 98, Ann. Cas. 1917E, 996, the court held that the city entered into the franchise contract between the city and telephone company subject to the reserved right of the state to exercise its police power and compel a change of rates, and that when the state exercised its power it did not work an impairment of any obligation of the contract. The court said:

"The regulation of rates for the purpose of promoting the health, comfort, safety, and welfare of society is an exercise of the police power, and is therefore an attribute of sovereignty"

—and was of the opinion that when seeking to determine whether the regulation of rates has been conferred upon the city, with or without limitations, the courts would be guided by the rule that the delegation of the sovereign right to regulate rates must be clear and express, and doubts would be resolved against the city.

Salem v. Anson, 40 Or. 343, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485, and other cases, are cited by plaintiff in error as holding that, under charter provisions like those under consideration, there was a delegation of exclusive power by the state Legislature to the city to regulate and control the use of the streets by a water company upon such terms and conditions as the city council might prescribe; and with ability counsel have argued that after acceptance of the terms of the franchise it was beyond the power of the Legislature to effect a change of its terms without impairing the obligation of the contract. The Oregon case does not pass upon the immediate question. In Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, specially relied upon, it was decided that the ordinance involved constituted a contract, but the court did not go farther than to hold that the car company, with which the contract was made, could not be relieved without the consent of the city. In Detroit v. Detroit Citizens' R. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, the contract was made in obedience to an act expressly authorizing agreement between the corporation and the city.

It seems to us that the later case of Home Telephone Co. v. Los Angeles, 211 U. S. 270, 29 Sup. Ct. 50, 53 L. Ed. 176, more fully expresses the views of the Supreme Court, where the contention is that the state has authorized one of its municipal corporations to fix rates by inviolable contract to be charged by a public utility corporation

for a definite term. There the charter examined gave to the council "power * * * to regulate telephone service" and "to fix and determine the charges" for telephone service and connections. The court was of opinion that, unless the legislation granting such a power was perfectly clear, the city could not make a contract fixing unalterably the charges for telephone service during the life of the franchise, and thus deprive the city from exercising the power of regulation, and the ordinance was treated as not one "to agree upon the charges," but as empowering the city "to fix and determine the charges." The court said:

"It authorizes the exercise of the governmental power and nothing else."

Authority to contract away the power of regulation was not found either in the express words of the ordinance or by implication from its terms. In the examination of the ordinance now before us we must always have in mind that the contract bound the water company to but one matter; that is, not to charge for water in excess of $1.82 per hydrant per month. The municipality did not surrender all right of fixing terms on which the water company could use its streets. There was no agreement fixing unalterably the charges. Under certain limitations, as, for instance, if the reasonableness of the rate were questioned, the city could require the water company to decrease its charge for hydrant service, and to a reasonable extent might vary conditions under which there was an occupancy of the streets. Thus, while there is a contract, we are disposed to think the city never agreed and has not undertaken to yield wholly its charter right of allowing the use of the streets "upon such terms and conditions as the council may prescribe," and has not altogether yielded its power "to fix * * * water rates." Milwaukee Elec. R. Co. v. Wisconsin R. R. Comm., 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254.

If we are correct in this view, then section 2 of chapter 80 of the Laws of 1911 was merely a ratification of the contract as made by the city, but did not sanction a contract which attempted to bargain away the rate-regulating power. Section 2 provided that all contracts heretofore made and then in effect for sale of water by any corporation—

"are hereby ratified and declared legal and valid contracts, in so far as the right of such city or town to contract with reference to same is concerned."

With these expressions of what seem to us to be the true view of the contract which is involved, we leave the last point without conclusive decision, and rest our ruling upon the ground that the city could agree that the state through the commission and the water company could consent to the modifications of the terms of the contract with respect to rates to be charged and paid. We believe, also, that as the city had no private property right for hydrant service that was not of a public or governmental nature, there could be no sound objection to a modification by the state with the consent of the water company, especially where the city sought a readjustment of rates for hydrants.

Affirmed.

KIRCHNER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1655.

1. WAR ⊂⊃4—ESPIONAGE ACT—FALSE REPORTS.
It is not essential that false reports and statements, to constitute an offense under Espionage Act, tit. 1, § 3 (Comp. St. 1918, § 10212c), should be made in the presence of persons who are, or are liable to be, selected for military or naval service.

2. WAR ⊂⊃4—ESPIONAGE ACT—TRIAL—EVIDENCE OF INTENT.
On a prosecution for making false reports and statements, in violation of Espionage Act, other statements than those charged, but of similar character, made by defendant at different times and places, even before the passage of the act, may be shown on the question of intent.

3. CRIMINAL LAW ⊂⊃309—EVIDENCE—PRESUMPTION OF GOOD CHARACTER.
On the trial of a criminal case, where there is no evidence of defendant's character, there is no presumption of his good character.

4. CRIMINAL LAW ⊂⊃24—PRESUMPTION OF INTENT.
It is not error in a criminal case to instruct that defendant is presumed to have intended what he did.

In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Criminal prosecution by the United States against H. E. Kirchner. Judgment of conviction, and defendant brings error. Affirmed.

William Beard, of Parkersburg, W. Va., for plaintiff in error.

Stuart W. Walker, U. S. Atty., of Martinsburg, W. Va. (Charles N. Campbell, Asst. U. S. Atty., of Martinsburg, W. Va., and J. J. P. O'Brien, Asst. U. S. Atty., of Wheeling, W. Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. On January 14, 1918, the grand jury of the United States District Court for the Northern District of West Virginia, at Parkersburg, returned the following indictment:

"The grand jurors of the United States, duly impaneled, sworn, and charged to inquire within and for the said district, upon their oaths present that H. E. Kirchner on the ——— day of ———, 1917, and after the 17th day of June, 1917, the United States then and there being at war with the imperial German government, did, at Elizabeth, in the Northern district of West Virginia, willfully, unlawfully, and feloniously make and convey to divers persons to the grand jurors unknown, some of whom said persons were at the time aforesaid between the ages of 21 and 31 years, and were then and there subject to be called into the service of the United States Army, under the provisions of the Selective Service Act, an act of Congress approved on the 18th day of May, 1917 [40 Stat. 76, c. 15 (Comp. St. 1918, §§ 2019a, 2019b, 2044a–2044k)], certain false statements regarding the United States government, the army of the United States, the bonds of the United States then being offered to the citizens of the United States for sale to promote the success of the United States in the prosecution of the war then being conducted against the imperial German government, which said statements in their entirety are unknown to the grand jurors, but which in substance were to

the effect that the United States government in the prosecution of the said war was corrupt, and controlled by the moneyed interests, that the Selective Service Act aforesaid was unconstitutional, that the people of the United States could never meet the expense of the war with Germany, that the people of the United States should not buy the United States bonds then being offered for sale, he, the said H. E. Kirchner, then and there knowing said statements to be false, with intent to interfere with the operation and success of the military and naval forces of the United States in the said war with the imperial German government, and to promote the success of the imperial German government in said war, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. Stuart W. Walker, U. S. Attorney."

The indictment was founded on section 3, title 1, of the original Espionage Act of June 15, 1917, c. 30, 40 Stat. 219 (Comp. St. 1918, § 10212*c*):

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

The charge of the trial court is reported in the series of bulletins, issued by the Department of Justice, known as "Interpretations of War Statutes," bulletin No. 69. The defendant below demurred to the indictment, and saved an exception to the order overruling the demurrer.

The first contention on the demurrer by counsel for defendant is based on the supposition that the indictment charges the defendant merely with the utterance of opinions. The indictment alleges that the defendant had said in substance that the United States government in the prosecution of the war was corrupt and controlled by the moneyed interests. Certainly such an assertion could be made and intended as a statement of fact. There is nothing on the face of the indictment on which to found an argument that the defendant was, in respect to the foregoing assertion, being prosecuted for an expression of opinion.

The assertion that the people of the United States could never meet the expenses of the war must be treated as a mere expression of opinion, and the statement that the people should not buy United States bonds is of course not a statement of fact. It is unnecessary to decide whether the statement that the Selective Service Act is unconstitutional be a statement of fact or of opinion. The indictment contains at least one clear statement of fact alleged to be false; the remaining statements alleged to have been made may properly be treated as surplusage.

[1] The remaining objections to the indictment are founded on the theory that the false statement must be made to, or at least within the hearing of, persons who are, or who are liable to become, members of the military or naval forces. We find no warrant for this contention in the statute. The success of the military and naval forces is aided

or hampered in large measure by the spirit of the civilian population. Shipbuilders, munition makers, coal miners, lumber producers, buyers and sellers of Liberty Bonds and War Savings Stamps, women and girls making Red Cross supplies, merely begin the list of civilians whose patriotic ardor is almost as essential to the success of our military and naval forces as is the spirit of the men composing these forces. Excepting only those who are too unintelligent to understand, there is no class of our population on whom some false statements may not have a pernicious effect in the direction of restraining patriotic endeavor. In drawing the indictment it was unnecessary for the pleader to negative the fact that the statements alleged against the defendant were made only in the hearing of those too unintelligent to understand them. The return of the indictment necessarily imported that the defendant's statements were made to some person who understood them and repeated them before the grand jury. It follows that, unless the false statement be made only to children of very tender years or to imbeciles, the intent to interfere with the operation or success of the military or naval forces may exist.

The crime denounced is not that of interfering with the success of our forces. If the false statement is willfully made with the intent denounced, the offense is complete; and if the effect of the statement may reasonably be to chill the ardor or restrain the efforts of any of those who hear the statement, the proscribed intent may exist. The statute does not discriminate between an intent to directly interfere, and an intent to indirectly interfere, with the operation or success of the military forces; and hence we have no reason for making such distinction.

In the bulletins, "Interpretations of War Statutes," mentioned above, are numerous expressions of judicial opinion as to this question. In U. S. v. Harper, No. 76, Judge Jack said:

"Neither is it necessary that the government prove that such statements were made in the presence of persons liable to military service. This latter phrase in the indictment may be regarded as surplusage."

In U. S. v. Frerichs, No. 85, Judge Munger said:

"If one were to say to those being solicited to subscribe for bonds to support the war, that the bonds were selling on the Stock Exchange at 50 cents on the dollar when they were selling at par, or near that, and that was said with the intent that it would discourage people from subscribing for the bonds, and thereby render difficult the support of the armies in the prosecution of the war, it could well be said that the intent of that man was to interfere with the success of and the operation of the naval and military forces of the United States."

In U. S. v. Zittel, No. 90, Judge Neterer said:

"A person would be guilty of the violation of the provisions of this act by making false reports or false statements with intent to interfere with the operation or success of the military, without making the reports or statements directly to men in uniform or men registered and held in reserve.

"There are many activities connected with the supply of the military and naval forces, and if false statements and reports are made with intent to interfere with any of the operative agencies which supply the military or naval forces and are necessary for their successful operation, it would be a

violation of this act. For instance, transportation is necessary, and if a person should willfully make false reports or false statements with the intent to interfere with the ship construction, or with the intention of interfering with supplying the vessels, when constructed, with seamen, or with any of the active agencies which are necessary to promote the success of the military and naval forces in whatever respect, if any disclosed by the evidence, it would be a violation of this act."

In U. S. v. Taubert, No. 108, Judge Aldrich said:

"Now, when a nation engages in war, it is important that it should not be hindered—that it should not be impeded or embarrassed or retarded or checked or slackened—by internal obstruction; and that means not only in respect to actual war activities in the field, but it must not be hindered in its activities in the direction of preparedness. * * *

"I have told you that the law is a constitutional law, that it is one enacted in war times, to the end that the war may be vigorously prosecuted, and it means that the war shall not be obstructed either in its active military operations or in respect to the necessary things that must be done in order to sustain the military arm. * * *"

In U. S. v. Stephens, No. 116 (S. C. 121), Judge Woolley said:

"A careful study of the Espionage Act and of section 3 before amendment satisfies me that the offense defined is not limited to a direct interference with the operation and success of military forces. The controlling word of the statute is 'interference,' and if the intent with which false statements are made is to work such interference it matters little whether that end is reached directly or indirectly. Physical contact with military operations is not necessary to work interference with them. Every one knows this now. Congress knew it when it enacted the statute. Interference being the thing, the processes by which it is achieved are not regarded as of importance."

In U. S. v. Weinsberg, No. 123, Judge Morris said:

"I wish to say in the beginning that when we speak of interfering with the success of the military forces of the United States it is my view that one can interfere with the success of the military forces of the country by destroying, or weakening, or undermining, any recognized and properly adapted instrumentality or organization which effectively aids in and contributes to that success. * * *"

In U. S. v. Binder, No. 126, Judge Garvin said:

"Now, it is important for you to bear in mind that it is not necessary, and I charge you this as matter of law, that any of the sentiments contained in this book should have been actually, by the defendant, brought to the direct personal notice of any one in the military or naval service of the United States, including the National Army, because you can readily understand that the effect which the government charges this defendant intended the publication should have might quite as easily be brought about by bringing sentiments of this sort to the notice of friends and relatives of those who are actually in or who were expecting to be connected with the military or naval service."

See, also, U. S. v. Nagler, No. 127.

We think it unnecessary to discuss the remaining arguments on the demurrer made by counsel for defendant. In passing, however, we should say that we regard as surplusage the allegation in the indictment that the statements made by the defendant were made to persons subject to be called into the military service.

[2] It is next urged that the trial court erred in admitting evidence of statements, similar in nature to those set out in the indictment, made

by the defendant in the Southern district of West Virginia and before the Espionage Law was enacted. In admitting this evidence the trial court distinctly and more than once advised the jury that this testimony was admitted only as bearing on the intent of the defendant in making the statements set out in the indictment. The evidence in question does have a tendency to prove that the defendant, if he made the statements charged, made them with the intent charged. We can see no force in this contention.

It is argued that the trial court committed error in calling the attention of the jury to the Act of April 22, 1898, c. 187, making all able-bodied citizens and certain persons of foreign birth between the ages of 18 and 45 years liable to military service. 30 Stat. 361. Counsel contends that this statute was repealed by the Draft Act of May 18, 1917. We think it unnecessary to decide the question. The action of the court was, in our opinion, unnecessary; but it did not in any event constitute reversible error. If our construction of the third section of the Espionage Act is sound, it is entirely immaterial whether all able-bodied male citizens between 18 and 45 years of age were or were not in January, 1918, liable to military service.

[3] After the testimony was all in, the defendant's counsel asked the court to give an instruction, reading in part as follows:

"The court instructs the jury that the character of an accused person is in law presumed to be good, and this alone may be sufficient to create a reasonable doubt of guilt. * * *"

There had been no evidence of good character offered or given, and the trial court refused to give the instruction. It seems unnecessary to say more of this exception than that the Supreme Court has decided that there is no such presumption as that asserted in this prayer. Greer v. U. S., 245 U. S. 559, 38 Sup. Ct. 209, 62 L. Ed. 469.

[4] It is next objected that the trial court added to an instruction, offered by the defendant and given, the following:

"The law presumes that a man intends that which he does, and it is from the statements made and the acts done that his intent is to be determined."

The jury knew the defendant to be sane and adult; the statements made by him and testified to by many witnesses were made knowingly and intentionally. The presumption in the mind of the trial court could have been more fully expressed; but we cannot see, in the circumstances existing, that the defendant was prejudiced. There is some comparatively recent authority to the effect that the assertion that a sane man intends the natural and probable consequences of his own acts, knowingly done, is not a true presumption of law. See Thayer's Preliminary Treatise, p. 335; 2 Chamberlayne, Ev. §§ 1166, 1167; 7 Ency. Ev. 592 et seq.; 16 Cyc. 1081; U. S. v. Rutherford, Bulletin No. 119; U. S. v. Fontana, Bulletin No. 148. However, we need not discuss this question. The rulings of the Supreme Court forbid that the exception now under consideration be sustained. See Allen v. U. S., 164 U. S. 492, 496, 17 Sup. Ct. 154, 155 (41 L. Ed. 528), where the trial court had in the course of its charge said:

"A person is presumed to intend what he does."

In affirming Mr. Justice Brown said:

"This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act."

In Agnew v. U. S., 165 U. S. 36, 50, 53, 17 Sup. Ct. 235, 241, 242 (41 L. Ed. 624), Mr. Chief Justice Fuller said:

"The Circuit Court, in this part of the charge, was dealing with the intent to injure and defraud the bank, and rightly instructed the jury that, if they found certain facts, such intent was necessarily to be inferred therefrom. This was in application of the presumption that a person intends the natural and probable consequences of acts intentionally done, and that an unlawful act implies an unlawful intent."

And again, the trial court having charged, inter alia:

"It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action"

—it is said:

"In our opinion there was evidence tending to establish a state of case justifying the giving of this instruction, which was unexceptionable as matter of law."

In Reynolds v. U. S., 98 U. S. 145, 167 (25 L. Ed. 244), it is said:

"A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does."

See, also, Hanauer v. Doane, 12 Wall. 342, 347, 20 L. Ed. 439.

The ruling of the trial court on the motion to set aside the verdict presents no question for consideration by this court. Holmgren v. U. S., 217 U. S. 509, 521, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Prichard v. Budd, 76 Fed. 710, 716, 22 C. C. A. 504.

We can find no tenable ground in support of the motion in arrest.

The judgment below must be affirmed.

SOUTH ATLANTIC S. S. LINE v. LONDON-SAVANNAH NAVAL STORES CO.

(Circuit Court of Appeals, Fifth Circuit. October 24, 1918.)

No. 3241.

1. SHIPPING ⟸108—CONTRACTS—BREACH.
Contract for freight room from United States to England, conditioned to be subject to provisions of ocean bill of lading, one of which was liberty to call at any port, in or out of customary route, was not breached by tender of ship "with the understanding that we reserve option of forwarding cargo via a continental port should it prove necessary," inserted in view of notice of shipper's claim that European war canceled all contracts for shipment to continental ports.

2. SHIPPING ⟸108—CONTRACTS—PRIVILEGE OF CALLING AT PORTS.
Provision of contract for freight room that ship is to have liberty to call at ports in or out of customary route, in any order, to receive or

discharge cargo or passengers, or for any other purpose, is valid, so far as a stop is for a purpose proper or necessary to the voyage in which the ship is engaged.

3. SHIPPING ⊂108—CONTRACTS—CANCELLATION.
Rejection by shipper of tender of ship, because of carrier's noncompliance with unwarranted demand that it forego a right reserved to it by contract for freight room, justified carrier in treating contract as canceled.

Appeal from the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Libel in admiralty by the London-Savannah Naval Stores Company against the South Atlantic Steamship Line. From a judgment for libelant (248 Fed. 949), respondent appeals. Reversed.

Samuel B. Adams and A. Pratt Adams, both of Savannah, Ga., for appellant.

William Garrard, of Savannah, Ga., and J. Parker Kirlin, of New York City (John M. Woolsey, of New York City, on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

WALKER, Circuit Judge. This was a libel in admiralty, filed by the appellee, London-Savannah Naval Stores Company, against the appellant, South Atlantic Steamship Line, to recover the damages claimed to have resulted from the alleged failure and refusal of the latter to tender vessels for the carriage from Pensacola, Fla., to Bristol, England, of certain rosin and turpentine, for which it had, by three written contracts with the appellee, agreed to furnish freight room during the month of August, 1914. The parties will be referred to by the designations they had in the trial court—the libelant and the respondent, respectively. The contracts, dated respectively July 11, 1914, July 14, 1914, and July 27, 1914, were made by filling out and signing a form of an engagement for freight room so as to show the amounts of rosin and turpentine to be carried, the places of shipment and of destination, the freight to be charged, and the time within which the goods were to be delivered and received for shipment. On the back of each of the contracts were certain printed conditions, among which was the following:

"This contract is made upon the express condition that it is subject to all the clauses and conditions in the ocean bill of lading used by the vessel, which bill of lading is made a part of this contract and a copy of the same shall be furnished on application."

The libelant put in evidence the form of ocean bill of lading which was made a part of the contracts in question. The following is a copy of so much of this form as is material to be set out:

"Received for shipment from ——— in apparent good order and condition, to be transported by the steamship ——— from ——— to the port of ——— (or so near thereto as she may safely get), with liberty to call at any port or ports, in or out of the customary route, in any order whatsoever, to receive or

discharge coals, cargo, passengers, or for any other purpose, * * * and also subject to the clauses on the back hereof, which are mutually agreed to, and form a part of this bill of lading and contract as fully as if recited at length over the signature hereto affixed; and in accepting this bill of lading, shipper, owner, and consignee of the goods, and the holder of this bill of lading, agree to be bound by all the stipulations, exceptions and conditions expressed on the face and/or back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder."

The above-quoted provisions were on the face of the form of bill of lading. On the back of it, after the words, "It is mutually agreed," was the following, among other provisions:

"Also that all goods destined for all points beyond Rotterdam or Antwerp are subject to all conditions, stipulations, and exceptions, expressed in the customary form of bill of lading, in use at the time of shipment by the carrier or carriers completing the transit."

Immediately succeeding the above quotation are the following statements in the summary of the evidence:

"The next clause is entitled 'London clause,' and refers only to the landing of goods and other immaterial matters. Except Rotterdam, Antwerp, and London, the form of ocean bill of lading does not mention any port."

On August 10, 1914, the respondent addressed the following two communications to the libelant:

"Gentlemen: Pensacola/Bristol: We herewith beg to tender you the s/s Twilight, now at Pensacola ready to load, under the above engagement, with the understanding that we reserve the option of forwarding this cargo via a continental port should it prove necessary. Kindly give your Pensacola office instructions to order this cargo out promptly, and oblige,

"Yours very truly, South Atlantic Steamship Line."

"Gentlemen: Pensacola/London: We herewith beg to tender you the s/s Uganda, now at Sand Key awaiting orders, under the above engagement, with the understanding that we reserve the option of forwarding this cargo via a continental port should it prove necessary. Kindly give your Pensacola office instructions to order this cargo out promptly, and oblige,

"Yours very truly, South Atlantic Steamship Line."

The contract referred to in the second of these two letters is not involved in this case. That letter is set out, so as to disclose all that was replied to by the following letter of the libelant of the same date, and addressed to the respondent:

"Dear Sirs: We have your letters of this date tendering us the steamers Uganda for London, and Twilight for Bristol, but beg to say that we cannot accept same with your reserving the option of forwarding these cargoes via a continental port. Such reservation is contrary to usance, besides which it is not provided for in your freight contracts with us and we must therefore insist upon your providing an unrestricted U. K. (meaning United Kingdom) voyage.

"Furthermore we would remind you that you agreed with our Mr. Jensen to give us one week's notice of steamers' readiness to load.

"Yours faithfully, London-Savannah Naval Stores Co."

On August 11, 1914, the respondent wrote the following letter to the libelant:

"Gentlemen: Engagement 3000 B/Rosin and 3000 B/Turps. August shipment. Pensacola/Bristol: We are in due receipt of your yesterday's favor

notifying us that you decline to make delivery to the s/s Twilight under our contract with you, which gives us the option of forwarding direct or via a continental port. Under these circumstances we are compelled to look upon the contract as canceled, and are taking action accordingly, which please note.

"Very truly yours, South Atlantic Steamship Line."

And on August 12, 1914, the libelant addressed the following letter to the respondent:

"Dear Sirs: We are in receipt of your three favors of the 11th inst., and beg to repeat that we cannot permit shipment via a continental port, neither can we accept your notices and regard the freight contracts as canceled.

"Please let us know when you propose to lift the 250 brls. rosin contracted for August shipment to Liverpool at 15/—.

"Yours very truly, London-Savannah Naval Stores Co."

The evidence disclosed the following facts, about which there was no dispute: When the contracts were made it was understood that the naval stores in question would constitute only a part of the cargo of the vessel on which they would be shipped. It had been the almost unvarying practice of vessels carrying naval stores from Atlantic or Gulf ports to Bristol to carry also other goods consigned to a port or ports in Great Britain or on the continent of Europe, and to stop at such other port or ports before going to Bristol. It was not at all unusual for such vessels carrying naval stores shipped from Pensacola to Bristol to stop first at a continental port or a British port other than Bristol. The libelant had previously made shipments under similar contracts with the respondent on vessels which were to and did first stop at a continental port. The last shipment from Pensacola to Bristol made by the libelant over the respondent's line went by Rotterdam to Bristol under the same kind of contract. The war in Europe having started after the contracts were made, the libelant put the respondent on notice that it considered all its continental contracts canceled on account of the war and that the United Kingdom contracts were still in force. The letters quoted were written after this occurred. The respondent had contracted to furnish freight room for goods to be shipped in August to both Antwerp and Rotterdam, to meet which obligations it expected to use the Twilight, if the shippers were prepared to ship and called for the fulfillment of their contracts. It was under these circumstances that the respondent's letters of August 10th were written.

The libelant's manager, who conducted its part of the above-quoted correspondence, was a witness in its behalf. He admitted that if there had been no such correspondence or communications, and the respondent had received the rosin and turpentine as provided in the contracts, and had issued its bills of lading therefor as contemplated by the contracts, it would not have been inconsistent with the contracts, or with the understanding of the parties when the contracts were made, for the ship carrying the goods to carry other goods destined to a continental port or ports and to stop at such port or ports before going to Bristol.

[1] We understand a contention made in behalf of the libelant to be that it was justified in declining the tender of the ship Twilight, made by the respondent's letter of August 10th, because that tender

had a condition attached which the respondent had no right to impose, and that the libelant's acceptance of that tender would have effected a change of its rights under the contracts. Nothing in either of the respondent's letters indicated a purpose on its part to do anything which under its contracts it was not at liberty to do. The libelant's reply of August 10th showed that it insisted on the respondent "providing an unrestricted U. K. voyage." Its letter of August 12th explicitly states that "we cannot permit shipment via a continental port."

Instead of the correspondence showing an attempt by the respondent to impose a condition inconsistent with its contracts, it shows an explicit refusal by the libelant to make use of the tendered freight room for which it had contracted unless the respondent would furnish a ship for a voyage different from the one contemplated by both parties when the contracts were made, and that it would not permit the goods to be shipped on a vessel which was to go "via a continental port," though under the contracts there was a right to carry cargo destined to, and to stop at, a continental port before the vessel reached Bristol. The respondent having been put on notice that the libelant considered that the existence of the European war had the effect of canceling all contracts for the shipment of goods to ports on the continent of Europe, its letters of August 10th served the purpose of informing the libelant that the respondent did not concur in that view, and that it did not surrender the option which it claimed its contracts gave it of forwarding libelant's goods via a continental port. If the respondent had remained silent under the circumstances, it was possible for the delivery of its goods for shipment by the libelant to be influenced by the inference or assumption that the respondent acquiesced in the former's view as to the effect on the contracts in question of the existence of war in Europe. In view of what had occurred, the letters amounted to a reasonable precaution to avoid the delivery and receipt of the goods under a misunderstanding as to the voyage being or not being such a one as was contemplated when the contracts were made.

[2, 3] As shown by the terms of the bill of lading stipulated for, the vessel carrying the libelant's rosin and turpentine was to have—

"liberty to call at any port or ports, in or out of the customary route, in any order whatsoever, to receive or discharge coals, cargo, passengers, or for any other purpose."

There is no law standing in the way of a shipper under a maritime contract binding himself by an agreement that the vessel carrying his goods, constituting only a part of its cargo, is to have the privilege expressed by the provision just quoted. No right of a shipper under such a contract is violated by the vessel carrying his goods going to the port to which they are destined by way of another port, in or out of the customary route, for the delivery of other goods shipped to such other port. Austrian Union Steamship Co. v. Calafiore, 194 Fed. 377, 114 C. C. A. 295, was a case of a shipment under a bill of lading containing a provision quite similar to the one above quoted. In the opinion of this court rendered in that case it was recog-

nized that the stopping of the vessel at another port before reaching that to which the complaining shipper's goods were destined could not have justified the complaint made, but for the fact that the stop which was made was for a purpose not proper or necessary to the voyage in which the ship was engaged.

In the instant case it was not indicated by the tender made or otherwise that the vessel tendered would stop anywhere or do anything not proper and necessary to such a voyage as was in the contemplation of the parties when the contracts were made. The shipper's acceptance of the tender would not have involved the loss of any right to which its contracts entitled it. The contracts did not entitle the libelant to demand the furnishing of the freight room contracted for, with the condition added that the voyage of the vessel tendered be different from the one contemplated by both parties when the contracts were made. All that libelant was entitled to was performance of the contracts. Its rejection of the tender because of the respondent's noncompliance with an unwarranted demand that it forego the right which the contracts reserved to it of going to Bristol by way of a continental port justified the respondent in treating the contracts as canceled.

It follows that the decree appealed from cannot be sustained. It is reversed.

W. & S. JOB & CO., Inc., v. HEIDRITTER LUMBER CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 32.

1. SHIPPING ⟸27—CONTRACT FOR SALE OF VESSEL—WARRANTY.
   A statement by the seller of a vessel, after the contract of sale had been made and part of the consideration paid, that she was sound and seaworthy, did not constitute an expressed warranty.

2. BROKERS ⟸95—IMPLIED AUTHORITY—WARRANTY ON SALE OF VESSEL.
   An independent shipbroker has no implied authority to give an express warranty on sale of a vessel for his principal.

3. SHIPPING ⟸27—CONTRACT FOR SALE OF VESSEL—IMPLIED WARRANTY—RULE OF CAVEAT EMPTOR.
   The rule of caveat emptor applies to the sale of a vessel, in the absence of an express warranty, and where a purchaser acted upon the report of a surveyor employed by it, and did not demand an express warranty, there was no warranty by implication.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by W. & S. Job & Co., Incorporated, against the Heidritter Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert B. Honeyman, of New York City, for plaintiff in error.

Harrington, Bigham & Englar, of New York City, for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

MANTON, Circuit Judge. The defendant in error, owner of the Florence M. Belding, sold her to the plaintiff in error on March 4, 1916. The latter now sues, claiming the schooner was not sound or seaworthy or in good condition when sold, and seeks to recover $7,600, the difference between the purchase price and the price at which the plaintiff in error sold the boat subsequently, plus 5 per cent. brokerage commissions, because, as it says, the schooner was not as warranted.

At the trial, both parties moved for judgment after the proof was submitted. The District Judge, however, submitted specific questions to the jury, for it to determine the seaworthiness of the vessel, and this without objection from either litigant. The jury found the vessel seaworthy and fitted for a voyage upon the Atlantic at the time the agreement of sale was made. The court thereafter in a written opinion approved the verdict and gave judgment for the defendant in error. This finding of fact, both of the jury and the District Judge, is binding upon us, unless error was committed during the trial.

Mr. Job, called by the plaintiff in error, was cross-examined as to whether or not he heard that the Florence M. Belding made a trip from Nova Scotia across the Atlantic, and this after trifling repairs were made. This testimony was duly objected to, but admitted, and exception taken to its admission. This error would require a reversal, for such evidence was hearsay and harmful, and might well influence the jury, if there was an expressed or implied warranty in the contract of sale. Was there an expressed or implied warranty? We think not.

[1] One Stoddard, a shipbroker, was informed that the defendant had this vessel for sale, and approached the plaintiff and offered her for sale, which negotiations resulted in the following correspondence:

"March 4, 1916.

"Mr. R. F. Clark, Agent, New York—Dear Sir: We understand from your agent, Mr. Stoddard, that you sell us the Florence M. Belding for the sum of $38,000, and beg to inclose herewith check for $5,000 on account of same.

"We shall take delivery of the ship as soon as you can supply us with the bill of sale. Kindly acknowledge receipt of check and oblige.

"Yours truly, W. & S. Job & Co., Inc."

"Elizabeth, N. J., March 4, 1916.

"Messrs. Job & Company, No. 29 Broadway, New York City—Gentlemen: We beg to acknowledge receipt of your check for five thousand ($5,000) dollars, account of purchase price for schooner Florence M. Belding, as per your letter of the 4th inst.

"Yours very truly, The Heidritter Lumber Company,
"By F. R. Clarke."

Thereafter, and on March 13th, Mr. Wolff, vice president of the defendant in error, delivered a bill of sale for the schooner to Mr. Job, an officer of the plaintiff in error, and received the balance due on the purchase. Job testified as follows:

"Mr. Wolff brought the bill of sale in and asked us for the balance of the money. Mr. Wolff told us he thought we had a bargain in the vessel, and I told him I was very glad to hear that, and he said she had been a very useful vessel to them, and that she was sound and seaworthy in every way. I told him we had only seen the top of the vessel. We had not been able to see her

bottom, because she was full of lumber. We had not been able to see what was inside. Mr. Wolff said she was sound and seaworthy all over."

[2] This was not denied by Mr. Wolff. However, whatever was said by Mr. Wolff on this occasion could not be considered an expressed warranty, for the sale was consummated by the exchange of the above letters, and the parties were obligated to the contract there made. No representations made after that date as to the soundness or seaworthiness of the vessel would constitute an expressed warranty, for there was no new consideration. A contract of warranty requires a consideration. The consideration which supports this contract of sale was determined and agreed upon by the parties on March 4th. Any further or new warranty would require a separate and sufficient consideration. Nor could Mr. Stoddard, an independent broker by anything that he said, commit the defendant to an expressed warranty, for he had no such implied or apparent authority. Smith v. Tracy, 36 N. Y. 79; Crist v. Turner, 175 App. Div. 664, 161 N. Y. Supp. 856.

[3] But the plaintiff in error contends that there was an implied warranty. Although this contention is not pleaded, we will examine it. The plaintiff in error pleads an expressed representation. A surveyor, at the request of the plaintiff in error, examined the vessel and made a formal report of her condition before its purchase. He pronounced her seaworthy, and, although the vessel still had lumber in her hold, ample opportunity was afforded, either for further examination or some insistence upon a warranty. This was not done, and, after the report of the surveyor, the contract of sale was made. The rule of caveat emptor applies to the sale of a vessel under these circumstances and in the absence of an expressed warranty.

In Barnard v. Kellogg, 10 Wall. 383, 19 L. Ed. 987, the court said:

"No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of caveat emptor applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because, if the purchaser distrusts his judgment, he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect, and declines to do it, he takes upon himself the risk that the article is merchantable; and he cannot relieve himself and charge the seller, on the ground that the examination will occupy time and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent. Of such universal acceptance is the doctrine of caveat emptor in this country that the courts of all the states in the Union where the common law prevails, with one exception (South Carolina), sanction it."

In Barr v. Gibson, 3 M. & W. 390, where a ship was sold without an expressed warranty, it was held that there was no implied warranty. There the court said:

"The simple bargain and sale, therefore, of the ship, does not imply any contract that it is then seaworthy or in a serviceable condition."

In Sanford & Brooks Co. v. Columbia Dredging Co., 177 Fed. 882, 101 C. C. A. 96, the court said:

"If the scows had been sold outright on May 23, 1904, after the respondents had full opportunity to discover their condition, it could scarcely be contended that the respondents would not be bound to pay the purchase price agreed upon, whatever defects might have been subsequently discovered therein. The rule of caveat emptor applies to the sales of ships as in the sales of other personal property. 1 Parsons on Admiralty, 86."

Nor is this result changed by reason of chapter 571 of the Laws of 1911 (New York State Personal Property Law). Section 96 thereof provides that, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

It is doubted whether a boat can be classified within the term "goods" as used in the statute, but here the buyer did not rely on the seller's skill or judgment, but, as above stated, made an independent examination of the boat. We think it was unnecessary for the District Judge to submit the questions to the jury, as there was neither expressed nor implied warranty in this contract of sale. Therefore the error in the admission of testimony was harmless.

The result below is right, and the judgment is affirmed.

In re FOUR PACKAGES CUT DIAMONDS.

GOLDSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 61.

CUSTOMS DUTIES ⊂=130—VIOLATION OF CUSTOMS LAWS—FORFEITURES.

Under Tariff Act, § III, par. H, merchandise attempted to be introduced into the commerce of the United States upon false and fraudulent invoices is subject to forfeiture, although the fraud consists in fraudulent undervaluation by the consignor in a foreign country and sending by registered mail, and although the consignee or owner in this country was innocent.

In Error to the District Court of the United States for the Southern District of New York.

Libel by the United States against Four Packages of Cut Diamonds; Max Goldstein, claimant. From a judgment of forfeiture, claimant brings error. Affirmed.

For opinion below, see 247 Fed. 354.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Crim & Wemple, of New York City (William L. Wemple, of New York City, of counsel), for plaintiff in error.

Francis G. Caffey, U. S. Atty., and John E. Walker, Asst. U. S. Atty., both of New York City, for the United States.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The United States filed a libel of information, asking for the condemnation of four packages of diamonds liable to custom duties, imported by Max Goldstein from the republic of Cuba, first, on the ground that they had been imported in sealed packages by registered mail, contrary to the provisions of the Postal Convention dated June 16, 1903, between the United States and Cuba, and the Universal Postal Convention dated May 26, 1906; second, on the ground that they had been fraudulently undervalued by the consignor in the consular invoice at Havana, Cuba. The four libels were by consent of counsel consolidated, and, both parties having moved for the direction of a verdict, Judge Manton directed a verdict of forfeiture in favor of the government.

We will take up the second ground of forfeiture, which applies to all the packages, because, if it is good, there will be no need of considering the first, which applies only to three of the packages.

The information charges Goldstein as importer, but the government at the trial exonerated him from any charge of fraud. This leaves the question whether what was done by the consignor abroad so tainted the goods themselves as to subject them to forfeiture. Judge Manton has found as a fact that Boyer, the consignor at Havana, who made the consular invoice, fraudulently undervalued the diamonds, which finding is binding on us. The Supreme Court held in United States v. Twenty-Five Packages of Panama Hats, 231 U. S. 358, 34 Sup. Ct. 63, 58 L. Ed. 267, that the purpose of the Tariff Act of August 5, 1909, 36 Stat. 11, 97, c. 6, was to make acts committed abroad by persons beyond the jurisdiction of the court for the purpose of defrauding the customs a ground of forfeiture of the goods, even if the consignee or owner here were innocent. Mr. Justice Lamar said:

"In order to close these loopholes and to make the act more effective, Congress, on August 5, 1909 (36 Stat. 11, 97), changed the law so as to increase the number of persons whose fraud should be punished. It also enlarged the scope of conduct for which the goods should be forfeited. Instead of punishing only for the fraud of the 'owner, importer, consignee and other persons,' as under the act of 1890, provision was made for forfeiture for fraud of the 'consignor or seller.' Instead of punishing only for entering or attempting to enter on a fraudulent invoice, it punished an attempt by such means 'to introduce any imported merchandise into the commerce of the United States.' This latter phrase necessarily included more than an attempt to enter; otherwise, the amendment was inoperative against the consignor against whom it was specially aimed, for he does not, as such, make the declaration, sign the documents, or take any steps in entering or attempting to enter the goods. When he makes the false invoice in a foreign country, there is no extraterritorial operation of the statute whereby he can be criminally punished for his fraud. But when the consignor made the fraudulent undervaluation in the foreign country, and on such false invoice the goods were shipped, and arrived consigned to a merchant in New York, the merchandise was within the protection and subject to the penalties of the commercial

regulations of this country, even though the consignor was beyond the seas and outside the court's jurisdiction."

Section III, par. H, of the present tariff act of October 3, 1913 (38 Stat. 183, c. 16 [Comp. St. § 5526]), under which these libels were filed, indicates the same intention even more strongly:

"H. That if any consignor, seller, owner, importer, consignee, agent, or other person or persons shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall make any false statement in the declarations provided for in paragraph F without reasonable cause to believe the truth of such statement, or shall aid or procure the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, or shall be guilty of any willful act or omission by means whereof the United States shall be or may be deprived of the lawful duties or any portion thereof, accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates. That the arrival within the territorial limits of the United States of any merchandise consigned for sale and remaining the property of the shipper or consignor, and the acceptance of a false or fraudulent invoice thereof by the consignee or the agent of the consignor, or the existence of any other facts constituting an attempted fraud, shall be deemed, for the purposes of this paragraph, to be an attempt to enter such merchandise notwithstanding no actual entry has been made or offered."

But paragraph I offers a locus pœnitentiæ within which the consular invoice may be amended so as to state the true value of the goods, the material provisions of which are as follows:

"I. That the owner, consignee, or agent of any imported merchandise may, at the time when he shall make entry of such merchandise, but not after either the invoice or the merchandise has come under the observation of the appraiser, make such addition in the entry to or such deduction from the cost or value given in the invoice or pro forma invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise or lower the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise subject to an ad valorem duty or a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of 1 per centum of the total appraised value thereof for each 1 per centum that such appraised value exceeds the value declared in the entry. * * *" Comp. St. § 5527.

United States v. One Case, 234 Fed. 856, 148 C. C. A. 454, is an instance in which we held forfeiture to have been properly denied because of the above provision. Unfortunately in the present case Gold-

stein, the owner of the diamonds, cannot get the benefit of this section, because no correction was made in the consular invoice before entering the goods, they never having been entered at all, and because there is no evidence that any correction was made before "the invoice or the merchandise had come under the observation of the appraiser." The consignee, Jacobsen, notified the special agent at the custom house that there was a registered letter addressed to him containing dutiable goods on which duties had not been paid. This letter, inclosing the bill of goods and the consular invoice, was obtained from the post office by Jacobsen's custom house brokers in the presence of a special agent of the United States and immediately opened and turned over to the United States appraiser. The purpose of Congress is perfectly clear and must be carried out, even if, as in this case, innocent persons suffer great hardships.

The judgment is affirmed.

CITY OF NEW YORK v. SELDEN.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 89.

MUNICIPAL CORPORATIONS ⊂=374(4)—CONTRACTS—ACTION FOR BREACH—EVIDENCE—DAMAGES.

In an action by a contractor for public work, for breach of the contract which rendered the work more expensive, defendant may show that by reason of subcontracting the work plaintiff sustained no actual damages, but that the loss, if any, fell upon the subcontractors.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Stephen L. Selden, receiver of the Elmore & Hamilton Contracting Company, against the City of New York. Judgment for plaintiff, and defendant brings error. Reversed.

William P. Burr, Corp. Counsel, of New York City (Terence Farley, of New York City, of counsel), for plaintiff in error.

Francis L. Kohlman, of New York City (Henry Herbermann and Frank A. Gaynor, both of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On December 28, 1909, the Elmore & Hamilton Contracting Company entered into a contract with the city of New York (known as contract No. 53) for the construction of Grassy Sprain cut and cover, Platt avenue siphon, and portions of Ardsley cut and cover in the White Plains division of the Catskill aqueduct in the town of Greenburgh, city of Yonkers, Westchester county, N. Y.

In March, 1911, permanent receivers of the Elmore & Hamilton Contracting Company were appointed, one of whom resigned, and

the plaintiff, as sole receiver, instituted this action for breach of contract. The complaint alleged two causes of action, but we are concerned with the second only. In substance it charges, and the proof of the plaintiff below tended to establish, that the defendant below granted a permit to H. S. Kerbaugh, Incorporated, to construct a high-tension transmission line along the line of the aqueduct and along the right of way and property where contract No. 53 was being performed, and that in the fall of 1911, and in 1912 and 1913, the defendant below permitted and caused huge steel towers to be erected and maintained some 500 feet apart, as part of this transmission line, which interfered with, delayed, and made more costly the performance of contract No. 53, all of which is claimed to be in violation of the terms of the contract, and to the damage of the plaintiff below.

The complaint does not allege that the plaintiff below performed the contract No. 53, and the fact appears that under a written contract dated June 5, 1911, receivers of the Elmore & Hamilton Contracting Company sublet the performance and completion of contract No. 53 to George Sergeant, Jr., and John C. Sullivan, and in March, 1912, Sergeant and Sullivan resublet that part of the work embraced in contract No. 53, described as the "south end" to Cenedella & Co. The construction work provided for by the contract here in suit was actually performed by the subcontractors Sergeant and Sullivan and Cenedella & Co. However, at no time did the defendant below release the Elmore & Hamilton Contracting Company, nor did it recognize the subcontractors as substitutes for the original contractor. Payments for the work, as it progressed, were made direct to the receivers, who in turn paid over the moneys to the subcontractors.

Upon the issue of breach of contract, in making the performance more difficult and expensive, and interfering with the rights of the contractors, and preventing the proper and prompt performance thereof, there was sufficient evidence to warrant the District Judge submitting those questions to the jury. The jury, by its verdict, has assessed the damages at $14,638.36. While the evidence indicates a very substantial interference with the performance of the work, still the defendant below contested this issue of fact. As to this finding of a breach, we would be concluded by the jury's finding, and would be obliged to affirm the judgment, but for the error now referred to.

At the trial the defendant below offered in evidence the contract made by the receivers with Sergeant and Sullivan, pursuant to which the subcontractors agreed to do the work at the prices fixed in accordance with the specifications set forth in contract No. 53, and the receivers agreed to pay to Sergeant and Sullivan the sums so specified as and when received from the city of New York, and the retained percentage after the completion of the work, with the further provision that the receivers should have certain percentages of Sergeant and Sullivan's net profits in case of a net profit of $50,000. There was no claim in the complaint, nor does the evidence establish, that there was ever a net profit of more than $50,000. The defendant below also offered in evidence the contract made by Sergeant and Sullivan to Cenedella & Co., wherein that firm agreed to do the work

described as the "south end" at the prices fixed and specified in the former's subcontract. Both contracts were excluded and exception taken.

The action is not based upon the theory, nor is there any evidence indicating, that by reason of the interference with the performance of the contract, either of the subcontractors, because of their loss thus sustained, endeavored to collect, or succeeded in collecting, their loss from the receivers of the Elmore & Hamilton Contracting Company. The theory of action of the plaintiff below was that the receivers sustained the damages. Even though the defendant below be guilty of a breach of contract, as claimed, it may nevertheless show any fact tending to prove that the plaintiff below did not suffer any actual damages thereby. First National Bank v. Fourth National Bank, 77 N. Y. 328, 33 Am. Rep. 618.

The plaintiff below frankly concedes that he did not do the work, but that it was performed through the subcontractors, and the difficulties and hindrances to performance caused by the breach of the defendant below were an interference and loss to the subcontractors, but insists upon his theory that he may maintain this action for the benefit of the subcontractors, intending to divide the proceeds of the litigation so obtained from the action, pursuant to the terms of the subcontracts. This he cannot do.

While the defendant below did not recognize the subcontractors, and privity of contract does not exist, the defendant below may establish in its defense, the absence of actual loss or damage to the plaintiff below. Dunn v. Uvalde Contracting Co., 175 N. Y. 214, 67 N. E. 439. It was most important for the defendant below, if it could, to establish the defense that no damages had been sustained by the plaintiff below, and it should have been permitted to establish the existence and terms of the contracts subletting the work. It was error for the court to exclude them. The District Judge not only excluded the contract, but likewise excluded testimony sought to be elicited from the witnesses tending to establish the existence of the contracts.

By the contracts under which Cenedella & Co. performed its work on the "south end," there was no provision permitting Sergeant and Sullivan to share in the profits. Any loss sustained because of the breach of contract in the performance of this portion of the work was a loss to Cenedella & Co. alone. There is no covenant allowing the plaintiff below to share in their profit, and there is a covenant requiring Cenedella & Co. to give a $50,000 bond conditioned for the faithful performance of the contract. It is therefore made to appear from the contract that by no chance could the plaintiff below have suffered loss in the interference or hindrance to the performance of this portion of the work. It does not appear that the plaintiff below reimbursed the subcontractors for any of the damages they may have sustained, nor does it appear that the plaintiff below claims by assignment the loss sustained by Sergeant and Sullivan and Cenedella & Co.

We conclude that there was an absence of proof establishing that the plaintiff below has sustained damages.

For these reasons, the judgment will be reversed.

ELLIS ICE & COAL CO. v. CARBONDALE MACH. CO.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1919.)

No. 3234.

1. SALES ⟸354(1)—ACTION FOR PURCHASE PRICE—DEFENSES—BREACH OF CONTRACT.

The plea in an action on a note given for part of the price of an ice machine *held* to sufficiently allege a breach of an express provision of the contract requiring plaintiff to replace free of charge parts which proved to have latent defects within one year.

2. SALES ⟸288(2)—ACTION FOR PURCHASE PRICE—BREACH OF WARRANTY.

In case of an express warranty that the property sold will be of a particular kind and quality, the purchaser has a right to rely on the warranty, and may plead partial failure of consideration growing out of defects discovered after acceptance, even though they would have been apparent on examination before delivery.

In Error to the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Action at law by the Carbondale Machine Company against the Ellis Ice & Coal Company. Judgment for plaintiff, and defendant brings error. Reversed.

Archibald Blackshear, E. H. Callaway, and Wm. M. Howard, all of Augusta, Ga., for plaintiff in error.

Shepard Bryan, of Atlanta, Ga., Wm. H. Barrett, of Augusta, Ga., and Lee M. Jordan, of Atlanta, Ga. (Barrett & Hull, of Augusta, Ga., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

WALKER, Circuit Judge. [1] This was an action by the defendant in error, Carbondale Machine Company (hereinafter referred to as the plaintiff), against the plaintiff in error, Ellis Ice & Coal Company (hereinafter referred to as the defendant), on a note given by the latter, dated December 11, 1915, for the sum of $4,333 and interest, payable to the order of the former 120 days after date. An amended plea of the defendant averred the following state of facts:

The consideration of the note sued on is a part of the purchase price of $14,000 of an ice-manufacturing machine sold by the plaintiff to the defendant by a written contract entered into between the parties on the 15th day of April, 1915, $9,667 of the purchase price having already been paid. By clause 3 of the contract the plaintiff agreed—

"to deliver to you [the defendant] f. o. b. Carbondale, free of charge, any parts which may prove to have latent defects within one year from date of shipment (provided that you use brine and ammonia of a quality and make recommended by us), and our liability is limited to the furnishing of such parts."

Another provision was the following:

"To construct the plant in all its parts in a thorough and workmanlike manner, using the best materials of their several kinds."

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The specifications called for:

"Necessary ammonia connections, of extra heavy wrought pipe and special fittings, to connect the parts. Full weight wrought pipe, unless otherwise specified, will be used in construction of machine parts."

The defendant agreed:

"To give us [plaintiff] an acceptance in writing when we have complied with the conditions in the contract and have successfully operated the plant for ten days. This acceptance shall be deemed a waiver of all claims, etc., and thereafter we shall be liable only under clause 3."

"The plaintiff failed to deliver to the defendant and to install in its ice plant the necessary ammonia connections of extra heavy wrought pipe and special fittings to connect the parts, and failed to furnish full weight wrought pipe in the construction of the machine parts of said plant, and failed to construct the plant in all its parts in a thorough and workmanlike manner, using the best materials of the several kinds, in that the plaintiff furnished to the defendant and installed in its said ice plant ordinary or common fittings, which did not properly connect the various parts, the said fittings not being special fittings, in that they were not recessed, but were screwed fittings, and the said fittings were in no sense special fittings, the same not being recessed or backed up, and the said fittings were not of the best material of the kind specified, nor the best of the kind in general use for connecting the various parts of said ice machine, and the defendant avers that the fittings so furnished and installed in said ice plant constituted latent defects in said ice machine, and that defendant did not know that they were ordinary or common screwed fittings until on or about the 24th day of February, 1916, long after the defendant had executed the promissory note sued upon by the plaintiff, and long after the defendant had paid the plaintiff the sum of $9,667, as hereinabove stated."

By a letter of date March 9, 1916, the defendant notified the plaintiff—

"that you did not install in our plant the kind of pipe your contract calls for," etc., and "the plaintiff sent one Botchford to inspect the said pipes and fittings, and on or about the 20th day of March, 1916, this defendant pointed out to the said Botchford, the agent and representative of the plaintiff, the said defects in said plants, and the defendant avers that it never accepted the said materials so furnished to it by the plaintiff, and that the plaintiff was on the ——— day of March, 1916, given full and complete notice of defendant's rejection of the said pipes and fittings installed in plant No. 2. * * * The plaintiff failed to remedy the defects in said pipe and said fittings so furnished to this defendant, although this defendant gave the plaintiff notice of the said defects within one year from the date of the shipment of the said materials so furnished, and did use the brine and ammonia of the quality and make recommended by the plaintiff. * * * By reason of the failure of the plaintiff to furnish necessary ammonia connections of extra heavy wrought pipe and special fittings to connect the parts, as hereinabove set out, and by reason of the installation in the said ice machine of common or ordinary fittings to connect the parts, the consideration has failed in the sum of $453.77, in that it will cost the defendant the sum of $453.77 to remove the said fittings so furnished and installed in the said plant by the plaintiff, and in that it will cost the defendant the sum of $453.77 to obtain special fittings to connect the various parts of the kind of material purchased of plaintiff and that plaintiff contracted to furnish the defendant."

The court sustained a demurrer to the above-mentioned plea. It also sustained a demurrer to a plea based upon an alleged noncompliance by the plaintiff with requirements of a contract entered into by the parties in 1912 for another ice-manufacturing machine, which was referred to as plaintiff's plant No. 1. What is relied on as a

ground of reversal is the action of the court in sustaining the demurrer to the first-mentioned plea; it being conceded by the counsel for the plaintiff in error that the demurrer to the other plea was properly sustained.

In the argument in behalf of the defendant in error it was suggested that the first-mentioned plea was subject to demurrer on the grounds:

(1) That the defendant waived any right of action or defense by accepting the machinery after trial;

(2) That the allegations of latent defects in plant No. 2 were mere conclusions; and

(3) That plaintiff was not notified of any latent defect in plant No. 2 within one year from date of shipment, and did not within that time make demand for any part which proved to have a latent defect.

The averments of the plea in question negative the conclusion that the defendant, by accepting plant No. 2 after trial, waived its right to have delivered by the plaintiff, f. o. b. Carbondale, free of charge, any parts which may prove to have latent defects within one year from date of shipment. The averments of the plea were sufficiently definite and specific in showing what defects were complained of, that they were latent, and that the defendant was duly notified of them within one year from the date of shipment.

[2] The averments of the plea in question show a breach of a warranty of parts of the machinery sold, and that the defendant has been damaged by the breach alleged.

"After acceptance of goods purchased, the presumption is that they are of the quality ordered, and the burden is on the buyer to prove the contrary. Partial payment, with knowledge of the defective condition, will not estop the buyer from pleading partial failure of consideration." Code of Georgia 1911, § 4137.

If under the terms of the contract any notice of the alleged latent defects was required to be given after they were discovered, the averments of the plea showed that the plaintiff had notice within the time within which such defects were to be made good. Beasley v. Huyett & Smith Co., 92 Ga. 273, 18 S. E. 420. In case of an express warranty that the property sold will be of a particular kind and quality, the purchaser has a right to rely on the warranty, and may plead partial failure of consideration growing out of defects discovered after acceptance, even though they would have become apparent upon an examination before delivery. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143. The conclusion is that the plea in question sufficiently averred a partial failure of the consideration of the note sued on, and that the demurrer to that plea was improperly sustained.

Because of that error the judgment is reversed.

KWOCK JAN FAT et al. v. WHITE, Commissioner of Immigration.*

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

No. 3146.

ALIENS ⟸32(9)—EXCLUSION OF CHINESE—FAIRNESS OF HEARING.

That an immigration commissioner at the time of rejecting a Chinese applicant for admission had in his possession a report of an inspector containing material statements made to him by an undisclosed witness, which report was not shown to applicant or his attorney, *held* not sufficient to invalidate the finding, where it appears that the commissioner did not consider the report.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Benjamin F. Bledsoe, Judge.

Habeas corpus by Kwock Jan Fat and Tom Ying Shee against Edward White, Commissioner of Immigration for the Port of San Francisco. Writ denied, and petitioners appeal. Affirmed.

Dion R. Holm, of San Francisco, Cal., for appellants.

Annette Abbott Adams, U. S. Atty., and C. F. Tramutolo, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. On June 20, 1915, the appellant Kwock Jan Fat, on application to the commissioner of immigration for the Port of San Francisco, secured a preinvestigation of his status as an American citizen; he being about to depart for China. He claimed to be a son of Tuck Lee, who was born at Monterey, Cal. On June 7, 1917, he returned to the United States at the Port of San Francisco, and upon testimony taken and a hearing had he was denied admission on the ground that he was not the son of Tuck Lee, and was not an American citizen, but that his true name was Leu Suey Chong. On appeal to the Secretary of Labor the decision was affirmed. Application was made to the court below for a writ of habeas corpus, the petition alleging that the hearing before the commissioner was unfair, in that in the record of the testimony taken no mention was made of the fact that three white witnesses for the applicant, Michaelis, Pugh, and Ortings, when confronted by the applicant recognized him, and were recognized by him, and in the further fact that in the report of Wilkinson, immigrant inspector, to the commissioner, the inspector stated that he had interviewed a person who desired that his identity be not disclosed, but who had given important information against the applicant concerning the issue whether or not the latter was the son of Tuck Lee. The court below denied the writ, and the questions so presented are brought to this court by appeal.

The fact that, when the applicant was confronted by three of the witnesses who were brought from Monterey to testify that he was the son of Tuck Lee, there was mutual recognition, was an important circumstance and should properly have been noted in the record of

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*Rehearing denied February 10, 1919.

the testimony. It appears, however, that, when the attention of the commissioner was directed to that omission, he wrote to the applicant's counsel stating that the witnesses when confronted with the appellant immediately recognized and identified him as the person whom they knew as Kwock Jan Fat, and that the appellant was equally prompt in his recognition of said witnesses, and adding:

"While I was advised of this incident and gave it full consideration in arriving at my decision, it was not made of record in connection with the statements taken from the witnesses. Copy of this letter will be placed with the record, however, and the fact that there was mutual recognition between said witnesses and the applicant will thus be available for the consideration of the secretary upon appeal."

The record shows that this letter was brought to the attention of the secretary on the appeal. This was clearly sufficient to give the applicant the advantage of the facts.

A more serious question is raised by the allegation that evidence was considered by the appellee which counsel for the appellant was not permitted to see. Wilkinson, immigration inspector, was sent to Monterey to investigate the case. He interviewed a person who gave evidence only with the understanding that his name was to be kept secret. The inspector's report states:

"This witness was intimately associated with the inhabitants of Chinatown of Pacific Grove, especially during the year 1902, and had occasion to visit the home of the applicant's alleged mother almost nightly during that year, under which circumstances said witness was in a position to have absolute knowledge as to the number and identity of the members of that family. While the witness was well acquainted with the applicant's three alleged sisters and knew their names and present whereabouts, it was stated most positively by the witness that there were no boys born to Tong Shee (applicant's alleged mother). Said witness was unable to identify the photographs of either Leu Suey Chong (the boy who was admitted at this port as the son of a merchant in 1909) or the photograph of the applicant (as it appears on his return certificate or in the group photographs of the Oakland class) as any one whom the witness had ever seen. As the applicant would have been about six years of age during the year of this witness' activity (1902), the above failure to recognize his photograph is very significant. After my first interview—on the afternoon of the 4th inst.—this witness inquired of an old Chinese resident of Pacific Grove and Monterey concerning the sons of Tuck Lee (applicant's alleged father), whereupon said Chinese stated that Tuck Lee had no sons and that the witness should have nothing to do with the case and should sign no affidavits in their behalf; that such action would involve the witness in trouble. * * * The above-mentioned witness was thoroughly conversant with the history of this family, and advised me concerning the daughter Quock Ah Oy, whose whereabouts is now unknown."

Counsel for the applicant demanded the right to see the affidavit of this undisclosed witness and was informed that no affidavit or record of the testimony of such witness was secured, that there was no evidence considered by the appellee in arriving at his decision in the case "which you have not been permitted to inspect," and that that portion of the inspector's report which was withheld contained nothing which was material to the issue. "As a matter of fact," wrote the appellee, "this inspector's report in no way influenced my decision." It is not true that the inspector's report contained nothing which was material to the issue. On the contrary, it was directly in point. In

Chew Hong Quong v. White, 249 Fed. 869, — C. C. A. —, we held that where the immigration authorities received and acted upon a confidential communication, the source and contents of which they did not disclose to the applicant or his attorneys so as to allow any rebuttal, and which communication was forwarded to the Department of Labor for its consideration, the hearing was unfair. But this is not such a case. Here it appears that the communication was not considered or relied upon. It should not be held that the mere receipt of an anonymous communication, which is not made the basis of the commissioner's decision and does not influence it, renders the hearing unfair.

The judgment is affirmed.

THE BERN. THE NATIONAL. APPEAL OF MARYLAND DREDGING & CONTRACTING CO. et al.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 84.

1. COLLISION ⊂⊃71(3)—LIABILITY—DREDGE AT ANCHOR.
Where a dredge at the time of collision was anchored at such a point as to obstruct navigation and a canal boat in tow of a tug collided with it, *held*, that the dredge was solely at fault and liable for full damages.

2. COLLISION ⊂⊃71(2)—DREDGE AT ANCHOR—FAULT OF TOWING TUG.
A tug in charge of a tow of canal boats which was assisted by other tugs *held* not at fault in failing to send out a scout tug to ascertain the whereabouts of a dredge which was improperly anchored while not in operation at a point impeding navigation; and hence, where one of the canal boats collided with the dredge, the tug was not liable.

Appeal from the District Court of the United States for the Eastern District of New York.

Libel by Theodore Miller against the steam tug Bern, her engines, etc., claimed by the Philadelphia & Reading Railway Company, which brought in Atlantic Gulf & Pacific Company and the dredge National, her engines, etc., claimed by the Maryland Dredging & Contracting Company. From a decree against the dredge National for full damage and dismissing the libel against the steam tug Bern, the Maryland Dredging Company and the Atlantic Gulf & Pacific Company appeal. Affirmed.

Russell H. Robbins, of New York City (Alfred C. Coxe, Jr., of New York City, of counsel), for appellants.

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for the Bern.

Park & Mattison, of New York City, for libelant.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Theodore Miller, owner of the Helen A. Miller and bailee of a cargo of coal thereon, filed this libel against

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the steam tug Bern complaining that, through the negligent operation of the Bern while conducting a tow of canal boats through the Kills, the Helen A. Miller, which was the outside starboard boat in the third tier of the tow, was on or about the 12th of March, 1915, brought into collision with the dredge National, owned by the Maryland Dredging & Contracting Company, anchored in the Kills below the Baltimore & Ohio bridge, and was sunk.

Under the fifty-ninth rule (29 Sup. Ct. xlvi), the owner and claimant of the Bern, the Philadelphia & Reading Railway Company, brought into the cause the dredge National. The Atlantic, Gulf & Pacific Company had a contract with the United States government for dredging work in the Kills, and the dredge National was at work upon this contract with this company. The day before March 11, 1915, the tow, consisting of 21 coal barges, was made up at Port Reading bound for Mott Haven. Each of these barges was 100 feet long and from 20 to 25 feet beam. They were arranged four abreast of one another in each of the first three tiers, and three in each of the remaining three tiers. As thus arranged, they were towed on two hawsers. The Bern, a seagoing tug, drawing 13 feet of water, had two tugs assisting, the Ashbourne and the Pencoyd, the latter on the starboard side of the fourth tier directly astern of the Miller, the former in the second tier from the rear on the same side. With a flood tide and clear weather, she intended to pass through the Staten Island opening in the bridge, and the first the master of the Bern saw of the dredge was when he was navigating this side of Buckwheat Island. The dredge had ceased working the evening before and was moved about 25 feet outside of the dredged channel and about 300 feet below the bridge. Here there was a set of the tide from the Jersey shore over to the Staten Island side, requiring the two helper tugs to be on the starboard side so as to overcome this set and straighten the tow so that it could safely pass through the 200-foot space between the center abutment of the bridge and the Staten Island abutment. The National advanced no good reason why it was located as indicated above. Concededly, navigation through the Kills below the bridge requires great care and skill, and it was a most dangerous spot to have permitted the dredge to remain, when there was no occasion therefor. There was abundant room for the dredge to move nearer the Staten Island shore or closer to the abutment so as to give the tow additional room to maneuver.

The master of the tug L'Hommedieu testified that, on the evening before, he moved the dredge out of the channel, putting it behind the Staten Island abutment, and did likewise on several occasions, stating that he had no trouble in so doing.

[1] We agree with the District Judge that the dredge at the time of the collision was in an uncalled-for, undesirable, and dangerous location, and but for its presence there would have been no accident. While the National, because of the contract for dredging, had some rights in the Kills when in operation, still, conceding, as appellant does, that the dredge was not actually working on the night in question, we are obliged to hold that it was not necessary for her to lay up for the night where she did, when there was another place with plenty of

water where she might move to and make clear the path of passing tows.

The authorities cited by appellant were both in this court and are distinguishable.

In Northrup v. Philadelphia & R. Ry. Co. et al., 234 Fed. 264, 148 C. C. A. 166, a collision occurred in the Arthur Kill between a canal boat forming part of a tow of 15 boats in tiers of three, and a scow alongside of a dredge engaged in deepening the channel. There, one of the towing tugs was held at fault in directing the casting off of the lines between the rear starboard boat which was to be taken out of the tow and the boat ahead of it, but continuing to push at the stern of the latter boat, which forced the latter boat out of the course of the tow and in collision with the scow. The dredge was held not in fault as obstructing the channel, the court saying:

"The dredge was engaged under the supervision of the government in dredging the waters of the Kill von Kull at a point where a channel 400 feet wide had to be deepened. The channel between the dredge and the New Jersey shore was 450 feet; and between the side of the scow next to the dredge and receiving the dredged material and the shore it was 415 feet. The contract between the dredging company and the government expressly requires the contractor to conduct the work in such a manner as to obstruct navigation as little as possible, and, in case the contractor's plant so obstructs the channel as to impede the passage of vessels, it must promptly be so moved as to afford a practicable passage on the approach of any vessel."

But it appeared that the dredge was engaged in work on the night and at the time of the collision.

In The Wyomissing, 232 Fed. 451, 146 C. C. A. 445, where there was a collision under somewhat similar facts as existed in the Northrup Case, above, it appeared that there was an unobstructed channel 400 feet wide through which the tow could have passed safely if properly navigated. The dredge was actually engaged at work, and it was held that it was not at fault in failing to get out of the way of the passing tow.

In the present case, the dredge was not engaged in work, and, in the location it was at the time of the collision, those in charge did not exercise a due regard for the rights of tows in passing; in other words, if it was placed nearer the Staten Island shore in back of the abutment, no damage would have occurred.

[2] It appears that there was an agreement between the parties requiring the sending ahead of scout tugs only when the dredge was in operation at night. But under the circumstances disclosed here, we do not think the Bern was required, either under this agreement or in the exercise of due diligence, to send ahead a scout tug.

Decree affirmed.

COLLIER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. November 6, 1918.)

No. 3171.

1. CONSPIRACY ⟸27—OFFENSE AGAINST UNITED STATES—CRIMINAL RESPONSIBILITY—OVERT ACT.
It is enough that "any act" of one of the conspirators "to effect the object of the conspiracy," by Criminal Code, § 37 (Comp. St. 1916, § 10201), made an element of the offense of conspiracy against the United States, be done with the purpose of putting the unlawful agreement into effect, though it have no tendency to accomplish its object.

2. WITNESSES ⟸236(4)—NOTICE OF PURPOSE OF QUESTION.
Where affirmative answer to question to codefendant, who had admittedly pleaded guilty and testified for prosecution under promise of leniency, would not necessarily imply more than that before pleading guilty he had made suggestions to codefendants and their counsel as to selection of jury, sustaining objection to question, in absence of notice of expectation of eliciting admission of his co-operation with the prosecution in selecting jury, was not error.

In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Tom Collier was convicted of conspiracy to rob the mail, and brings error. Affirmed.

Erle Pettus, of Birmingham, Ala., for plaintiff in error.

Robert N. Bell, U. S. Atty., and Ralph W. Quinn, Asst. U. S. Atty., both of Birmingham, Ala.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

WALKER, Circuit Judge. [1] The plaintiff in error was convicted on the second and third counts of an indictment charging that he and four other named persons conspired to rob, steal, and purloin mail matter in a railway postal car used by the post office establishment of the United States for the conveyance of mail matter and attached to a designated train, and that they committed acts for the purpose of effecting the object of the alleged conspiracy; the overt act alleged in the second count being the cutting of a number of telegraph wires at or near the place at which it was conspired to commit the robbery, and the overt act alleged in the third count being the boarding by the defendants of an automobile and going in it to or near the place at which the offense was to be committed. A demurrer to the indictment raised the objection that it failed to show that the overt acts alleged were calculated to effect, or aid in effecting, the object of the conspiracy. The action of the court in overruling that demurrer is assigned as error, as is also the giving of the following part of its charge to the jury, which was excepted to:

"The overt act might be one not really calculated to effect the object of a conspiracy; but if the party who does it believes it to be calculated to effect the object of the conspiracy, and does it for that purpose, while in fact it may not have that effect, yet it becomes an overt act, and fixes the guilt of all the conspirators."

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The statute makes the doing by one or more of the alleged conspirators of "any act to effect the object of the conspiracy" an element of the offense of conspiring to commit an offense against the United States. Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1916, § 10201). It is settled that the gist of the offense is the conspiracy, and that the provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus pœnitentiæ, so that before the act done one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. To complete the crime denounced by the statute there must be some action in addition to the mental one of jointly agreeing or assenting to participate in the commission of the crime. Nothing in the language of the statute indicates an intention to require that that additional action be calculated or have a tendency to accomplish the object of the conspiracy. It is enough if it is done with the purpose or intention of putting the unlawful agreement into operation, whether it is or is not effective towards that end. Gantt v. United States, 108 Fed. 61, 47 C. C. A. 210; United States v. Donau, Fed. Cas. No. 14,983. There was no error in the above-mentioned rulings.

[2] It appears from the bill of exceptions that before any evidence was introduced by the government a nolle prosequi of the case against one of the defendants, Oscar Linn, was entered, and that another defendant, Jim Raper, pleaded guilty to the charge contained in the indictment. The latter was examined as a witness for the prosecution. In the course of his cross-examination the defendants propounded the following question:

"Isn't it a fact that you made certain suggestions about striking off certain people on the jury, and keeping others on the jury?"

An exception was reserved to the action of the court in sustaining the government's objection to this question. The relation of the witness to the case had been fully disclosed to the jury. He had already admitted that, before pleading guilty and testifying, he was advised by his attorneys that they had an agreement or assurance from the government authorities that, in the event he pleaded guilty and went on the stand for the government, he would get a light sentence. It is plain that, if the witness had been permitted to answer the question, no answer he might have made could have done more than furnish cumulative evidence of the witness' co-operation with the prosecution, a fact already apparent. But the question was not so framed as to apprise the court that it was expected to elicit an admission by the witness that he made any suggestion to the prosecution in regard to the selection of the jury. An affirmative answer to the question would not necessarily have implied anything more than an admission by the witness that, before pleading guilty and testifying, he had made suggestions to his codefendants or their counsel in regard to the selection of the jury. The court is not chargeable with error in sustaining the objection to the question, in the absence of notice to it that an admission by the witness of his co-

operation with the prosecution in selecting the jury was expected to be elicited.

Other rulings relied on for a reversal are not such as call for discussion. We have discovered no reversible error in the record.

The judgment is affirmed.

ALDRICH v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 85.

1. TOWAGE ⟹4—DUTY OF CARE AND SKILL BY TOWING VESSEL.
One undertaking towage service is not an insurer, nor bound to exercise the highest degree of care and skill, but only such reasonable care and skill as would be exercised by a prudent navigator in a similar service.

2. TOWAGE ⟹15(2)—INJURY TO TOW—EVIDENCE OF NEGLIGENCE.
The burden is on one who asserts negligence to prove it, and the mere fact that a barge has been damaged while in tow does not raise a presumption that the tug was in fault.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by William W. Aldrich against the Pennsylvania Railroad Company. Decree for respondent, and libelant appeals. Affirmed.

The court below dismissed the libel filed against the respondent for damages to the barge William F. Monk, alleged to have been sustained through negligent towage. The libelant appeals.

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The William F. Monk was taken in tow by appellee's tug at Pier B. Jersey City, destined for the stake boat near Liberty Island, on the morning of April 4, 1916. There the Monk was the port outside boat in the next to the last tier, and in the last tier there were but three boats. There was no boat tailing astern of the Monk. After the tow proceeded, at about 3 o'clock in the morning, the master of the Monk went to bed. At this time the appellant and the master of the Monk testified that the barge was in good condition and undamaged at the place where it was subsequently discovered, it had met with violence. The tow was tied up at the Iron Dock at Elizabethport, as was the practice, to allow the loaded tugs bound north to pass. The first information given by the witnesses as to the evidence of a collision was given by the master of the Monk, who says that at 8 o'clock the next morning, upon coming on

deck, his attention was called to a very considerable hole—"large enough to walk in and out"—on the port side about 3 or 4 feet from the stern; there six planks, running fore and aft, were broken. The barge was light and had about 10½ feet free board. The testimony is silent as to a collision of any character, and the master of the tugs which did the towing testified that during the course of navigation there was no collision or bumping of any character.

The appellant rests his case, asking to infer negligence upon the foregoing circumstances. He urges that, from the mere happening of an accident under these circumstances, a presumption of negligence arises, and casts upon the appellee the burden of demonstrating that it was not due to any failure of duty on its part, or that of its servants, or, at least, establishing that the accident was one of those unavoidable occurrences for which no one is to blame.

[1] While the general rule respecting the duty and liability of one undertaking towage services for another is that he is bound to exercise reasonable skill and care, such as a prudent navigator would exercise in similar service until it is accomplished, and he is responsible for any damage which may result to the tow as a result of the failure to perform the responsibilities of such an undertaking, he is not an insurer, and required to use the highest possible degree of skill or care. The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774; The Margaret, 94 U. S. 494, 24 L. Ed. 146; The J. P. Donaldson, 167 U. S. 599, 17 Sup. Ct. 951, 42 L. Ed. 292.

[2] The burden is on the one who asserts negligence to prove it, and the mere fact that a barge has been damaged while in tow does not raise the presumption that the tug has been at fault. The Winnie, 149 Fed. 725, 79 C. C. A. 431; The R. B. Little, 215 Fed. 87, 131 C. C. A. 395.

From the evidence in this record, including that of the appellant, it does not appear that the tug managed this tow with other than reasonable care and skill under all the circumstances. The appellant has not attempted to sustain the burden which is cast upon him of proving negligence in the performance of this duty assumed. No one seems to know, nor, indeed, do appellant's witnesses pretend to know, how this damage was caused. In the absence of some proof showing that the tug caused it, negligence cannot be presumed.

The master in charge of the Monk does not enlighten us as to the cause, and apparently there was no collision or blow to the barge during the night, which awakened him or any of the other barge masters who were in the tow. We are clear that the burden imposed upon the appellant has not been sustained.

Decree affirmed.

DOTHAN NAT. BANK v. JONES.

In re FOY & WILLIAMS.

(Circuit Court of Appeals, Fifth Circuit. November 6, 1918.)

No. 3191.

BANKRUPTCY ⇐467—APPEAL—REVIEW OF FINDINGS.

The finding of fact, on which apparently a referee's rejection of claim against bankrupt's estate, approved by District Court on review, was founded, not clearly being made to appear wrong, is binding on appeal.

Appeal from the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

In the matter of Foy & Williams, bankrupts. Claim of the Dothan National Bank, opposed by E. O. Jones, trustee, was rejected by the referee, which action was approved by the trial court, and claimant appeals. Affirmed.

Albert E. Pace, of Dothan, Ala., for appellant.

W. L. Lee, of Columbia, Ala., and Oscar L. Tompkins, of Dothan, Ala., for appellee.

Before WALKER, Circuit Judge, and EVANS, District Judge.

PER CURIAM. The action of the referee, approved on review by the trial court, in rejecting the claim presented by the appellant against the bankrupt estate of Foy & Williams, was fully sustained by one phase of the evidence adduced. To say the least, it is not clearly made to appear by the record that the finding of fact upon which apparently the rejection of the claim was based was wrong. The record does not show the commission of any error calling for a reversal of the decree appealed from.

That decree is affirmed.

BLUNT v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. July 24, 1918. On Petition for Rehearing, December 13, 1918.)

No. 2599.

1. CONSTITUTIONAL LAW ⇐70(3)—POWERS OF COURT—WISDOM OF LEGISLATION.

In case of a revenue law, it is beyond the province of the courts to inquire into its wisdom, justice, or efficiency, the motives that led to its enactment, or its incidental effect as a police measure.

2. INTERNAL REVENUE ⇐2—HARRISON NARCOTIC ACT—CONSTITUTIONALITY.

The provision of Harrison Act, § 2 (Comp. St. § 6287h), after providing that specified narcotic drugs shall be sold only on written order forms obtained from the Internal Revenue Department, that "it shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession," is unconstitutional, as not

within the taxing power of Congress, which includes no right to make any specific use of a tax-paid article unlawful.

3. POISONS ⊂=2—HARRISON NARCOTIC ACT—REGISTRATION OF PHYSICIANS AND DEALERS.

Rev. St. § 3236 (Comp. St. § 5959), providing that, whenever more than one pursuit or occupation subject to internal revenue tax are carried on in the same place by the same person, the tax shall be paid for each, requires a separate registration under Harrison Narcotic Act (Comp. St. §§ 6287g–6287q) by a physician who dispenses and is also a dealer in narcotic drugs, and payment of a separate tax for each; the same is also required by the regulations of the Commissioner of Internal Revenue.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Criminal prosecution by the United States against Arthur L. Blunt. Judgment of conviction, and defendant brings error. Reversed in part, and affirmed in part.

Hope Thompson, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Benjamin P. Epstein, both of Chicago, Ill., for the United States.

Before BAKER and MACK, Circuit Judges.

MACK, Circuit Judge. Writ of error to review a judgment and sentence against plaintiff in error, Arthur L. Blunt, under an indictment charging him with a violation of sections 1 and 2, Harrison Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. §§ 6287g, 6287h]) copied in substance as a footnote. The first 12 counts are substantially identical, except that each count refers to a separate transaction. The offense therein charged was that the defendant, a practicing physician, in Chicago, and one who dispensed and distributed certain derivatives of opium, and who had registered his name and place of business with the collector of internal revenue, and had paid to the collector the special tax as required by law, unlawfully and feloniously obtained, by means of order forms theretofore issued by the Commissioner of Internal Revenue and sold to the defendant by the Comsioner, certain quantities of morphine sulphate—

"for a purpose other than the use or distribution thereof by him, the said Arthur L. Blunt, in the legitimate practice of his profession as such physician, that is to say, for the sale by him of such morphine sulphate to persons who were not patients being treated in good faith by him, the said Arthur L. Blunt, as such physician, and for sale by him to other persons not in pursuance of written orders of such other persons or forms issued in blank for that purpose by said Commissioner of Internal Revenue."

The fourteenth count charges that the defendant, as a dealer, unlawfully and feloniously sold to Thomas Dean 2,000 grains of morphine sulphate, without having registered as a dealer and without having paid the special tax as such dealer.

The sentence imposed was penitentiary imprisonment for five years on each of counts 1 to 12, inclusive, and count 14, the sentences to run concurrently, and a fine in the sum of $1,000 upon each of the counts 1 to 12, inclusive.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The evidence showed that the defendant was a licensed physician, with offices at 9 West Harrison street, Chicago, Ill.; that he had been practicing medicine for many years; that on July 1, 1916, he registered his name and place of business as a physician with the collector of internal revenue of the United States for the First internal revenue district of Illinois, and paid the special tax. He did not file a separate registration setting out that he was a "dealer" in the drugs in question, and did not pay a separate tax as a "dealer."

After being so registered, he purchased from the collector a number of order forms, issued in accordance with the provisions of the act, and by using them obtained quantities of morphium and other drugs. These he dispensed to various drug addicts who came to his office for treatment for the drug habit. He kept a record of the name and address of each person treated, and indicated in his record the daily allowance of the drug to each such person. He did not always enter in his books the exact amount dispensed to an addict on a given day; in some cases addicts received sufficient drugs to supply their usual allowance for more than one day, and on such occasions the defendant marked in his books the proportionate amount for each of such days. In one case a patient secured sufficient amount to cover several days, urging as his reason that he feared he could not get it later on account of government intervention.

The fourteenth count is based upon a sale of 2,000 grains of drugs to a government secret agent, who was being treated as an addict and was registered as a patient, on his representation that he was about to leave the city and required that quantity to sustain him on his trip, or until a cure was effected.

1. As to the first 12 counts, it is necessary to consider only the principal contention of plaintiff in error, that the last paragraph of section 2 of the act (italicized in footnote),[1] is unconstitutional.

[1] Section 1. That every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on: Provided, that the office, or if none, then the residence of any person shall be considered for the purpose of this act to be his place of business. At the time of such registry and on or before the first day of July, annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs shall pay to the said collector a special tax at the rate of $1 per annum:

* * * * * * * * * *

It shall be unlawful for any person required to register under the terms of this act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section.

* * * * * * * * * *

All provisions of existing law relating to special taxes, so far as applicable, including the provisions of section thirty-two hundred and forty of the Revised Statutes of the United States are hereby extended to the special tax herein imposed.

That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this act into effect.

Sec. 2. That it shall be unlawful for any person to sell, barter, exchange,

In view of United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, it is no longer open to question that the Harrison Act is to be construed as a revenue law and considered as a revenue measure, and not as in any sense a regulation of commerce, whether foreign or interstate.

[1] If an act is in fact a revenue law, it is beyond the province of the courts to inquire into its wisdom, justice or efficiency, the motives that led to its enactment, or its incidental effect as a police measure. The regulation of private morals, the suppression of frauds upon the public, or the protection of industry that may result from a revenue law, will not change in character or invalidate it, if it be otherwise constitutional. McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. And in the exercise of a power granted to it, whether it be that of taxation as in Felsenheld v. U. S., 186 U. S. 126, 22 Sup. Ct. 740, 46 L. Ed. 1085, sustaining the constitutionality of the italicized section of the clause of the Dingley Tariff Act (Act July 24, 1897, c. 11, § 10, 30 Stat. 206) copied as footnote,[2] or

or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

* * * * * * * * * *

Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only: Provided, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this act.

* * * * * * * * * *

(d) The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this act in their districts, respectively. * * * The price at which such forms shall be sold by said collectors shall be fixed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, but shall not exceed the sum of $1 per hundred.

* * * *It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.*

[2] None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them, any article or thing whatsoever, other than the manufacturer's wrappers and labels, the internal revenue stamp and the tobacco or cigarettes respectively, put up therein, on which tax is required to be paid under the internal revenue laws; nor shall there be affixed to, or branded, stamped, marked, written, or printed upon, said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward.

that of regulating commerce, as in Hoke v. U. S., 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, sustaining the constitutionality of the White Slave Traffic Act of June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. §§ 8812–8819), or in Hipolite Egg Co. v. U. S., 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, sustaining the constitutionality of the Pure Food Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. §§ 8717–8728]), Congress may adopt "not only means necessary but convenient to its exercise and the means may have the quality of police regulations."

And in the Felsenheld Case it was held to be within the power of Congress to keep the package of tobacco to which a stamp was affixed to indicate payment of the federal tax on the tobacco, free from extraneous articles, such as prize or premium coupons, because, as Justice Brewer said, the government has the—

"power to prescribe that the packages which it stamps, upon which it collects a tax, shall contain the very articles and only the articles which it purports to tax and which its stamp certifies that it has taxed."

[2] It does not, however, follow from any of these cases or from the principles underlying them, that because Congress may tax any article regardless of whether or not it be a legitimate article of interstate commerce, it may enact an intrastate prohibition law as to any such article. Its power under article 8, cl. 1, of the Constitution, is only to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; not to regulate taxation throughout the land. And while a power to regulate interstate commerce may include the right to prohibit such interstate commerce as may be deemed harmful (Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; Hoke Case, supra [but see Hammer v. Dagenhart (June 3, 1918), 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101]), the power to lay taxes on an article includes no right to make any specific use of such tax-paid article unlawful.

This, however, is the sole purpose and intent of the last clause in section 2. No question of tax or revenue or the protection or security thereof is involved; under this clause, it is declared unlawful for a physician who has paid the required license fee and has bought the order form essential to obtaining the drug, to consume it himself as a drug addict or to give it away or to sell it except in the legitimate exercise of his profession. In our judgment, this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the states.

We pass only upon the question raised under this indictment and express no opinion upon the power of Congress to limit the sale of order forms to those entitled to registration, thereby excluding the mere consumer from the right to obtain the drug otherwise than as a patient of a physician.

[3] 2. While the act does not, in express words, require a separate registration and payment of tax as dealer and as physician, there is a clear differentiation between them as to the obligations imposed

upon them respectively under the act. They represent distinct classes; each class is required to pay the tax. And the combination of both occupations in one individual does not exempt him from payment of a separate tax as a dealer and as a physician. Revised Statutes, § 3236 (Comp. St. § 5959), copied as footnote,[3] as a provision of existing law relating to special taxes, is expressly made applicable to the special tax imposed under section 1.

Furthermore, in accordance with the power vested in him under this section 1, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, made a regulation to the same effect (copied as footnote).[4] Wallace v. U. S., 243 Fed. 300, 156 C. C. A. 80.

"A sale, dispensing or distribution" is permitted to a dealer for a customer on a written prescription; but only "a dispensing or distribution" is allowed to a physician treating a patient, and then only in the course of his professional practice.

The evidence abundantly justified the verdict that the transaction with Dean was a sale by defendant as a dealer in drugs.

It follows, therefore, that the judgment and sentence must be reversed as to the first 12 counts, and affirmed as to count 14, and the cause remanded for further proceedings in accordance herewith.

NOTE.—Judge Kohlsaat concurred in the foregoing conclusions, but died before the opinion was prepared.

On Petition for Rehearing.

In the petition for rehearing as to the fourteenth count, plaintiff in error, in addition to restating matters heretofore considered and as to which we find no occasion for further discussion, calls attention for the first time to a portion of article 10 of the Revised Regulations of the Treasury Department as of May 4, 1916, contained in Internal Revenue Regulations, No. 35, and reading as follows:

"A physician, dentist, or veterinary surgeon may not engage in the business of selling narcotic drugs unless he is a registered dealer, authorized by the state laws to engage in such business. Additional registration is not required, however, when narcotic drugs are sold to a patient upon whom a physician, dentist, or veterinary surgeon is in personal attendance."

These sentences, however, are to be construed in the light both of article 1 and of that part of article 10 immediately preceding the quoted sentences, and reading as follows:

"Under the exempting provisions of section 2 of the act, no written order is required for the 'dispensing or distribution of any of the aforesaid drugs to a

[3] Whenever more than one of the pursuits or occupations hereinafter described are carried on in the same place by the same person at the same time, except as hereinafter provided, the tax shall be paid for each according to the rates severally prescribed.

[4] Every person conducting more than one class or place of business or practicing more than one profession, or at more than one place, in which the narcotic drugs are sold, dispensed or given away, must register and pay the special tax for each profession and business separately, even though conducted at the same address, and separate records must be kept under each registration.

patient by a physician, dentist or veterinary surgeon registered under this act in the course of his professional practice only.' A record, however, is required to be kept of all such drugs dispensed, distributed or administered in his office, and of all such drugs left with any person or patient to be taken in his absence, only such drugs as are personally administered by a physician, dentist or veterinary surgeon when away from his office are exempt from the records."

So construed, the regulations clearly require a physician who acts as a dealer to register as such; but a sale to one in the course of his personal attendance upon him as physician does not necessitate registration as a dealer.

The sale here contemplated is a sale by him not as a dealer but as a physician; instead of "dispensing, distributing or administering" a dose of the narcotic as a part of his medical service, without a separate charge therefor, it may be that in some places physicians are accustomed to charge specifically therefor. While this might well be deemed a dispensing, yet as it could be held to be sale, the regulations out of abundant caution provide that in such a case, doubtless because the physician is not then acting as a dealer, no additional registration is required.

In the instant case, however, the indictment charges and the evidence abundantly proves that, though the purchaser was registered as a patient, the sale was made to him by defendant acting as a dealer, and not as a physician in personal attendance, administering or dispensing the drug as part of the professional service.

That the same form of stamp or receipt is issued by the department to all persons, reciting that the money is for "Special Tax on Manufacturer, Distributor, etc., of Opium, etc., under Act of December 17, 1914," in no manner modifies the specific requirement under article I of the regulations, of double registration for one acting both as physician and as dealer.

Rehearing denied.

UNITED STATES v. DENKER et al.

SAME v. BERNSTEIN et al.

(District Court, E. D. New York. August 16, 1918.)

1. POISONS ⇐2—HARRISON NARCOTIC ACT—CONSTRUCTION.
Harrison Narcotic Act, § 8 (Comp. St. § 6287n), making it unlawful for any person who has not registered and paid the special tax to have in his possession any of the drugs named, applies only to the classes of persons required by the act to register and pay the tax.

2. POISONS ⇐2—HARRISON NARCOTIC ACT—CONSTITUTIONALITY.
Harrison Narcotic Act (Comp. St. §§ 6287g–6287q) is constitutional.

Criminal prosecutions by the United States against Morris Denker and Hyman Morganstein and against Samuel Bernstein and Nathan Horowitz. On demurrer to indictments. Demurrers overruled, except as to one charge in second case, which is sustained.

Melville J. France, U. S. Atty., and Charles J. Buchner, Asst. U. S. Atty., both of Brooklyn, N. Y., for the United States.

K. Henry Rosenberg, of New York City, for defendants.

GARVIN, District Judge. These two cases were argued at the same time and may be disposed of together.

[1] The defendants have demurred to the indictments, claiming that Act Dec. 17, 1914, 38 Stat. 785, c. 1 (Comp. St. §§ 6287g–6287q), known as the Harrison Drug Law, is unconstitutional. The defendants Denker and Morganstein are charged in one indictment with having violated sections 1 and 2 of the act. The defendants Bernstein and Horowitz by a second indictment are charged with violating sections 1, 2, and 8. The demurrer of the defendants Bernstein and Horowitz to the second charge (a violation of section 8) must be sustained. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854.

[2] The defendants all claim that the entire Harrison Law is unconstitutional, under the authority of United States v. Doremus (D. C.) 246 Fed. 958, a decision of the District Court for the Western District of Texas. Subsequently the law has been declared constitutional by the District Court for the Southern District of New York. United States v. Jacob Rosenberg (decided July 17, 1918) 251 Fed. 963. A decision has also been rendered by the United States Circuit Court of Appeals for the Seventh Circuit in Arthur L. Blunt v. United States of America, 255 Fed. 332, — C. C. A. —, by which the last paragraph of section 2 has been held unconstitutional, but the first part of that section has been held constitutional. To the same effect are United States of America v Hoyt, 255 Fed. 927, United States District Court, Southern District of New York, November 9, 1917, and United States v. Jin Fuey Moy, 253 Fed. 213, United States District Court, Western District of Pennsylvania, November term, 1917.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

A statute constitutional in part only will be upheld as to what is constitutional, if it can be separated from the unconstitutional provisions. Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615. I am of the opinion that the weight of authority is substantially in favor of upholding the constitutionality of this law, except so far as section 8 is concerned.

The demurrers, therefore, will be overruled, except the demurrer of the defendants Bernstein and Horowitz to that part of the indictment which charges a violation of section 8 of the law, in which respect the demurrer of these two defendants is sustained.

THE SILVER SHELL.

(District Court, E. D. New York. November 19, 1918.)

1. SEAMEN ⟸10—PROVISIONS—BURDEN OF PROOF.
   The burden is on the owner of a vessel to show that it was properly provisioned.
2. SEAMEN ⟸10—FOOD—LIABILITY.
   Under Rev. St. §§ 4612, 4568 (Comp. St. §§ 8357, 8392), the owner of a vessel is not liable for poor cooking, where good food was provided, or for the substitution of wholesome equivalents for provisions which could not be obtained in foreign ports.
3. SEAMEN ⟸10—FOOD—EVIDENCE.
   On a libel by seamen who claimed one dollar per day for a period of 75 days because of the failure of the ship to provide food fit to eat and in sufficient quantities, evidence *held* insufficient to show that the vessel was at fault.
4. SEAMEN ⟸26—EXTRA WORK—RIGHT TO RECOVER.
   On a libel by seamen for reasonable compensation for extra work while the crew was short, evidence *held* insufficient to show that the seamen who filed the libel were compelled to do extra work.
5. SEAMEN ⟸33—WITHHOLDING OF WAGES—WHAT CONSTITUTES.
   Where there was an actual controversy between seamen and the owner as to the owner's failure to furnish required food and as to the seamen's claim for extra compensation, the captain had the lawful right to have the questions adjudicated by the court, and his refusal to pay the sums demanded by all seamen was not a wrongful withholding of wages.
6. SEAMEN ⟸33—WITHHOLDING OF WAGES—WHAT CONSTITUTES.
   Where the seamen's claim for additional compensation for extra work and for compensation for insufficient food was submitted to the shipping commissioner of a port and decided in favor of the captain of the vessel, that in itself established captain was making a bona fide contention, and the seamen could not recover on the theory that the withholding of the amounts claimed was withholding of wages.

In Admiralty. Libel by Axel Hansen and others against the steamship Silver Shell, etc. Libel dismissed.

Silas B. Axtell, of New York City, for libelants.
Kirlin, Woolsey & Hickox, of New York City, for claimant.

GARVIN, District Judge. Various members of the crew of the steamship Silver Shell have brought this libel to recover upon four alleged causes of action:

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

(1) Each libelant claims $1 per day for a period of 75 days because of the alleged failure of the ship to provide food fit to eat and sufficient in quantity pursuant to provisions of section 4612 of the United States Revised Statutes (Comp. St. § 8392), and, by amendment of the libel at the trial, of section 4568 of said statutes (Comp. St. § 8357).

(2) The libelants Axel Hansen, Alberts, Van Der Lee, Vantol, Olsen, Alec Hansen, Johansen, Leno, Helstrom, Zeilon, and Sjosmand claim for overtime which they allege they have earned.

(3) The libelants Fugelseth, Helstrom, and Leno claim such compensation as is reasonable for extra work required of them during a period of 24 days while the ship was en route from Sabang to Port Said, because for that period the boat had only three instead of seven able-bodied seamen as required by law.

(4) All libelants who have not been discharged and paid all of their wages claim waiting time at the rate of two days' pay for every day until settlement of their claim for wages, overtime, etc., has been effected.

With respect to the first and second causes of action, various members of the crew testified. Taking their testimony as a whole, and even without considering the testimony offered by the respondent, it is far from satisfying. Thirteen libelants are named. Eight verified the libel. One, Vantol, who did not verify, repudiated his having been named as a libelant, and testified that he had no claim, although the libel sets up a claim in his behalf for eight hours' overtime. John Gallagher, not joined in the action originally, testified, making a claim for bad food and overtime. Two signatures of men appear in the verification of the libel. They do not appear in the libel, and one of them, Peter Vesser, testified that he had authorized no one to bring an action in his behalf. This is not calculated to impress the court with the good faith of the claims advanced, or with the reliability of those who testify in their behalf.

[1-3] So far as the first cause of action is concerned, it is true the burden is upon the owner to show that the ship was properly provisioned. The Emma F. Angell (D. C.) 217 Fed. 311; The Elizabeth Frith, Fed. Cas. No. 4,361.

But in view of the fact that various libelants (Fuglseth, p. 12; Leno, p. 34; Van Der Lee, p. 12) testified, either that substitutes were given when the food specified ran short, or else that it was improperly cooked, and having in mind that the claimant's testimony is to the effect that the real trouble was with poor cooking, that every effort had been made to engage a competent cook, and that whenever there was a shortage of certain articles of food (for which proper substitutes were not supplied) such as pickles, molasses, and beans, it was in those parts of the world where they could not be obtained, although the master attempted to secure them in every port at which the boat touched, it seems to me that the owner has sustained the burden of proof.

"The language of the statute, 'bad in quality or unfit for use,' clearly contemplates something more than poor cooking or seasoning of good food." The Edward R. West (D. C.) 212 Fed. 287.

"But in ports, where the specific articles of provisions cannot be obtained,

it would be unreasonable to suppose that the spirit and intention of the law do not permit equivalents, of other good and wholesome esculents, to be substituted and supplied, in place of provisions damaged or consumed.

"The owner or master is to take the best precautions to procure good and wholesome enumerated articles, which is often difficult in foreign ports."

Mariners v. Washington, Fed. Cas. No. 9,086.

[4] The third cause of action, a claim by three of the libelants for reasonable compensation for extra work which they claim was required of them for 24 days while the ship was going from Sabang to Port Said (the crew being four able-bodied seamen short) has not been established. The testimony offered by the claimant establishes to the satisfaction of the court that the four men from the crew who were discharged at Sabang were not only discharged for cause but could not have remained on the boat longer without endangering its safety. They were intoxicated and disorderly; the ship was loaded with gasoline, and there was danger of an explosion if they were allowed to come aboard. The captain made every effort to obtain seamen to take the places of those discharged and, when unsuccessful, after consultation with the consul at Columbo, made an arrangement with the gun crew of the boat, by which the gun crew did the work of the discharged men, and the court believes that the three seamen involved in this cause of action were not compelled to do extra work as they claim.

[5] As to the fourth cause of action, I am of the opinion that there is reasonable ground for holding that there was an actual controversy between the libelants and the owner. The captain, therefore, had a lawful right to have the questions adjudicated by the court, and his refusal to pay the sums demanded by the libelants, under those conditions, would not be a wrongful withholding of wages without sufficient cause. The Amazon (D. C.) 144 Fed. 153; The Sadie C. Sumner (D. C.) 142 Fed. 611; The George W. Wells (D. C.) 118 Fed. 761; The Alice B. Phillips (D. C.) 106 Fed. 956.

[6] The matters in controversy were submitted to the shipping commissioner in New York and were decided in favor of the captain. This of itself established that the captain was making a bona fide contention that the amounts claimed were not due. The Alice B. Phillips.

The libel is dismissed.

THE HELEN B. MORAN.

(District Court, E. D. New York. December 13, 1918.)

1. TOWAGE ⇐15(2)—INJURY TO SCOW—EVIDENCE.

Where a scow, in charge of a tug in harbor waters, was injured by striking on the spiles of a bridge, and if the tug had kept in the middle of the channel there would have been 20 feet of clear water on either side, and the same scow had previously passed under the bridge without injury, such facts are sufficient to raise an inference of negligence and support a recovery against the tug.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. TOWAGE ⊂=15(2)—INJURY TO SCOW—BURDEN OF PROOF.

Where there was considerable clearance, and a scow, which was part of a tow and ordinarily should have passed safely under a bridge struck on the spiles on one side, the claimant of the tug, which was libeled, had the burden of proving it was exercising due care in navigation.

In Admiralty. Libel by Nicholas J. Hughes against the steam tug Helen B. Moran, etc. Decree for libelant.

Hyland & Zabriskie, of New York City, for libelant.
Park & Mattison, of New York City, for claimant.

GARVIN, District Judge. A libel has been filed against the tug Helen B. Moran to recover damages sustained by the scow K. C. Lang on April 22, 1917. On that day the tug took a tow of five boats from Brooklyn to Flushing. The Lang was loaded with city ashes, and was the last boat in the tow. There are three bridges near Flushing, and when the tow reached the first of these bridges the tug and the first four boats apparently passed through without injury. The Lang, however, struck the spiles of the bridge on the left side, thus inflicting damage on her starboard side aft; she was being towed stern first. She had been towed through this bridge many times before without difficulty. Some considerable testimony was offered tending to prove that the Lang was in an unseaworthy condition, was unfit for use, and that she was unable to stand the ordinary wear and tear to which a scow would be subject in doing its work in and about the harbor of New York. But this was sharply contradicted, and there is insufficient evidence to charge her with being unseaworthy.

[1, 2] The case is controlled by The Jonty Jenks (D. C.) 54 Fed. 1021, where it is stated, at page 1023:

"If the tug had kept the middle of the cut there would have been 20 feet of clear water on either side. Failure to do this was negligence"—citing The Lady Pike, 21 Wall. 1, 22 L. Ed. 499.

The channel opening where the accident occurred is shown by a map offered without objection before the case was finally submitted. At the same time the libelant offered a report of the department of plant and structures of the city of New York, showing the opening to be 60 feet wide. The boats in the tow were tandem, so there would have been 20 feet of clear water on either side, if the tug had kept the middle of the cut. Nothing appears to indicate that wind or tide conditions prevented this. The burden of proof as to this is on the claimant. The Ellen McGovern (D. C.) 27 Fed. 868.

It is well settled that negligence may, under certain circumstances, be inferable. In The Mason, The Cascade, 249 Fed. 718, — C. C. A. —, it is said by Judge Hough:

"In good weather and harbor waters, the tugs in broad daylight put aground a vessel having at the time no motive power of her own, and completely under the control of the tugs. * * * If negligence is not inferable from such circumstances, it is difficult to imagine anything that could justify the conclusion short of a proven intent to injure another's property."

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The fact that the boat in question had often been towed through this bridge without difficulty indicates that the accident could have been avoided. The burden of proof is on claimant to explain why such an accident happened, if the tug was using due care in navigation. The Ellen McGovern, supra.

Decree for libelant, with costs.

In re MARX.

In re GARDNER.

(District Court, N. D. California, First Division. December 16, 1918.)

No. 392.

SEARCHES AND SEIZURES ⟸3—USE OF DOCUMENTS OBTAINED.

Papers seized under a void search warrant, and claimed by a citizen, cannot be used against him before the grand jury in a criminal investigation as to whether his taking of such papers from the government should be made the basis of an indictment, but the warrant should be quashed and the papers restored to claimant.

At Law. In the matter of search warrants to search No. 1069 Shattuck Avenue, occupied by Mrs. Ralph Marx, and No. 1130, occupied by John Endicott Gardner, at Berkeley, Alameda County. Documents seized were claimed by John Endicott Gardner. Search warrant quashed, and property ordered restored to claimant.

Lyman I. Mowry, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., of San Francisco, Cal., for the United States.

DOOLING, District Judge. On January 23, 1918, upon an affidavit now admitted to be wholly insufficient, the commissioner issued a search warrant describing certain papers in the most general terms, under which something like 1,000 documents and papers were seized and are now in the custody of the marshal. Some proof was taken before the commissioner, upon which he determined that many of the papers belonged to the United States government, whereupon he ordered practically all of the papers seized to be delivered to the commissioner of immigration at Angel Island, as being part of the records of his office. The papers have been at all times claimed by Dr. John E. Gardner as his own. They were taken from the premises of his son-in-law.

The District Attorney now desires to use them before the grand jury against the claimant. The ownership of the papers is the very thing in dispute between the government and claimant. If they are his papers, no offense has been committed by him. If they do not belong to him, but to the government, he may be guilty of larceny or embezzlement in the taking of them. The question then is: May documents, seized under a void search warrant and claimed by a citizen to be his property, be used against him before the grand jury in

a criminal investigation as to whether his taking of such papers should be made the basis of an indictment?

The government urges that this may be done, on the theory that these are government papers, and not private papers belonging to the claimant. But that is the very question in dispute. It is conceded that they were seized upon a defective and invalid search warrant. That being so, I am of the opinion that, when they are claimed by a citizen to be his property, the merits of that claim will not be investigated, but that the duty of the court is plain, to discharge the warrant and restore the papers to that possession from which they never should have been taken.

Only in this way can the provisions of the Constitution and statutes against unwarranted searches and seizures be made effective. The proceeding here is absolutely without legal authority from the beginning, and the order of the court is therefore that the search warrant be quashed, and all property taken thereunder be restored to the claimant.

ROCKAWAY PACIFIC CORPORATION v. STOTESBURY et al.

(District Court, N. D. New York. April 4, 1917.)

1. COURTS ⟸303(2)—UNCONSTITUTIONAL STATUTES—"SUIT AGAINST STATE."
An unconstitutional statute is to be regarded as nonexistent, and no defense to state officers acting under it; so a suit to enjoin state officers from acting under such an invalid statute is not a suit against the state, which, under Const. Amend. 11, cannot be maintained in the federal courts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit Against the State.]

2. STATES ⟸132—APPROPRIATIONS—"DEBTS OF STATE."
Laws making annual appropriations do not and cannot create debts of the state, within Const. N. Y. art. 7, § 4, being only effective against funds at the disposal of the Legislature.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Debt of State.]

3. COURTS ⟸366(1)—PRECEDENCE—STATE DECISION.
The federal courts are bound to follow the decisions of the highest court of a state construing its Constitution and laws.

4. CONSTITUTIONAL LAW ⟸280—EMINENT DOMAIN ⟸71—TAKING OF PROPERTY—COMPENSATION—DUE PROCESS.
Laws N. Y. 1917, c. 13 (Consol. Laws, c. 57, art. 4A), providing a method of condemning premises which are in the judgment of the Governor necessary for public defense, section 59b of which provides that, if the commission created be unable to agree as to compensation, proceedings shall be brought before the Court of Claims, *held*, in view of Const. N. Y. art. 3, § 21, and article 7, §§ 2–4, to be invalid under article 1, § 6, and Const. U. S. Amend. 14, respectively prohibiting the taking of private property for public use without just compensation, and the taking of property, etc., without due process of law, unless Act 1917 be accompanied with an appropriation by the Legislature sufficient to cover any damages which a property owner may suffer.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

5. EMINENT DOMAIN ⟸274(4)—TAKING OF PROPERTY—INJUNCTION—EMERGENCY.

Where the owner of land, which the state sought to condemn for purposes of defense, consented to the state's taking possession of the same, and temporary fortifications were being erected, there is no such emergency as will preclude an injunction preventing final passage of title unless compensation be secured.

6. EMINENT DOMAIN ⟸18—PURPOSE OF TAKING BY STATE—USE OF UNITED STATES.

Laws N. Y. 1917, c. 13, providing for condemnation of private property for public defense, is not invalid because of a provision that property condemned might be turned over to the federal government, even though the state cannot authorize the exercise of eminent domain, except for the use of its own sovereignty, and the federal government in the exercise of its distinct sovereignty may condemn property needed.

Hough, Circuit Judge, dissenting in part.

In Equity. Bill by the Rockaway Pacific Corporation against Louis W. Stotesbury and others, individually, and purporting to act as a commission under the pretended authority of Laws N. Y. 1917, c. 13, and purporting to act, respectively, as Adjutant General, State Engineer, and Superintendent of Public Works, under the pretended authority of said act. On motion for interlocutory injunction. Motion granted.

This is a motion heard before three judges in accordance with the provisions of section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. § 1243]), for an interlocutory injunction restraining the defendants from proceeding as a commission under chapter 13, Laws of 1917 of the State of New York, to condemn certain premises belonging to the complainant upon the ground that the law is unconstitutional.

The complainant is a corporation of the state of Delaware, and the defendants are citizens of the state of New York, and inhabitants of the county of Albany.

Gordon M. Buck, of New York City, for complainant.

Alfred L. Becker, Deputy Atty. Gen., for defendants.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. [1] The defendants make a preliminary objection to the jurisdiction of the court on the ground that the suit is against the state, and therefore not maintainable under the Eleventh Amendment to the Constitution of the United States. It is, however, well settled that an unconstitutional statute is to be regarded as nonexistent and no defense to state officers acting under it. Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185. We are therefore obliged to consider the objections made by the complainant.

[2-4] Article 1, § 6, of the Constitution of the State of New York, provides, "* * * nor shall private property be taken for public use, without just compensation," and the Fourteenth Amendment to the Constitution of the United States provides, "Nor shall any state deprive any person of life, liberty or property without due process of law."

"The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation, affecting life, liberty, and property, as is offered by the Fifth Amendment against similar legislation by Congress; but that the federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a state applicable to all persons in like circumstances and conditions, and that the federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights, such as existed in the case of Norwood v. Baker, 172 U. S. 269 [19 Sup. Ct. 187, 43 L. Ed. 443]." Hibben v. Smith, 191 U. S. 326, 24 Sup. Ct. 92, 48 L. Ed. 195; French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879.

The question before us is whether the state of New York is proceeding to condemn certain premises belonging to the complainant at Rockaway Point, Long Island, in accordance with the foregoing provisions.

The condemnation proceedings are taken under article 4a, added to the state law (Con. Laws, chap. 57) by chapter 13, Laws of 1917, passed in pursuance of an emergency message from the Governor.

The purpose of the legislation is to regulate the method of condemning premises which are in the judgment of the Governor necessary for public defense. The Adjutant General, State Engineer, and Superintendent of Public Works are constituted the commission to acquire title to such premises. They are directed to make a survey and map thereof; to submit the same, accompanied by certain certificates, to the Governor, and, if approved by him, to file the same in the office of the Secretary of State and in the office of the county clerk of the county in which the premises are situated, and, after service of notice upon the owners or by publication and the performance of certain other prescribed formalities, title to the premises shall vest in the state. Section 59(b) concludes:

"If the commission is unable to agree as to the compensation to be paid for such lands and the structures and waters thereon, the court of claims shall have jurisdiction to determine the amount of such compensation, and upon proceedings being brought before such court as provided by law, an award shall be made of compensation for the lands, structures and waters * * * so appropriated."

The proceedings to be brought before the court of claims, "as provided by law," are evidently those contained in sections 263–281 of the New York Code of Civil Procedure, as amended by chapter 1, Laws of 1915, regulating proceedings in the court of claims, substituted for the former board of claims.

Article 3, § 21, of the Constitution of New York, provides that—

"no money shall ever be paid out of the treasury of this state or any of its funds or any of the funds under its management except in pursuance of an appropriation by law. * * *"

Sections 2 and 3 of article 7 restricted the power of the Legislature to contract debts to a sum not exceeding in the aggregate $1,000,000 at any one time, except to repel invasion, suppress insurrection, or defend the state in war. The creation of all debts exceeding $1,000,000, other than these, must be submitted to the people by referendum Section 4.

Laws making annual appropriations do not and cannot create debts of the state, within article 7, § 4, of the Constitution. They are only effective against funds at the disposal of the Legislature; beyond that they are nullities and create no debt. People v. Board of Supervisors, 52 N. Y. 556. Although that case was decided in 1873, the provisions of the then Constitution of 1846 were in this respect, and in all other respects, considered in this opinion the same as those of the present Constitution of 1894.

Chapter 13, Laws of 1917, goes no further in protection of the landowner than to provide the manner in which the amount of his compensation shall be ascertained. While it is not necessary to ascertain and pay that compensation in advance, there should also be provided a certain and adequate method by which it may be recovered. The right of the citizen to be secured in respect to just compensation for his property taken for public use is as sacred as the right of the sovereign to take it. The sovereign is the whole people of the state, and we believe that all the states of the Union have thought it proper to limit the power of the Legislature to condemn private property for public uses by imposing an express condition that just compensation shall be made. It was not thought sufficient to leave the citizen to the obligation to pay that might be implied by law.

Some decisions of the federal courts are cited but, as we are bound to follow the decisions of the Court of Appeals of the state of New York construing its Constitution and laws, we shall consider those cases only.

In the case of Bloodgood v. Railroad Co., 18 Wend. (N. Y.) 9 (1837), Chancellor Walworth said at page 17 (31 Am. Dec. 313):

"I cannot, however, agree with my learned predecessor in his subsequent reasoning in that case, upon which he afterwards acted in the case of Jerome v. Ross, 7 Johns. Ch. R. 344 [11 Am. Dec. 484], that it is not necessary to the validity of a statute authorizing private property to be taken for the public use that a remedy for obtaining compensation by the owner should be provided. On the contrary, I hold that before the Legislature can authorize the agents of the state and others to enter upon and occupy, or destroy or materially injure, the private property of an individual, except in cases of actual necessity which will not admit of any delay, an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages, or compensation, and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation. I do not mean to be understood that the Legislature may not authorize a mere entry upon the land of another for the purpose of examination, or of making preliminary surveys, etc., which would otherwise be a technical trespass, but no real injury to the owner of the land, although no previous provision was made by law to compensate the individual for his property if it should afterwards be taken for the public use. But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the Legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so. In the ordinary case of lands taken for the making of public highways, or for the use of the state canal, such a remedy is provided; and if the town, county, or

state officers refuse to do their duty in ascertaining, raising, or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by mandamus to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the Legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid."

In People v. Hayden, 6 Hill (N. Y.) 359 (1844), Chief Judge Nelson said at page 361:

"Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is, I apprehend, the settled doctrine even as it respects the state itself, that, at least, certain and ample provision must be first made by law (except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay."

In Sage v. City of Brooklyn, 89 N. Y. 190 (1882), Chief Judge Andrews said at page 196:

"It is so axiomatic that it is laid up as one of the principles of government, that a provision for compensation is an indispensable attendant upon the due and constitutional exercise of the power of depriving an individual of his property under the right of eminent domain. Gardner v. Village of Newburgh, 2 Johns. Ch. 168 [7 Am. Dec. 526]. The courts, in construing the constitutional guaranty, have departed from what may seem its plain and natural meaning, and have held that the payment for property taken in invitum for public use need not be concurrent with the taking, but that it is sufficient if the law authorizing the taking also provides a sure, sufficient, and convenient remedy by which the owner can subsequently coerce payment by legal proceedings. If such provision is not made, then, as was said by Nelson, C. J., 'the law making the appropriation is no better than blank paper.' People ex rel. Utley v. Hayden, 6 Hill, 359. It is, I think, a plain proposition that a law authorizing the taking of a man's land, and remitting him for his sole remedy for compensation to a fund to be obtained by taxation of certain specified lands in a limited district, according to benefits, is not a sure and adequate provision, dependent upon no 'hazard, casualty or contingency whatever,' such as law and justice require to meet the constitutional requirement. The pledge of the faith and credit of the state, or of one of its political divisions, for the payment of the property owner, accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment has been held to be a certain and sufficient remedy within the law."

In Litchfield v. Pond, 186 N. Y. 66, at page 74, 78 N. E. 719 (1906), Judge Werner said, arguendo:

"Such a statute, if intended to authorize the exercise of the right of eminent domain, would be clearly unconstitutional, because it makes no provision for compensation to those whose private property is to be taken for a public use. While payment need not precede the taking the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover. Sweet v. Rechel, 159 U. S. 380, 398 [16 Sup. Ct. 43, 40 L. Ed. 188]; Sage v. City of Brooklyn, 89 N. Y. 189, 195; Matter of Mayor, etc., of N. Y., 99 N. Y. 569, 577 [2 N. E. 642]; Brewster v. Rogers Co., 169 N. Y. 73, 80 [62 N. E. 164, 58 L. R. A. 495]."

As in the state of New York no compensation can be recovered out of the state treasury except by an appropriation law, and as under

chapter 13, Laws of 1917, the owner's title to the premises vested in the state before the ascertainment and payment of compensation, it seems to us quite clear that the law, construed alone, is unconstitutional. It does not comply with the language of Chancellor Walworth in Bloodgood v. R. R. Co., supra, that—

"An adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages, or compensation; and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation."

It does not comply with the language of Chief Judge Nelson in People v. Hayden, supra, that—

"The settled doctrine, even as it respects the state itself, that, at least, certain and ample provision must be first made by law (except in cases of public emergency) so that the owner can coerce payment through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay."

It does not comply with the language of Chief Judge Andrews in Sage v. City of Brooklyn, supra, that—

"The pledge of the faith and credit of the state, or of one of its political divisions, for the payment of the property owner, accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment, has been held to be a certain and sufficient remedy within the law."

It does not comply with the test laid down by Judge Werner in Litchfield v. Pond, supra, that—

"While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover."

We think that, to make chapter 13 of the Laws of 1917 constitutional, it must be accompanied by a law appropriating public funds to pay such an award as the court of claims shall make. The amount of the compensation is a judicial, and not a legislative, question. Still an appropriation law must be passed, because in no other way can compensation be secured in accordance with the provisions of the Constitution and the long-established practice under it.

The necessity of an appropriation act was recognized in this very case, because a bill appropriating $1,000,000, or so much thereof as might be necessary, passed both houses of the Legislature just before the temporary restraining order was granted herein, and the affidavits inform us that a bill has passed the Senate appropriating $2,500,000, or as much thereof as may be necessary, for the same purpose.

The Legislature, by appropriating a sum or so much thereof as may be necessary to pay any award the court of claims shall make, does not limit or define the amount of the recovery. In our opinion, the appropriation should be of such an amount as is quite certain to cover any award that can reasonably be made. It is safer and fairer to the citizen to fix an amount too large than too small. The affidavits of experts submitted on behalf of the complainant go as high as $2,000,000, while the defendants show that the assessment for local

taxation of the whole tract, half as large again as the part sought to be condemned, is but $865,000, and that the vice president of the complainant in a verified return for the purposes of state taxation stated that to be its actual value. This court expresses and has no opinion whatever about the proper amount of compensation, and takes it for granted that the court of claims will determine the value upon proper proofs, unaffected in any way by the amount of the sum appropriated by the Legislature.

[5] No such emergency exists as is excepted in some of the foregoing cases, justifying the commandeering of private property for public use without any proceedings at all. The premises are now, with the owner's consent, in the possession of the state; temporary fortifications are being made. The only existing stay is that title shall not vest in the state until a method for recovering the owner's compensation shall be provided. The Legislature, being now in session, is entirely able to enact an appropriate law.

The interlocutory injunction as prayed for is granted, but upon the enactment of a law appropriating a sum not less than $2,000,000, or so much thereof as may be necessary, it will be vacated.

ROGERS, Circuit Judge. I concur in the foregoing opinion of Judge WARD.

[6] In the earlier years, when the United States desired land within the limits of a state for federal purposes, it was the practice to proceed in a state court and under a state statute. See U. S. v. Dumplin Island, 1 Barb. (N. Y.) 24; Gilmer v. Lime Point, 18 Cal. 229; Burt v. Merchants' Ins. Co., 106 Mass. 356, 8 Am. Rep. 339. But in 1871 the Supreme Court of Michigan, speaking through Judge Cooley, in People ex rel. Trombley v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94, held that the state could not condemn for the federal government. "In the first place," the opinion declared, "there can be no necessity for the exercise of this right by the states for this purpose, for the authority of the nation is ample for the supply of its own needs in this regard under all circumstances. In the second place, the eminent domain in any sovereignty exists only for its own purposes; and to furnish machinery to the general government under, and by means of, which it is to appropriate lands for national objects is not among the ends contemplated in the creation of the state government."

And in 1875 the Supreme Court of the United States in Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449, in an opinion written by Justice Strong, not only held that the government of the United States had as a sovereign within its sphere the power to appropriate land within a state for its public use, and was not under the necessity of applying to a state government to condemn the property, but the opinion of Judge Cooley in the Trombley Case was expressly approved, as being based on the better reason. In 1914, in State v. Milwaukee, 156 Wis. 549, 146 N. W. 775, the Supreme Court of Wisconsin held that the fact that land sought to be condemned by a city for the improvement of its river harbor was to be conveyed to the United States as a condition of receiving a federal appropriation did not affect the right

of the city to condemn the property. This was upon the theory that the authority of the city or state, such as it is fixed by the law, would be in no wise impaired by the grant. "It is," said the court, "as if the city by the authority of the Legislature of the state should convey to the United States by deed a public highway. This * * * would not make the highway any less a public use, would carry no proprietary interest therein, because the city and the state had none, * * * and would not diminish the city or state authority over it; for, as said before, that is not to be conveyed by deed." The court thought the case readily distinguishable from Trombley v. Humphrey, supra, and that it was rather controlled by the principle of Lancey v. King Co., 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

The power to condemn sites for forts, lighthouses, post offices, and custom houses is in the United States, and, when property is needed for the purposes specified, it should not be condemned by the state, as it is not being taken for its public use. In the latest work on this subject, Nichols on Eminent Domain, vol. 1, § 34 (1917), that writer declares:

"It is now, however, generally considered to be the sounder rule that a state cannot authorize the exercise of eminent domain except for the use of its own people, and that consequently state cannot authorize the taking of property within its jurisdiction for the use of the United States in carrying out the public and governmental functions assigned exclusively to the United States by the Constitution."

The Legislature of New York has passed an act, and the Governor has signed it, under which, if requested to do so by any officer or agent of the United States duly authorized, the Governor may execute a deed of the land proposed to be taken, transferring title to the government of the United States, to be used for purposes of defense. The validity of the law is not invalidated by such a provision, in view of the fact that the state of New York is entitled to condemn land for its own public defense, and that this land, if it should thereafter be transferred to the United States, will still be used for the defense of the state. If the state were proposing to condemn a site to be used for a post office or a custom house, I should think the court should deny its power to do so, for plainly it would not be a taking for the use of the state, and therefore be beyond its right. But where it is proposed to take property for public defense, I do not see how the right of the state can be successfully challenged on the ground that under certain conditions the property may be transferred to the United States for the defense of the lives and property of the citizens of the state as well as citizens of the United States.

This leads to a consideration of the right of the owner of the land to compensation. The rule on that subject is stated in Cooley's Constitutional Limitations as follows:

"When the property is taken directly by the state, or by any municipal corporation by state authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain

that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it."

And in Crozier v. Krupp, 224 U. S. 291, 32 Sup. Ct. 488, 56 L. Ed. 771 (1911), and in other cases in that court which need not be cited, the doctrine is laid down by the Supreme Court of the United States that compensation for property taken by the government under eminent domain need not necessarily be made in advance, if adequate means be provided for a reasonably just and prompt ascertainment and payment thereof.

The Legislature of New York has passed an act appropriating $1,000,000 or so much of that sum as may be needed to pay for the land it is proposed to condemn. This the Governor has not yet signed. Another bill, we are informed, has passed the Senate, and is awaiting the action of the Assembly, appropriating $2,500,000 for the purpose of providing a fund which may be used in paying for this property. So that at this time no adequate means are provided whereby the owner of the property can be compensated for its taking. Until such means are provided, and reasonable, certain, and adequate provision is made for obtaining compensation, the Constitution protects the owner against the taking of his property.

The Rockaway-Pacific Corporation asks this court to believe that the property which it alleges that the state of New York proposes to take is worth upwards of $2,000,000. It supports this allegation by the affidavits of real estate experts of standing and character. The defendant, however, shows that the complainant in 1915 presented to the taxing officers of the state, upon the sworn affidavit of its official representative, that the entire property (one-half of which is now said to be worth upwards of $2,000,000) was worth the sum of $524,000, and that that was its true value. The plaintiff does not appear in a court of conscience in any too favorable light, asking it to exercise its discretion, and issue an injunction for the protection of the rights, which it now asserts are worth $2,000,000 and upwards. Nevertheless it has rights, and its stockholders have rights, which are not to be prejudiced by the conduct of its official representative. Moreover, the affidavits presented justify this court in seeing that a fund sufficiently large is provided to pay the true value of the land to be taken, whatever it may ultimately be ascertained to be in the tribunals authorized by law for its determination.

It may be conceded that in times of impending public danger, too urgent to admit of delay, private property may be taken for public use before compensation has been secured. But this court is not confronted by such an emergency. The Legislature of New York state is in session. The Senate of New York has passed a bill appropriating $2,000,000, if so much is needed, for the acquisition of this property. The passage of the bill through the Assembly and its signature by the Governor can be only a matter of hours. This is not, therefore, such an emergency as in my opinion justifies the taking without providing

such securities for payment as the law entitles the owners to demand, and the injunction prayed should be granted.

HOUGH, Circuit Judge (dissenting in part). Plaintiff owns a piece of land at Rockaway Point, Queens county, a place within the boundaries of the city of New York. This land for purposes of local taxation, has never been assessed at as much as $900,000, and its assessed value has been reported under oath as its value for purposes of state taxation. Pursuant to chapter 13 of the Laws of 1917, the state of New York (as asserted in the bill) seeks to appropriate by the right of eminent domain about one-half of plaintiff's tract.

The method of procedure (not unfamiliar in this state) consists of filing a description of the land appropriated in the proper record office of Queens county, upon which filing title vests in the state; the statutory commissioners (defendants herein) being called upon, at or after such filing, to come to an agreement with the landowner as to the price to be paid; but, if such agreement cannot be reached, plaintiff is given the right of suing for what is alleged to be the proper value in the court of claims.

The bill alleges that the one-half of plaintiff's tract is worth $2,000,000, and seeks to enjoin the commissioners from filing the statutory description of the land, because (as is said) the statute under which they intend to act is unconstitutional, i. e., obnoxious to the national Constitution, in that plaintiff is about to be deprived of its property without due process of law, and to the state Constitution, in that private property is to be taken for a public purpose without just compensation.

The application for injunction pendente lite is matter of grace, and rests in the discretion of the court, which is justly influenced by the attitude of any person or party seeking injunctive relief.

The law has long required real property within the boundaries of New York City to be assessed for taxation substantially at its market value, and, for a longer period than the ownership by plaintiff of the land in question, it has been matter of notoriety that the real estate assessments in New York City were invariably very near, and very frequently above, the value of the land obtainable in the open market by an undisputed owner.

The discrepancy between the assessed value and the now asserted value of the land desired by the state is gross. Indeed, the difference between not over $450,000 and $2,000,000 cannot be overcome without imputing ignorance or dishonesty to the assessing officers or unusual exaggeration to the plaintiff's assertion. When it is noted that the assessed value was sworn to as the full value by an officer of plaintiff for the purpose of state taxation, the difficulty of accepting (even tentatively) the position of the plaintiff becomes insurmountable, and deprives the plaintiff of any right of appealing to the court, except such as may be found by necessary and strict adherence to ruling decisions.

Plaintiff invokes both the state and federal Constitution because of one act done, or one omission made, by the state, viz. the Legislature

has either made no appropriation for the payment of such value for plaintiff's land as may be agreed upon or ascertained by the court of claims, or such appropriation, if any, does not exceed $1,000,000.[1]

The proposition is that for the state of New York to take for any public purpose private property without appropriating, sequestering, or otherwise allotting a particular, definite, and sufficient fund, for the payment of what the plaintiff owner asserts his property to be worth, is at one and the same time denying due process of law and just compensation for the property taken.

There is also advanced another proposition depending, not upon the wording of the statute, but upon the alleged reason for its passage. The avowed purpose of taking plaintiff's land is public defense, i. e., the emplacement of guns and the possible construction of fortifications; but it is alleged and admitted that the state does not intend to procure or place guns itself or itself construct a fort—that is to be done by the nation; but the state takes the land in order to convey the same (some time) to the United States for the purposes just stated.

It is urged that the state of New York cannot exercise its sovereign right of eminent domain for the benefit of another sovereign, i. e., the United States of America.

Considering the last suggestion first, it is not doubted that the state can condemn land for the purposes of its own defense, nor that the United States can do the same thing for the purpose of defending the whole country, including New York. It would seem, therefore, upon reason that New York can also condemn for the purpose of assisting in the defense of the United States, because thereby it is defending itself. As matter of law there is no difference, in substance, between what was approved of in Matter of United States, 96 N. Y. 227, and the legal result of what is here sought to be accomplished by or through the legislation complained of.

As to the argument that absence of an appropriation, or of an appropriation sufficient in plaintiff's opinion, renders action by the state unconstitutional until such sufficient appropriation is made, it may first be noted that it requires, as a prerequisite for the exercise of the undoubted sovereignty of New York, that security be given for the damage about to be inflicted upon private citizens—a security measured not by what the Legislature deems enough, nor (logically) by what some court thinks enough, but by the owner's estimate of the largest price which he may hereafter be able to prove. This necessarily follows from the tenor of the bill, which presupposes an appropriation of $1,000,000, and the argument would be just the same if there be assumed an existing appropriation which in any substantial amount falls short of $2,000,000 and expenses.

Let it be assumed that due process of law requires that somehow, at some time, compensation be made for property taken for public uses. Monongahela, etc., Co. v. United States, 148 U. S. at 324, 13

[1] The bill alleges that an act appropriating $1,000,000 was at the date of verification of bill about to pass; at the time of argument it was admitted by counsel that no such statute had become law.

Sup. Ct. 622, 37 L. Ed. 463. It must be assumed that within limits, and very wide limits, the state may determine whether property is wanted for *public* use. "The necessity or expediency of the appropriation is not a matter for judicial inquiry." Spring Valley Water Works v. Schottler, 110 U. S. at 378, 4 Sup. Ct. 64, 28 L. Ed. 173.

Likewise it is obvious that whether the appropriation here be deemed for the benefit of the state or of the United States, it is not a prerequisite to the exercise of eminent domain (even in matters much less vital than public defense) that compensation be made before possession or even title be taken. Great Falls, etc., Co. v. Garland (C. C.) 25 Fed. 521; Sage v. Brooklyn, 89 N. Y. at 195.

So far as New York is concerned, the most extreme statement of the rule was made (obiter) in Litchfield v. Pond, 186 N. Y. at 74, 78 N. E. 722:

"While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the propery taken and the amount of damages which the owner may recover."

So far as it may be said that the state Constitution must be read in consonance with, and subordination to, the Fourteenth Amendment of the national Constitution, the matter was actually presented in Adirondack Ry. v. New York, 176 U. S. at 349, 20 Sup. Ct. 465, 44 L. Ed. 492, where it was held that, where the state itself took property for its own exclusive and designated purposes—

"Compensation must indeed be made, and inquiry as to its amount in some appropriate way, before some properly constituted tribunal, must be provided for. * * * It is the rule in New York that where this is done, and a certain, definite, and adequate source of payment is provided, compensation need not actually be made in advance of a taking by the state or one of its municipal subdivisions. * * * This act [the Adirondack Park bill] fulfills these requirements, in that the state treasury is the source of payment, and an appropriate mode is designated for the ascertainment of compensation as to owners."

The application at bar then must rest upon the single proposition that the New York rule can only be satisfied by an appropriation before action sufficient in the property owner's opinion.

This puts the state sovereign at a disadvantage as compared even with its municipal subdivisions, for the rule has been held satisfied by the liability of the county of Kings (Matter of Church, 92 N. Y. 1), of the city of Brooklyn (Sage v. Brooklyn, supra), and see Rider v. Stryker, 63 N. Y. 137.

As was said by Andrews, C. J. (in the Sage Case, supra):

"The pledge of the faith and credit of the state, or of one of its political divisions, for the payment of the property owner, accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment, has been held to be a certain and sufficient remedy within the law."

There is just this difference between the faith and credit of a political subdivision of the state and the state itself—the former can be sued as matter of right; the latter cannot without its own permission. Therefore the plaintiff's argument comes to this: That although an

appropriation of this very land for purposes of a park by the city of New York would be sufficient if the faith of the city were pledged for payment (that faith being enforceable by legal proceedings), the faith and credit of the state of New York is not enough, even when the state waives its sovereign privilege and invites action in the court of claims. It seems as if the statement of this doctrine contained its own refutation.

Happily for the country, the proven and notorious circumstances under which this appropriation is sought have been so infrequent that the attention of courts has rarely been called to them; yet the matter has not remained wholly without recognition and comment.

There is an acute and obvious difference between the demands of a sovereign for such civil purposes as may be found in the cases already cited, or the allotment of a fraction of its sovereignty to a railway corporation or city for purposes of business, convenience, or comfort, and the exercise of the highest duty of sovereignty—the preservation of its own existence.

In Bloodgood v. Mohawk, etc., Co., 18 Wend. (N. Y.) at 17, 31 Am. Dec. 313, Chancellor Walworth held that the "agents of the state and others" could not enter upon or occupy—

"the private property of an individual, except in cases of actual necessity, which will not admit of any delay, an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages, or compensation."

But the learned chancellor also said that "the public purse" (18 Wend. p. 18, 31 Am. Dec. 313) might justly be considered "an adequate fund." The difference between a taking by the sovereign for itself and the exercise of delegated authority by some subordinate political entity or private corporation is well considered in Smeaton v. Martin, 57 Wis. 364, 15 N. W. 403 (see, also, Walther v. Warner, 25 Mo. 277, and Covington Short-Route Transfer Ry. Co. v. Piel, 87 Ky. 267, 8 S. W. 449); while the supreme exigencies of war and the legal necessity of yielding thereto are amply commented upon by Clifford, J., in United States v. Russell, 13 Wall. at 627, 20 L. Ed. 474. It was there said that the—

"taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified; * * * and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service."

The legislation complained of by this plaintiff was passed under an "emergency message" from the Governor of New York, and as a measure of defense at a time concerning the dangers of which comment would be superfluous.

It is therefore my opinion that this application should be denied for three reasons:

(1) The plaintiff's demand for relief is based upon untrustworthy, if not incredible, assertions of value regarding its property. Such statements do not invite the exercise of discretionary power.

(2) Even if the declared and proven purpose of the state in acquiring plaintiff's property was not public defense in time of pressing danger, the statute complained of does pledge the credit of the state and the public purse to make full reparation to plaintiff. This is enough, even under New York decisions made without any thought of public danger. And

(3) The state has acted in this instance under a power only called into play under the exigency of threatened war. Such power may be exercised without a contemporaneous appropriation, even if it be admitted (as it is not) that the sovereign need ever go so far when taking property for its own sovereign use.

For these reasons I cannot agree with the majority.

In re LALLY.

(District Court, N. D. New York. February 5, 1919.)

1. BANKRUPTCY ⟸415(3)—REVIEW OF ACTION OF REFEREE—FINDINGS OF FACT.
   The findings of fact of a special master or of a referee on application for discharge stand in substantially the same position before the court as does the verdict of a jury, and are not to be disturbed, unless unsupported by the evidence or against the weight thereof.
2. BANKRUPTCY ⟸414(1)—OBJECTIONS TO DISCHARGE—BURDEN OF PROOF.
   A bankrupt, who has conformed to the requirements of the statute, is prima facie entitled to a discharge, and the burden of proof rests on an objecting creditor to establish by satisfactory evidence some one of the designated acts which will defeat his right thereto.
3. BANKRUPTCY ⟸414(3)—OBJECTIONS TO DISCHARGE—PROOF.
   Proceedings on an application for discharge are civil, and where criminal acts are alleged to defeat the discharge, they must be proved by clear, convincing, and satisfactory evidence, although not beyond a reasonable doubt.

In Bankruptcy. In the matter of William P. Lally, bankrupt. On motion to confirm report of special master recommending discharge. Confirmed.

W. H. Weller, of Utica, N. Y., for bankrupt.
Sholes & Norton, of Utica, N. Y., for creditors.

RAY, District Judge. It is claimed by the objecting creditors, not only that the bankrupt has concealed assets from his trustee in bankruptcy, but that he made a false oath in verifying his schedules. These claims are based on the alleged ownership by the bankrupt, William P. Lally, of the products of the farm which he occupies, owned by a Miss Peck, or of an interest therein, and of certain other personal property thereon. The facts seem to be these:

The bankrupt is married and has two small children, but before marriage, if not now, was what is termed in the brief of Messrs. Sholes & Norton, and is uncontradicted, a "ne'er-do-well," who met with considerable success in that line of business, and all that he succeeded

in accumulating consisted, and still consists, of a few judgments and claims against himself owned by others, including his father, which are unpaid, and which he seeks "to get rid of" in bankruptcy proceedings, finding them cumbersome and undesirable. As the father is a man of some considerable means, it is not at all incredible that he desires to see his son in an unshackled condition; that is, freed from all connection with these judgments and claims. It is not claimed that prior to the time this son went upon the Peck farm, which he now occupies, he had accumulated any of this world's goods, except some household furniture and two old harnesses.

His father, Thomas Lally, is a retired farmer, and owns a farm in Sangersfield, N. Y., on which one of his sons resides. This other son, the bankrupt, had removed to a farm in Norwich, Chenango county, N. Y., which he rented or worked on shares, and where, it seems, he was meeting with the same success he had achieved before marriage, when he ran a threshing machine, filled silos, and engaged in "tending bar" in saloons or hotels. He had boarded with his father, but omitted to pay his board. The father had also guaranteed payment for a pair of horses purchased by this son on credit, and which guaranty he had to make good, reimbursing himself by selling the horses.

Prior to the beginning of the farm-working season of 1916, Mr. Lally, the father, made a written lease with Miss Peck, who owned a farm in the vicinity of Waterville, N. Y., for such farm, which was a "hop and dairy farm," and this contains no provision or suggestion that William P. Lally, the bankrupt, was to have any interest in the farm or its products, or of the property thereon. It was understood, however, between the father and Miss Peck that the now bankrupt was to go on and at least occupy the farm, if not work it. The father, as a witness before the special master, says he told Miss Peck:

"William is the one who is going to take charge of the farm, and he is going to *supervise the work*. I will be there only occasionally, and I would suggest that you turn over one-half the milk checks to him to pay the running expenses of the farm, paying the hired help and living expenses, expenses required to carry on the farm."

In 1916 there were two or three hired men on the farm. The son, William P. Lally, did go on the farm with his family, and it was worked and the pay for the milk delivered at the milk station and for other crops and products sold, except the hops, went first to Miss Peck, who, deducting her share, paid over the other half or share to William P. Lally, the now bankrupt, and not to the father, the lessee of the farm, except the hop money; that is, the proceeds of the hops raised on the farm. It is evident from the evidence that the son, William P. Lally, did have "the living" of himself and family from the proceeds of the farm, and there is no evidence of any contract or agreement between the father and son as to any specific sum or rate of wages that was to be paid, or that the interest of the father in the lease was ever assigned to the son. It is claimed that, from all the circumstances and what was done, the court is authorized to find and should find, notwithstanding the report of the special master adverse to the contention, that the lease in the name of the father, Thomas Lally, was

merely a cover, put in his name to keep the interest of William P. Lally in the products and proceeds of the crops of the farm from his creditors, and that he was the real owner and lessee, and that his time and labor went to produce them, and that it was the real understanding between himself and his father that they were to be and were his and at his disposal as compensation for work done on the farm and in managing it and boarding the hired help. On the other hand, it is contended that the father, desiring to aid this improvident son and his family, and aid them in procuring and having a living, took this way of doing it, and of protecting himself and the son from a further accumulation of debts and liabilities, and that he had a right so to do. The contention is that this son was to have the living of himself and family from the proceeds of the farm as he went along, and nothing more, and that this was the understanding, and that he did have this, and that he at no time owned any interest in the stock or implements on the farm, or in the crops or products thereof or of the dairy. The special master has arrived at this latter conclusion. He had the advantage of seeing and hearing the witnesses, and his conclusions ought not to be lightly disturbed or overruled. The attorney for the bankrupt thus describes him:

"William P. Lally, the bankrupt, while a 'good worker,' is not and never will be capable of earning his own living, unaided. He has never succeeded in any business which he has undertaken, whether in speculating in hay, which enterprise resulted in several judgments and claims against him, or in running a thresher and silo filler, which culminated in the Norton judgment. Such being the case, the father, Thomas Lally, put him on this farm as his superintendent, under his own immediate direction, however, and so placed him in a position where he [William] could obtain his own living and a living for his wife and two small children."

[1, 2] It goes without saying that a court in bankruptcy ought to frown on and discourage any scheme or arrangement made in fraud of creditors, or entered into for the purpose of hindering, delaying, or defrauding creditors, or entered into for the purpose of covering or keeping the property or earnings, exempt from levy and sale on execution or legal process, from creditors. No citation of authorities is required for such propositions as these. In this case it was incumbent on the objecting creditor to show by a fair preponderance of the evidence, either an agreement or contract giving the son an interest in these farm products and the stock on the farm, one or both, or facts and circumstances from which it would be the duty of the court to find such an agreement. The findings of fact of a special master, or of a referee, in bankruptcy matters, stand in substantially the same position before the court as does the verdict of a jury. They are not to be disturbed, unless unsupported by the evidence or against the weight thereof. Poff v. Adams et al., 226 Fed. 187, 141 C. C. A. 185, and cases there cited. The court says:

"Creditors opposing a discharge have the burden of proving by satisfactory evidence the charges against the bankrupt of transferring or concealing his property with the intent to hinder, delay, or defraud creditors; but the findings of fact by the special master and the District Court will not be disturbed by this court, except upon the clearest conviction that the find-

ings are not supported by the evidence. In re Hoffman (D. C.) 173 Fed. 235; In re Hatem (D. C.) 161 Fed. 896; In re Noyes Bros., 127 Fed. 286, 62 C. C. A. 218; In re Schulman, 177 Fed. 191, 101 C. C. A. 361; In re Buckingham v. Estes, 128 Fed. 584, 63 C. C. A. 20; Osborne v. Perkins, 112 Fed. 127, 50 C. C. A. 158."

In Re Braun, 239 Fed. 113, 152 C. C. A. 155, it was held that, in view of presumption of honesty, creditors opposing discharge on ground that bankrupt had been guilty of fraudulent transfer of his property have burden of proof. In Re Wix (D. C.), 236 Fed. 262, affirmed Sherwood Shoe Co. v. Wix, 240 Fed. 692, 153 C. C. A. 490, it was held that as the discharge in bankruptcy is a great privilege and right the burden rests on a creditor objecting to a discharge to show that the bankrupt is not entitled thereto.

While the burden of sustaining objections filed to the discharge of a bankrupt rests upon the objecting creditor, I think the reason for the rule rests on the basis that it is an independent proceeding, and that when the bankrupt comes into court with a proper certificate of conformity, showing he has performed all the acts he is required by the bankruptcy act to perform as preliminary to his discharge, the independent objections of creditors raise a new issue which they must sustain by proof. When the bankrupt applies for his discharge and shows conformity by the proper certificate, he is entitled thereto, unless it appears on objections sustained by evidence that he has in some way violated the provisions of section 14b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9598]), which declares:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by, the court: Provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose."

The language used plainly and unequivocally indicates that *the allegations and proofs in opposition to a discharge* are to precede any proofs on the part of the bankrupt, and expressly states that the bankrupt is to be discharged "unless he had," etc. It is very clear that the commission of some act which will defeat a discharge is to be made to appear by evidence.

In re Cooper, 230 Fed. 991, 145 C. C. A. 185 (2d Circuit) is not to the contrary. In that case it was made to appear that the bankrupt owned certain lots at one time prior to his bankruptcy (not at a remote time). He had not included such property in his schedules. The bankrupt, on application for discharge, testified he had sold these lots prior to his bankruptcy. There was no other witness as to such sale, and there was no corroborative evidence of such alleged sale. It appearing positively on the part of the objecting creditors that the bankrupt owned the lots shortly before bankruptcy, it was held by Judge Hand and also by the Circuit Court of Appeals that this made it incumbent on the bankrupt to show by satisfactory evidence that he had sold such lots before bankruptcy. This was not a holding that in the first instance it was the duty of the bankrupt to prove he did *not* own real estate, or the lots in question at the time of his bankruptcy, but that the objecting creditors having shown that he did the burden then fell upon the bankrupt of showing he had disposed of them, and that he had failed so to do.

In the instant case the objecting creditor was under the necessity of relying on the testimony of the father of the bankrupt and that of Miss Peck, mainly, and this fact is given due weight.

If it had appeared that this son, the now bankrupt, was, or ever had been, a good business man, one who had been successful, even in a moderate degree, in accumulating property in business, or by savings from his labor, the case would be different; but, as seen, it is conceded on all hands that he was such a person as would not be expected to save, or accumulate from any source, and in the absence of evidence that he did it does not follow that because he worked the farm he owned an interest in the stock or implements on or products of the farm. The evidence and concessions on all hands show a very good reason why the father would not have been a party to the creation of a situation which would give the son an ownership in any of the products of the farm, other than the right from time to time to supply his table for himself and family and purchase necessary clothing. It cannot be denied that the father, from his own means and on his own credit, had the right to support this improvident son and his family in such lawful manner as he saw fit to adopt.

I fail to find such satisfactory evidence that the method adopted was to cover or conceal from creditors the earnings of the son, now bankrupt, as demands a refusal to confirm the report of the special master. We may suspect that such was the purpose, and the loose methods pursued give some basis for such suspicion; but, at the same time, fatherly kindness and interest in the son and grandchildren, combined with family pride, will excuse a failure to exercise that strong and direct control over the management of the farm and business methods of the son in conducting it as would make plain to the world the exact relations existing. There is no evidence that what the son received from time to time by way of housing and board for himself, wife, and children was inadequate compensation for the services rendered. It is true that it does not satisfactorily appear what the son

did with all the money he received; but this appears to have been due to lax bookkeeping, or no bookkeeping, rather than to an intent to conceal or defraud. The father seems to have kept a firm hand on the proceeds of the hops, and to have dealt with them and their proceeds as his own. This fact is inconsistent with ownership of the lease and products of the farm by the son, or with any concession by the father that they were the property of the son.

[3] Under subdivision 4 of section 14 of the Bankruptcy Act, to defeat his discharge, the bankrupt, at some time "subsequent to the first day of the four months immediately preceding the filing of the petition," must have transferred, removed, destroyed or *concealed,* or permitted to be removed, destroyed or concealed any [some] of his property with intent to hinder, delay or defraud his creditors," and to constitute an offense under section 29b which will bar a discharge, so far as applicable in this case, the bankrupt must have "knowingly and fraudulently concealed while a bankrupt * * * from his trustee any [some] of the property belonging to his estate in bankruptcy," or "made a false oath * * * in, or in relation to any [his] proceeding in bankruptcy." It has been several times decided that to sustain either of these charges the evidence must be clear, convincing and satisfactory. It is not enough that strong suspicion is created by the testimony. The inferences should be such as to carry conviction, not, however, beyond a reasonable doubt, but such as to satisfy the reasonable mind.

The question of discharge is a civil action or proceeding, and not a criminal case, although it may involve a criminal act or acts, and in such case it is the duty of the court or jury to resolve the issues of fact according to a reasonable preponderance of the evidence. United States v. Regan, 232 U. S. 37, 47, 48, 34 Sup. Ct. 213, 58 L. Ed. 494. Here the evidence is such as to be consistent with honesty of purpose in making the arrangement testified to by the father of the now bankrupt between himself and Miss Peck, and that such arrangement was made, not to hinder, delay, or defraud creditors, or conceal any property of the son, or his earnings, but to assist him in making and having an honest living for himself and his family. See cases cited in 7 C. J. pp. 390, 391.

The case is not one where the court would be justified in reversing or disregarding the findings and conclusions of the special master, and his report will be confirmed.

CARBON STEEL CO. v. LEWELLYN, Internal Revenue Collector.

(District Court, W. D. Pennsylvania. January 14, 1919.)

No. 1957.

INTERNAL REVENUE ⊂=9—"MUNITION MANUFACTURERS"—PERSON SUBJECT TO TAX.

A steel company, contracting to deliver howitzer shells to a foreign government, which manufactured bars from which shells are made and turned them over to subcontractors for completion, retaining ownership, paying subcontractors, and afterwards delivering shells under its contracts, is subject to tax imposed on "munition manufacturers" by Act Sept. 8, 1916, § 301 (Comp. St. § 6336¼b), upon the "entire net profits actually received * * * from the sale" of the shells under contract.

At Law. Action by the Carbon Steel Company against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-Third District of Pennsylvania. Judgment for defendant.

H. V. Blaxter, of Pittsburgh, Pa., for plaintiff.

B. B. McGinnis, Sp. Asst. U. S. Atty., of Pittsburgh, Pa., for defendant.

ORR, District Judge. In pursuance of a stipulation by the parties waiving a trial by jury, this case came on to be tried by the court without a jury.

Plaintiff claims a right to recover from the defendant the sum of $271,062.62, which the plaintiff charges was illegally assessed against it and illegally exacted from it as a munition manufacturer's tax for the period ending December 31, 1916. The plaintiff paid the amount of the tax under protest, and thereupon sought relief in the required manner from the Commissioner of Internal Revenue. Relief was refused by the Commissioner of Internal Revenue, and relief must be denied by this court.

Long before the passage of the act which first provided for the collection of a tax from the manufacturers of munitions, the plaintiff procured three several contracts from the British government for the delivery to the authorized representatives of said government at New York of 4½-inch howitzer shells. The first contract was dated January 26, 1915, the second September 29, 1915, the third October 7, 1915, and together the said contracts provided for the delivery of 548,316 shells.

For the purposes of this case the said contracts may be considered to be similar in all respects. The contracts did not require that the steel company should manufacture the shells contracted for. They contemplated that some portion of the manufacturing might be done by the steel company and that other portions might be done by subcontractors. However, the steel company was bound to deliver the shells to said government when they were completed, and said government was bound to pay the steel company the price fixed in the contract.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The work necessary to complete a shell in accordance with said contract is as follows:

(1) Obtaining suitable steel in bar form.
(2) Cutting or breaking said steel bars to proper length.
(3) Converting said cut bars or slugs into a hollow shell forging by means of a hydraulic press.
(4) The turning of said shell upon a lathe to exact dimensions.
(5) Closing in one end of said forging to form the nose of the shell.
(6) Drilling out the base of said shell and the inserting of a base plate.
(7) Threading of the nose of the shell, and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof.
(8) Cutting a groove around the circumference of said shell, and inserting therein a copper driving band, and turning said band to the required dimensions.
(9) Varnishing, greasing, and crating the completed shell.

The plaintiff's plant was not equipped and did not have facilities for doing any of said work, except the manufacture of steel suitable for said shells in bar form. The plaintiff manufactured suitable steel in its plant in bar form in what is known as mill lengths. That was the beginning of the actual work necessary to fulfill its contracts with the British government. The other steps in the manufacture of the completed shells were taken by others. The steel bars in mill lengths were sent to another corporation, which partially sawed, cut, or indented the same at points representing the required lengths of shell forgings, and thereafter redelivered the same to the plaintiff, which then separated them into short lengths, which are known in the trade as slugs.

The plaintiff then shipped the said cut bars or slugs to the Westinghouse Machine Company, another corporation, which converted the same, by forging, into hollow shell forgings and annealed the same, so that they would be suitable for machine work. Said hollow shell forgings were then subjected to the necessary lathe work by said Westinghouse Machine Company and by the Union Switch & Signal Company; each of said corporations treating approximately equal quantities. They also afterwards closed in one end of the forging to form the nose of the shell, and drilled out the base of the shell, and inserted a base plate, and, as well, also performed the work of threading the nose of the shell and inserting the nose bushing, and in said nose bushing inserting the wooden plug to protect the thread. They also afterwards performed the work of cutting the groove around the circumference of the shell, and inserted therein a copper driving band, and turned said band to the required dimensions. They also performed the work of varnishing, greasing, and crating the completed shell.

The said different steps were taken under contracts with the plaintiff, which furnished said subcontractors with the varnish, grease, and cement required, and which also furnished the wooden plugs to protect the threads in the nose of said shells (which the plaintiff procured under a contract with a corporation of the state of Maine), fixing screws (which plaintiff procured from a corporation of Illinois, under contract) and with copper tubing (which plaintiff procured from a cor-

poration of Pennsylvania, under contract), which copper tubing the Union Switch & Signal Company cut into rings, which rings were inserted by the company last named and the Westinghouse Machine Company in appropriate grooves cut in the shells and turned to the required dimensions.

The said Westinghouse Machine Company and said Union Switch & Signal Company crated the said shells for export and delivered the same to the plaintiff at said company's works for transportation to New York. The freight upon said shipments was paid by the plaintiff, who, in turn, delivered the shells to the British government in New York Harbor. While this work was being done by the said Westinghouse Machine Company and the Union Switch & Signal Company, the British government maintained inspectors at the plants of said companies, who examined the shells and approved those properly made in accordance with the specifications in the contracts between the British government and the plaintiff.

None of the corporations who performed any of the work or furnished any of the materials entering into the completed shells after the plaintiff had manufactured the steel in bar form were in any manner connected with, or controlled by, the plaintiff, its officers, directors, or stockholders, nor in any way could one of them be properly called a subsidiary of the plaintiff.

For the purpose of keeping separate the profit upon said shell contracts, plaintiff opened a separate set of books, upon which it credited to an account known as "Special Contract Account" the advance payments received from the British government on account of said work, and from said account made all payments to subcontractors, and other payments for expenses connected with said work, and credited to said account all money received from the British government, and, when said contracts were completed, transferred to its general books the remaining net profit in said account.

As a result of this, the said net profit did not show, in any way, upon the general books of plaintiff until the profit was thus finally determined. The plaintiff charged to said special contract account the steel bars in mill lengths manufactured by it at market prices, in the same manner as if plaintiff had purchased said steel bars in mill lengths in the open market, for the reason that such work was not part of plaintiff's business. This entry of the market prices was for the purpose of determining the net profit upon the shell contracts. Subsequently, when making its return under protest, under the law providing for munition manufacturers' tax, the plaintiff, at the request of the Department of Internal Revenue, altered the charge for steel bars in mill lengths, so as to reflect the same in its return at cost price, instead of market price, therefore adding to the amount upon which plaintiff was taxed the profits shown on plaintiff's general books upon said steel bars in mill lengths.

The tax upon the increased profit caused by charging steel bars at cost instead of market prices amounted to	$ 15,112.39
The tax upon the balance of profit	255,950.23
The total tax paid is	$271,062.62

This was paid to the defendant on December 29, 1917.

The plaintiff employed none of its capital in the manufacture of munitions, but it employed the advance payments made by the English government. It contracted no interest-bearing debts or loans to meet the needs of such manufacture.

The gross payments from the British government constitute the gross amount of income received by it, being a total of.....		$8,544,337.51
As against that sum the plaintiff charged the cost of raw materials.....	$1,316,626.28	
The running expenses.....	717,457.21	
It paid to the other corporations for work done and materials furnished.....	4,341,753.06	
There were no other items to be deducted as allowed by section 302 of the act of Congress, because the plaintiff paid no interest or taxes, and sustained no loss or depreciation, or made any apportionment or allowance for amortization, etc.		
The sum of the deductions.....		6,375,836.55
The total net profits upon which the tax was computed, therefore, were.....		$2,168,500.96

In addition to the foregoing facts, it appears that the Westinghouse Machine Company and the Union Switch & Signal Company, and perhaps others who did work or furnished material under the contracts aforesaid, were assessed for a munition manufacturer's tax upon the profits made by them under their contracts aforesaid with the plaintiff and severally paid the amounts of the respective assessments.

Plaintiff's methods of keeping its accounts, or of performing its obligations under the contracts with the British government, are not to be deemed as evidence of any intent to evade its liability for the tax, because such methods were adopted and such course of business was begun prior to the passage of the act of Congress.

The act under which the assessments was made was passed September 8, 1916, and is entitled "An act to increase the revenue, and for other purposes." Act Sept. 8, 1916, c. 463, 39 Stat. 756–780 (Comp. St. §§ 6336a–6336¼a). The particular parts of that act which determine plaintiff's liability upon the facts found are set forth under title III, "Munition Manufacturers' Tax," and are as follows:

"Sec. 301. That every person manufacturing * * * (c) projectiles, shells, or torpedoes of any kind, * * * shall pay for each taxable year, in addition to the income tax, * * * an excise tax of 12½ per cent. upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: Provided, however, that no person shall pay such tax upon net profits received during the year 1916 derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January 1, 1916."

Section 302 specifies the deductions to be allowed severally "from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States."

"Sec. 307. The tax may be assessed on any person for the time being owning or carrying on the business, or on any person acting as agent for that person in carrying on the business, or where a business has ceased, on the person who owned or carried on the business, or acted as agent in carrying on the business immediately before the time at which the business ceased."

Comp. St. §§ 6336¼b, 6336¼c, 6336¼h.

If the excise tax provided for in the foregoing sections be a tax imposed upon manufacturers of munitions, can it be said that the plaintiff escaped liability under the facts found in this case? The plaintiff, by its engagement with the British government, undertook to manufacture, or have others manufacture, the shells. It began the manufacture of the shells to the extent of making the round bars in mill lengths. The steel in said round bars was the plaintiff's property, and remained the plaintiff's property during all succeeding processes, and until the plaintiff delivered the finished product to the British government. If this court would hold that the plaintiff ceased to be a manufacturer when it had finished the manufacture of the round bars in mill lengths out of which the shells were made, although it retained title thereto during the processes performed by others, the construction of the law would be too illiberal, and would tend to defeat what plainly appears to be the purposes of Congress. The tax, however, is not upon the manufacturer; it is upon the entire net profits actually received or accrued from the sale or disposition of such articles.

The liability for the tax is not expressly limited to the person manufacturing the munitions. It may be assessed on any person for the time being owning or carrying on a business, or on any person acting as agent for such a one. In the present case, the business was carried on by the Carbon Steel Company. In fact, the entire business of furnishing the shells to the British government, in pursuance of the several contracts, was carried on by the plaintiff. The making of the round bars was continuing long after the first slugs were delivered to the other corporations. The clerk (or clerks) of the plaintiff was stationed at the works of the Westinghouse Machine Company and the Union Switch & Signal Company for the purpose of checking up the work as it progressed. The case is not made any different because those companies paid the assessment upon their profits for making parts of the shells. The plaintiff was not charged in the assessment against it with any of the profits made by its subcontractors. The tax paid by it was a tax assessed upon its profits only. In every aspect of the case, the plaintiff appears to have been liable to the payment of the tax.

Therefore the plaintiff is not entitled to recover, and judgment will be entered in favor of the defendant.

STATE OF GEORGIA et al. v. SOUTHERN RY. CO.

(District Court, N. D. Georgia. December 5, 1918.)

1. REMOVAL OF CAUSES ⊂=18—JURISDICTION OF FEDERAL COURT—IMPAIRMENT OF OBLIGATION OF CONTRACT.
Actions against defendant, which used part of the right of way of the Western & Atlantic Railroad, a road owned by the state of Georgia, which were brought by the state and by the lessee of the railroad under authority of the Western & Atlantic Railroad Commission, pursuant to Act Ga. Aug. 4, 1916 (Acts 1916, p. 146) § 5a, *held* actions merely to determine the rights of defendant in the property under the various acts of the state Legislature, and not to be removed to the federal court on the ground of impairment of contract obligations or deprivation of property without due process of law.

2. REMOVAL OF CAUSES ⊂=48—SEPARABLE CONTROVERSY.
Where, under the authority of the Western & Atlantic Railroad Commission, separate actions were begun in the name of the state of Georgia and the lessee of the Georgia-owned railroad, wherein it was asserted that the defendant had encroached upon the property, *held* that, though the lesse was a foreign corporation, there was no separable controversy between it and defendant, which could be removed to the federal court, for the rights of the lessee depended on the state, and the same evidence would have to be adduced in either case.

3. REMOVAL OF CAUSES ⊂=11—CASES WHICH CAN BE REMOVED.
No suit which could not have been originally brought in the federal court can be removed from a state court.

4. REMOVAL OF CAUSES ⊂=102—CASES WHICH CAN BE REMOVED.
Where it was doubtful, under Act Ga. Aug. 4, 1916 (Acts 1916, p. 146) § 5a, whether the state of Georgia, which sued defendant, asserting it had encroached on a state-owned railroad, could be considered an unnecessary party to removed cause, and the lessee of the railroad, which had also sued, be considered the sole party, so that the federal District Court for Georgia might have taken jurisdiction under Judicial Code, § 57 (Comp. St. § 1039), as having jurisdiction of the property, the court will remand the cause to the state court.

At Law. Separate actions by the State of Georgia and by the Nashville, Chattanooga & St. Louis Railway Company against the Southern Railway Company were removed from the state to the federal court. On motion to remand. Motions granted.

William A. Wimbish, of Atlanta, Ga., for plaintiffs.
McDaniel & Black, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. There were two distinct actions instituted by the above complainants against the defendant, the Southern Railway Company, one in the superior court of Fulton county, Ga., and the other in the superior court of Whitfield county, Ga., under authority of the Western & Atlantic Railroad Commission, seeking analogous relief in said two counties, and each was removed to the United States District Court for the Northern District of Georgia, and they are now heard together on motions to remand.

In each of these actions it is alleged: That the state of Georgia is the sole and exclusive owner of the Western & Atlantic Railroad,

together with its rights of way and properties, extending from the city of Atlanta, in the state of Georgia, to the city of Chattanooga, in the state of Tennessee, and extending through the said counties of Fulton and Whitfield, in the state of Georgia. That the Western & Atlantic Railroad was constructed as a great public work by the state of Georgia, solely out of public funds, and that all of the property appertaining to said railroad, including its right of way and terminals, is exclusively owned by the state of Georgia, directly and immediately, in its sovereign or governmental capacity. That the said railroad has never been incorporated, nor has it any capital stock, nor does it constitute a legal entity, being public property, and the income derived therefrom constituting a part of the public funds, and, under the laws of the state, devoted to public uses. That the Nashville, Chattanooga & St. Louis Railway, a corporation of the state of Tennessee, operates the said Western & Atlantic Railroad under a lease from the state of Georgia, under the corporate name of the Western & Atlantic Railroad Company, which said lease came into existence in the following manner:

The said Western & Atlantic Railroad was, for a number of years, operated directly by the state, through its legislative and executive departments; that is, until the 27th day of December 1870, when it was leased to and operated by a private corporation known as the Western & Atlantic Railroad Company, for a term of 20 years, pursuant to an act of the General Assembly approved October 25, 1870 (Acts 1870, p. 423). Upon the expiration of this lease, on December 27, 1890, the said railroad was leased to the Nashville, Chattanooga & St. Louis Railway for a term of 29 years, the lessee becoming a corporation of the state of Georgia under the name and style of Western & Atlantic Railroad Company, pursuant to an act of the General Assembly approved November 12, 1889 (Acts 1889, p. 362), which lease is still current and will not expire until the 27th day of December, 1919.

In the case of the Fulton county action it is alleged that the Southern Railway Company is occupying and using, for the operation of its trains and the conduct of its business, a considerable portion of the right of way of the said Western & Atlantic Railroad in and near the city of Atlanta, in the county of Fulton, which is then more specifically described, and that said defendant claims a right or license to use and occupy said portion of said right of way by virtue of certain acts of the General Assembly of Georgia, to wit: Act approved December 20, 1860 (Acts 1860, p. 193), and act approved December 11, 1866 (Acts 1866, p. 127), authorizing the Governor to grant to the Georgia Western Railroad Company the right to build its railroad upon the right of way of the Western & Atlantic Railroad for the distance, at the location, and under the conditions named therein, and act approved August 23, 1872 (Acts 1872, p. 337), authorizing the said Georgia Western Railroad Company to construct its line on the right of way of the Western & Atlantic Railroad under certain conditions named therein, and also act approved February 27, 1877 (Acts 1877, p. 236), incorporating the Georgia Pacific Railroad Company, which became

the legal successor of the Georgia Western Railroad Company, and providing that such legal successor should possess all the rights, powers, immunities, and franchises possessed by the Georgia Western Railroad Company. The defendant, the Southern Railway Company, having become the purchaser, at judicial sale, of the properties and assets of the said Georgia Pacific Railroad Company, claims to have succeeded to and become invested with all the rights and privileges conferred upon and enjoyed by the said Georgia Pacific Railroad Company, including the use of the right of way of the Western & Atlantic Railroad in controversy here.

It is further alleged that under date of August 6, 1881, the then Governor of the state of Georgia, acting upon a petition of the Georgia Pacific Railroad Company, made and entered an executive order granting to said company the privilege of building its road on the right of way of the Western & Atlantic Railroad for a distance not exceeding four miles, from the depot in Atlanta, and upon conditions named therein; that under claim of authority granted by said executive order the said Georgia Pacific Railroad Company proceeded to lay its tracks upon, and to use and occupy, a portion of the said right of way of the Western & Atlantic Railroad in, and for some distance beyond, the city of Atlanta, and thereafter continued the use of said right of way for the operation of its trains, and subsequently also or the operation of the trains of the East Tennessee, Virginia & Georgia Railroad Company.

It is then alleged that the said use and occupation did not conform with the requirements and limitations of said executive order, nor was it authorized by the acts referred to, pursuant to which said order purports to have been made, for reasons then specifically set out; that the Georgia Pacific Railroad Company never acquired any lawful right to use or occupy said right of way of the Western & Atlantic Railroad, and its use thereof was permissive only, and by sufferance of the state and its lessee.

Further it is alleged: That, under the Constitution and laws of Georgia, the Legislature was forbidden to authorize, and the Governor was incompetent to grant, any portion of the right of way of the Western & Atlantic Railroad, or to create a permanent and exclusive easement therein, to any person or corporation, without such valuable consideration therefor as could and should be applied to the reduction of the bonded debt of the state, or to dispose of any of the property or property rights of the state as a donation or gratuity, or without such valuable consideration therefor as would support a grant, and that such consideration was never paid by the Georgia Pacific Railroad Company or received by the state. That at the time of the acquisition of the properties of the Georgia Pacific Railroad Company by the Southern Railway Company at judicial sale, on August 18, 1894, the defendant, the Southern Railway Company, had notice that the Georgia Pacific Railroad Company had no legal right to the use and occupancy of that portion of the right of way of the Western & Atlantic Railroad now in question, for that the said railroad company had never complied with the terms of the several acts and resolutions

of the General Assembly in that behalf, or of the executive order passed in pursuance thereof. That therefore the Southern Railway Company did not, by reason of its purchase at judicial sale, acquire or become vested with any license or privilege that the said Georgia Pacific Railroad Company may have enjoyed, to the use or enjoyment of any portion of the right of way of the Western & Atlantic Railroad. That should said acts of the Legislature and the said executive order be construed as authorizing a qualified use of said right of way by the Georgia Pacific Railroad Company, such use was permissive only, and constituted nothing more than a license to be enjoyed at the will of the state upon the conditions expressed, and that such authority, if it existed, was in the nature of a special privilege not authorized by law to be granted to each and all railroads alike, and as such did not pass to the purchaser.

It is further shown that the continued use and occupancy by the Southern Railway Company of said right of way of the Western & Atlantic Railroad is in derogation of the state's right and title thereto, and operates to exclude the state and its lessee from the use and enjoyment thereof, that such use and occupation, being without warrant in law, constituted a continuing trespass, and a constantly recurring grievance, occasioning irreparable injury incapable of pecuniary estimation.

It is further alleged that by an act approved November 30, 1915 (Acts 1915 [Extra Sess.] p. 119), the Western & Atlantic Railroad Commission was created for the purpose and with the powers and duties therein expressed and by an amendment thereto, approved August 4, 1916, was given full power and authority in its discretion, to deal with and dispose of any and all encroachments upon, and use and occupancies of, any part of the right of way and properties of the Western & Atlantic Railroad, and to take such action as might be deemed proper and expedient, and to institute and prosecute, in the name and behalf of the state of Georgia, such suits or other legal proceedings as might be deemed appropriate in protection of the state's interests or the assertion of the state's title, in pursuance of which authority these proceedings were instituted.

In the action instituted in Whitfield county it is alleged on information and belief that the Southern Railway Company claims some right or license to the use of a certain portion of the right of way of the Western & Atlantic Railroad in said county by reason of the following facts:

That at the time of the lease to the Nashville, Chattanooga & St. Louis Railway, above referred to, the East Tennessee, Virginia & Georgia Railway Company, a foreign corporation, was using and occupying a portion of the right of way of the said Western & Atlantic Railroad in and for a distance of about seven miles south of the city of Dalton, in said county, that such use and occupation was maintained by said railway company until the 8th day of July, 1894, when all its assets and properties were sold, pursuant to judicial decree, and purchased by and in behalf of the Southern Railway Company, since which time said Southern Railway Company has used and oc-

cupied said portion of the right of way of the Western & Atlantic Railroad, which is then more specifically described. That this right or license is claimed pursuant to an act approved December 14, 1859 (Acts 1859, p. 313), authorizing the Governor to grant to the Dalton & Gadsden Railroad Company (a Georgia corporation) the right to construct its railroad for a short distance upon the right of way of the Western & Atlantic Railroad, provided the said Dalton & Gadsden Railroad Company should grant a similar privilege to the Western & Atlantic Railroad, and provided, further, that such grant be not, in the opinion of the Governor, incompatible with the public interests, which right or license was subsequently acquired by the East Tennessee, Virginia & Georgia Railway Company, and thus passed to the Southern Railway Company.

It is then alleged: That no record or memorandum can be found indicating that the Dalton & Gadsden Railroad Company, or either of its successors, ever applied to the Governor for the grant of any right or privilege pursuant to said act, that no order or other authority granting any such privilege was ever made or given by the Governor, nor has any similar privilege ever been granted to the Western & Atlantic Railroad by said Dalton & Gadsden Railroad Company, or any or either of its successors. That therefore the occupation of said right of way by said Southern Railway Company is not referable to nor authorized by said act, but has been and is being maintained by said Southern Railway Company without authority of law therefor, and without the consent of the state of Georgia or its said lessee. That it operates to exclude the state and its lessee from the use and enjoyment thereof, constituting a continuing trespass and a constantly recurring grievance, occasioning irreparable injury, incapable of pecuniary estimation.

This petition then alleges the creation of the Western & Atlantic Railroad Commission, with the authority vested therein, as stated above in connection with the Fulton county suit.

These suits have been removed from the superior courts of the counties in which they were brought, respectively, to the United States District Court on the ground of diversity of citizenship and the existence of a separable controversy between the Nashville, Chattanooga & St. Louis Railway, one of the plaintiffs, and the Southern Railway Company, the former being a citizen of the state of Tennessee, and the latter a citizen of the state of Virginia, except that it is asserted in the petition that under the leasing act, by which the Nashville, Chattanooga & St. Louis Railway obtained its rights to the railroad, it was provided that it should become a corporation of the state of Georgia under the name of the Western & Atlantic Railroad Company, therefore the situation was such that, at the time of the removal, it was a citizen of the state of Georgia under that act. It is then alleged in the petition for removal that the District Court of the United States for the Northen District of Georgia would have jurisdiction of the causes, for the reason that they are brought to enforce legal or equitable liens upon or claims to, or to remove incumbrances or liens or clouds upon the title of real property lying in the state of Georgia

and in the Northern district thereof. A separable controversy, it is claimed, exists—

"because the petition filed by the plaintiff sets out no cause of action, legal or equitable, in favor of the state of Georgia; it clearly appearing from the face of the petition filed jointly by the state of Georgia and the Nashville, Chattanooga & St. Louis Railway Company, in connection with the exhibits thereto and the laws of Georgia, of which judicial cognizance will be taken, that the state of Georgia has no right of possession to the rights of way, lands, and other appurtenances which have been made the subject of the controversy, but, on the contrary, it clearly appears that the Nashville, Chattanooga & St. Louis Railway, as lessee of the state, is entitled to the sole and exclusive possession of the properties involved, if it should be found that your petitioner is in wrongful possession and occupancy thereof.

"(b) Your petitioner further shows that there exists a separable controversy between it and the Nashville, Chattanooga & St. Louis Railway Company, wholly determinable between the two, and which can be fully determined without the presence of the state of Georgia as a party to the cause, for the further reason that, even if it should be considered that the possession and occupancy of the premises involved constitutes an injury to the freehold, the right, remedy, and redress which the state of Georgia would have in the controversy incident upon such injury to the freehold would be entirely different and separable from the right which the Nashville, Chattanooga & St. Louis Railway may assert by reason of the deprivation of its possession of the premises in dispute; the controversy which the state might urge being separable from that which the Nashville, Chattanooga & St. Louis Railway might be entitled to prosecute, there existing in the two no joint controversy or right of action."

Setting out that it had given bond, as required by law, the petition of the Southern Railway Company then shows that its appearance through its attorneys to remove this suit is a special appearance, and does not waive objections to the jurisdiction of the court; it being solely for the purpose of removal of the case from the state court to the United States court for the Northern district of Georgia.

After the removal of the case to this court, the removal papers having been filed on July 26, 1918, the Southern Railway Company, on October 12, 1918, amended its petition for removal, or attempted to do so, in the following way:

"Your petitioner further shows that said cause involves a controversy between it and the state of Georgia of the value of more than $3,000, exclusive of interest and costs, which arises under the Constitution and laws of the United States, for that it is apparent upon the face of plaintiff's petition that there arises between petitioner and the state of Georgia controversies as to whether the action of the Western & Atlantic Railroad Commission in pursuance of the act of the General Assembly of Georgia approved November 30, 1915, as amended August 4, 1916, in instituting this suit, and as to whether the acts of the Legislature in question themselves impair the obligation of the contract between the state of Georgia and the predecessors of petitioner which arose under the act of the General Assembly approved December 14, 1859 (which acts are set up and referred to in the equitable petition filed by plaintiffs), contrary to that provision of article 1, section 10, paragraph 1, of the Constitution of the United States, which, among other limitations on the powers of the individual states, forbids that a state shall pass a law impairing the obligation of contracts.

"And petitioner further shows that there is necessarily involved in the controversy the question as to whether the act of the General Assembly of Georgia approved December 14, 1859, together with the action of the Western & Atlantic Railroad Commission in proceeding against it, will deprive it of its

property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States."

There is a motion to remand both cases, and the matter is now before the court on this motion. Argument has been had, and I have had the matter under advisement for some days.

Perhaps the first question for consideration is the amendment to the petition to remove, proposed by the Southern Railway Company. Assuming that the defendant has the right to amend its petition, as claimed by it, setting up the federal question for removal to this court, which is not conceded, let us see if any federal question is involved on the record made in this case.

[1] It is a suit brought by the state, under authority and by the direction of the Western & Atlantic Railroad Commission, as shown in the plaintiffs' petition, and the lessee company, and they assert the right to the possession and occupancy of certain parts of the right of way of the Western & Atlantic Railroad, of which the Southern Railway Company now has some occupancy and use, and this, it is claimed, it is not authorized to have under the various acts of the Legislature of Georgia, which are set out, and the facts stated in connection therewith. They do not seek to annul any contract which was made between the state of Georgia and the Southern Railway Company, or the Southern Railway Company's predecessors in right, but simply ask to have the rights of the parties determined and settled in this suit. As I understand the pleadings, the court is simply asked to construe the legislation of the state on the subject, and what has been done by the parties, and determine whether the Southern Railway Company has acquired the right to the use of the property named. The case in the superior court of Fulton county also asks the court to construe some executive orders purporting to have been passed in pursuance of certain acts referred to. There is nothing, so far as I can see, that looks to an impairment of the obligation of the contract, or to depriving the defendant of its rights without due process of law.

The act of the Legislature of Georgia of August 4, 1916 (Acts 1916, p. 146), under which these suits are brought, granting powers to the Western & Atlantic Railroad Commission, provides, by way of amendment to the original lease act, a new section to be designated as "section 5a," and in that section provides:

"The said commission, subject to direction in specific cases by the General Assembly, is hereby given full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and uses and occupancies of any part of the right of way and properties of the Western & Atlantic Railroad by any person other than the present lessee and its tenants and licensees under and during the term of the present lease, whether such encroachments, use or occupancy be permissive or adverse, and whether with or without claim of right therefor. The said commission is hereby fully authorized and empowered to determine whether such encroachments, uses and occupancies, or any of them, shall be removed and discontinued, or whether they, or any of them shall be permitted to remain, and, if so, to what extent and upon what terms and conditions. The said commission is further authorized to adjust, settle and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse use or occupancy of any part of said right of way and properties of the Western & Atlantic Railroad, in such manner and upon such terms and conditions as it may deem the best

interests of the state require; and all contracts and agreements that said commission may make or enter into in settlement or disposition of all matters touching such adverse uses and occupancies shall be binding upon the state. The said commission is further authorized and fully empowered to take such action as it may deem proper and expedient to cause the removal and discontinuance of any encroachment, use or occupancy of said right of way and properties which in its opinion should be removed or discontinued; and to this end the commission is authorized and empowered to institute and prosecute, in the name and behalf of the state of Georgia, such suits and other legal proceedings as it may deem appropriate in protection of the state's interest, or the assertion of the state's title."

This act evidently intended simply to protect the state's interest in and to the property of the Western & Atlantic Railroad, and in case the commission should determine that there were encroachments on the property to institute suits and have the rights of the state and the parties who are thought to be so encroaching determined. It is claimed by the amendment to the petition for removal that what is done by the state is an impairment of the obligation of the contract, and seeking to take the defendant's property without due process of law, both in violation of the federal Constitution. It is perfectly clear to me that no such federal question is involved here, even if the right to amend, as proposed by the plaintiff, at the time the amendment was made, exists.

Laying aside this ground for removal as wholly without merit, then we come to the next question, as to the grounds set up in the original petition for removal; that is, diversity of citizenship and the existence of a separable controversy between the Southern Railway Company and the Nashville, Chattanooga & St. Louis Railway, and also that the question with reference to the state is one concerning the title or possession of certain real estate in this district and on the part of the lessee the right to occupancy and noninterference with such occupancy during the term of the lease.

[2] I do not find in this case any separable controversy, whether we look for the rights of the state or of the railroad company, either treating it as the Nashville, Chattanooga & St. Louis Railway, or the corporate name by which it is known under the lease, the Western & Atlantic Railroad Company. The right of the lessee is through its lease from the state. It has no different character of rights in the sense that is necessary to constitute a separable controversy, for the sole question on the part of everybody asserting the claim is whether the Southern Railway Company has the right to its present occupancy and use of the portions of the right of way of the Western & Atlantic Railroad which is in question here. The same controversy exists as to both; that is, through the same evidence and by the same course of reasoning and determination the state gets its rights as owner and the lessee its rights as lessee. Did the Southern Railway, under the legislation set out in the bill and by its continued occupancy of certain portions of the railroad right of way, acquire the right to such occupancy? Has the Southern Railway the right to do what it is doing, and to occupy, as it is, the right of way it is occupying? That is the sole question, and there is no separable controversy in it. Has the

Southern Railway the right it seems to claim, or has it not? That is all that must be determined as to either of the plaintiffs.

[3, 4] Strong argument might be made, and has been made here, in favor of a right to removal in this case for the reason that it involves an action under section 57 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102 [Comp. St. § 1039]), which comes from section 8 of the act of 1875, and section 738, Revised Statutes, which provides that when in—

"any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state: Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

Treating the present suit, as I think we properly may, as one covered by this law, and considering the state as an unnecessary or improper party, under the decision of the Supreme Court of Georgia in Southern Railway Co. v. State of Georgia, 116 Ga. 276, 42 S. E. 508, and Coney & Parket et al. v. Brunswick & Florida Steamboat Co. et al., 116 Ga. 222, 42 S. E. 498, it becomes a suit to settle title and right to the occupancy of certain land in this district, and would then be between the Nashville, Chattanooga & St. Louis Railway and the Southern Railway Company. In this view neither party would be a citizen of the state, and the defendant, a nonresident of the state, removes the case. On this line the case of Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, holding that no suit which could not have been originally brought in the Circuit Court of the United States can be removed from a state court, might be urged, to be met by the

fact that, being authorized by the act of Congress I have referred to, now section 57 of the Judicial Code, the suit could have been originally brought in this court and the nonresidence of both parties would be immaterial, they being citizens of different states and embraced within the general, or what is sometimes called the inherent, jurisdiction of the court. But, even if the fact of its being a local action—that is, concerning property within this district—would relieve it of the objection that neither party is a citizen of the state, we are met with the further objection as to whether the decision of the Supreme Court of the state in 116 Ga. (42 S. E.) is pertinent, since the act to which I have referred by the Legislature of Georgia, establishing the Western & Atlantic Railroad Commission, and giving it authority to bring suits such as this concerning encroachments upon the right of way of the railroad. The Supreme Court of the state evidently considered only the general law on the subject of respective rights of lessor and lessee, and did not have at that time—indeed it was not in existence—the act of the Legislature of Georgia which expressly authorizes proceedings by the lessor to relieve itself of unlawful encroachments upon its property.

Upon the whole I must say that, if this case were retained in this court, the propriety and legality of its retention would always be, as it is now, a matter of grave doubt with me. It is well understood, of course, that the jurisdiction here must be clear, and that a doubt as to the jurisdiction is sufficient ground for remanding a removed case to the state court from which it had been removed. I am satisfied, therefore, for the reasons I have given, that these cases should be remanded to the state courts, respectively, from which they were removed. An order may be taken in each case, directing the remand accordingly.

WESTINGHOUSE ELECTRIC & MFG. CO. v. BINGHAMTON RY. CO.

(District Court, N. D. New York. January 22, 1919.)

1. STREET RAILROADS ⇐58—RECEIVERS—OPERATION OF ROAD.
   Under Judicial Code, § 65 (Comp. St. § 1047), it is the duty of a receiver of a street railroad to operate the same according to the valid laws of the state in which the road is situated.

2. CARRIERS ⇐18(1)—RATES—POWER OF COURTS.
   The Legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.

3. CARRIERS ⇐12(9)—RATES—PUBLIC SERVICE COMMISSION.
   In New York the Public Service Commission has, under Public Service Commission Law, §§ 33, 48, 49, power to increase or change rates of fare; but this power does not exist, where there is a valid contract between a municipality and a street railroad company fixing the rates of fare.

4. STREET RAILROADS ⇐58—RECEIVERSHIP—POWER OF COURT.
   Where a receiver of the property of a street railroad company in failing circumstances is appointed, the court has the equitable power to restrain suits which would hamper the operation of the road, and, if necessary, may order a sale of the property and distribution of the assets.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

5. RECEIVERS ⊂⊃81—NATURE OF RECEIVERSHIP.
A receivership is for the benefit and protection of all interests.

6. STREET RAILROADS ⊂⊃58—RECEIVERSHIP—RESTRAINING FORECLOSURE OF MORTGAGE.
The existence of a receivership does not warrant the court restraining an action to foreclose a mortgage securing bonds on the property of a street railroad company in the hands of a receiver, where interest is in default, and the court has no power to issue receiver's certificates to pay such interest, and make same a lien superior to the mortgage.

7. CARRIERS ⊂⊃12(5)—FARE—RATES.
Existing conditions *held* to show necessity for increasing the rates of fare of a street railroad company in the hands of a receiver.

8. CONTRACTS ⊂⊃15—CREATION—VALIDITY.
Contracts, to be valid and binding, when not implied by law from the existence of certain conditions, result from the mutual agreement of the parties to be bound thereby, or, in other words, the meeting of the minds.

9. CONTRACTS ⊂⊃105—CREATION—VALIDITY.
There can be no valid agreement to violate a law, but private legal obligations imposed by statute may be varied by an agreement which is not forbidden by law, or which is not in violation of the spirit of the law.

10. CONTRACTS ⊂⊃161—CONSTRUCTION.
All the terms and conditions of a contract are to be read together, and each provision construed with reference to the others.

11. CONTRACTS ⊂⊃247—ALTERATION—PRESUMPTION.
The parties by mutual consent properly evidenced may take out of a contract one provision and substitute another, etc., but as a general rule it is never implied that one party assents to a change which materially affects his rights or remedies and creates new obligations and substitutes nothing.

12. CONTRACTS ⊂⊃249—DISCHARGE.
A contract may be discharged by performance, by operation of law or by express agreement called waiver, cancellation, or rescission.

13. CARRIERS ⊂⊃12(9)—CHARGES—CONTRACTS.
Where municipal ordinances provided that street railroads should be operated by animal power and the fare should not exceed 5 cents, consent by the municipality to electrification of the roads *held* to work cancellation of the contract as to fare.

14. CARRIERS ⊂⊃12(9)—FARE—CONSENT OF MUNICIPALITY.
Though Laws N. Y. 1884, c. 252, relating to street railroads, provided for consent of municipal authorities, yet as the act itself, by fixing the rate of fare, showed a legislative exercise of the rate-making power, the consent did not create any contract between the municipality and the street railroad company, restricting the latter to the rate of fare prescribed in the act.

15. CARRIERS ⊂⊃12(9)—FARE—RATE-MAKING POWER.
Where a state Legislature proceeds to exercise its power to fix rates for a street railroad company, such company and a municipality cannot contract as to the matter, for, when the state or nation proceeds to act as to matter which it has power to regulate, private contracts as to such matter are no longer binding.

16. CARRIERS ⊂⊃12(9)—RATES—REGULATION.
In view of the history of legislation and Railroad Law, art. 5, *held*, that the rate of fare to be charged by a consolidated street railway company, to which a city had granted the right to build extensions, was subject to regulation by the state; any contract with the city having been abrogated.

17. CARRIERS ⟸12(9)—RATES—REGULATION.
Where the state exercised its power to regulate rates charged by a street railroad company, *held*, that the fact a municipality thereafter contracted as to existing rates does not preclude the state from altering the rates.

18. COURTS ⟸366(1)—PRECEDENTS—STATE DECISIONS.
Interpretation of a state statute by the highest court of the state enacting it is binding on the federal courts, including the national Supreme Court, where there is no infringement of the United States Constitution, except when the Supreme Court has first passed on the matter.

19. CARRIERS ⟸12(9)—RATES—REGULATION.
The New York Public Service Commissions Law does not allow the Public Service Commission to regulate the rates of a street railroad company, where there is a valid contract between such company and a municipality as to such rates.

20. CARRIERS ⟸12(5)—RATES—CONFISCATORY.
A rate limiting a street railroad company to a 5-cent charge per passenger *held* confiscatory.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Binghamton Railway Company, in which William T. Phelps was appointed receiver. In the matter of the application of the receiver for an order authorizing and directing him to increase the rates of fare for carrying passengers on defendant's road from the present rate of 5 cents to 7 cents, and to apply to the Public Service Commission of the Second District of New York for a determination by it as to the reasonableness of such increased rate, and for such other and further order, decree, or direction in the premises as the court may deem proper. Application granted.

This is an application made by William G. Phelps, as receiver of the Binghamton Railway Company, for permission and direction to apply to the Public Service Commission of the Second District of the State of New York, for an order authorizing an increase in the rates of fare for carrying passengers on said railway, such increased rate to continue during the war in which the United States is now engaged, and for two years thereafter. Before such direction should be given to the receiver by this court, it is necessary to determine three propositions, to wit:

First. Does there exist a contract between the city of Binghamton and the defendant company which precludes the Public Service Commission from authorizing an increase in the rate of fare?

Second. Are all of the corporations, which have by mergers or consolidations become the Binghamton Railway Company, subject to the provisions of the general street railroad laws of the state of New York?

Third. Has the Public Service Commission, upon the application of the receiver under the direction of the court, power to authorize an increase in rates?

Geo. B. Curtiss, of Curtiss, Keenan & Tuthill, of Binghamton, N. Y., for receiver.

John J. Irving and Wm. H. Riley, both of Binghamton, N. Y., for city of Binghamton.

Jas. E. Connerton, of Johnson City, N. Y., for village of Johnson City.

E. H. Moody and D. V. Ashley, both of Binghamton, N. Y., for town of Union.

RAY, District Judge (after stating the facts as above). The Binghamton Railway Company, owning and operating a surface street railway, extends through certain of the streets of the city of Binghamton, N. Y., and also to points outside of said city, and is made up of an original company and several other companies, subsequently organized and thereafter consolidated therewith. It is the only line of street railway in or near the city of Binghamton, and extends to the village of Lestershire, Johnson City, and the village of Union, and also to the State Asylum for the Insane and to Port Dickinson.

Owing to the war and war conditions mainly, if not wholly, the present rate of fare charged, five cents, has proved to be wholly inadequate to the production of revenues sufficient for the maintenance of the road; that is, payment of running and operating expenses, taxes, and the interest due on its bonded indebtedness, excluding all consideration of dividends to stockholders, and even the purchase of new and needed equipment, or the making of contemplated and needed extensions and improvements, which would be of benefit, not only to the company itself, but to the public.

The maintenance and continual operation of this road is a matter of concern, not to its stockholders alone, but to the general public and every resident of the city of Binghamton and of the communities named and to which the road reaches. This financial condition of this corporation is not due to any financial or business mismanagement, or to ill-considered or unnecessary outlays, or to excessive salaries paid to officers or managers, or to the payment of dividends to stockholders, but to the rapid and unforeseen increase in the cost of material, especially iron and steel, and other equipment, and the cost of labor absolutely essential to the operation of the road and the keeping of same in even ordinary repair, consistent with the safety of those riding thereon. The cost of labor and material, in most cases, has more than doubled, and in some cases is three or four times what it was formerly.

The company found itself without revenues to pay overdue taxes, bills overdue for necessary supplies purchased and used for needed repairs, current expenses, and cars purchased, but not paid for, saying nothing of interest on its bonded indebtedness falling due in the immediate future. It had borrowed to the limit of wisdom, if not to that of possibility. It found itself threatened with suits to which it had no defense, executions and levies on its personal property, cars, and other equipment, which would render operation impossible, and with default in payment of interest on its outstanding bonds and a foreclosure of the mortgages given to secure same and a sale of its property.

With this situation confronting it, a suit in equity was brought by one of its large creditors, in which this court was called upon to appoint a receiver of the company and of its property, whose duty it should be to protect and preserve the property as a going concern and operate the road for the benefit of all concerned, applying the earnings to the payment of necessary current expenses. An able business man, not connected with any interest, was selected by the court and appointed to this place. There was no objection to his selection.

The court has found it necessary to authorize the issue and sale of receiver's certificates to provide for overdue taxes and other expenses, and has taken considerable evidence in this proceeding establishing all the facts stated on a full hearing and on due notice to all concerned, and in which counsel for the city of Binghamton and the other places named have been heard.

This application, as before stated, was and is directed to this court for authority and direction to the receiver, William G. Phelps, to apply to the Public Service Commission of the State of New York, Second Division, for authority to increase the rate of fare charged on this road from 5 cents per trip to 7 cents per trip, or to such sum as the court may recommend and the Public Service Commission may approve and grant. It is not sought to have this increase permanent, but for the period of the war, soon to close finally, and for the two years following, when it is expected conditions will be more normal. It is doubted and denied by some that the said Public Service Commission possesses such power in this case, and this court has taken proof of all the pertinent facts to enable it to determine whether or not, in its opinion, such power exists, and whether or not the facts demand the exercise of such power, if it does exist, to the end that said receiver, who is but the arm of the court, may be directed to incur the expense of a proper application to that commission invoking its action.

Necessity.

[1] The necessity for the invocation of such power, if it exists in this case, is beyond all question. This court is without power in any case or under any circumstances to increase rates of fare, or direct its receiver so to do, even while in possession of and operating the road for the benefit of the public who use it. The court cannot do this, even when to run at the present established rates entails large losses to creditors and stockholders. The statutes of the United States provide that:

"Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both." Comp. St. § 1047.

It is the duty of a receiver appointed by the federal court to operate the railroad according to the valid laws of the state in which such road is situated. Erb v. Morasch, 177 U. S. 584, 585, 20 Sup. Ct. 819, 44 L. Ed. 897; United States v. Harris, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780; Act Aug. 13, 1888, c. 886, § 3, 25 Stat. 433, 436, 1 U. S. Comp. St., p. 1184, § 1047; Judicial Code, § 65. In Erb v. Morasch, supra, it is said:

"Now, in respect to the federal questions, we remark, first, that it is the duty of a receiver, appointed by a federal court to take charge of a railroad, to operate such road according to the laws of the state in which it is situated.

Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 433, 436; United States v. Harris, ante, 305 [20 Sup. Ct. 609, 44 L. Ed. 780]."

[2] In Chicago & Grant Trunk Railway v. Wellman, 143 U. S. 339, 344, 12 Sup. Ct. 400, 402 (36 L. Ed. 176), the court said:

"The Legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

To the same effect is Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; Chicago, Milwaukee, etc., Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970.

[3] In the state of New York the Public Service Commission is to increase or change rates of fare. Public Service Commissions Law, §§ 33, 48, 49. Section 49, amended by chapter 546, Laws of 1911, provides:

"Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed."

See People ex rel. U. & D. R. Co. v. Public Service Commission, 171 App. Div. 607, 156 N. Y. Supp. 1065, affirmed 218 N. Y. 643, 112 N. E. 1071.

[4] This power of the court does not exist, however, in cases where there is a valid contract in force fixing the rates between the municipality and the railroad company. Such contracts cannot be disregarded or overthrown by the action of the court. Detroit v. Detroit C. S. R. Co., 184 U. S. 368, 382, 22 Sup. Ct. 410, 46 L. Ed. 592; Matter of Quimby v. Public Service Commission, 223 N. Y. 244, 263, 119 N. E. 433. This is admitted or not questioned by the receiver in this case, but he denies the existence of such a contract. The court, however, in such cases as this, has the equitable power to restrain suits which would hamper the operation of the road, inconvenience the public, waste the assets, and destroy the value of the stock and road. It may, if necessary, order a sale of the property and the distribution of the proceeds to creditors, balance, if any, to stockholders. It is immaterial whether we term such equitable suit one in the nature of a sequestration proceeding or one in the nature of a conserva-

tion of assets proceeding; the end sought to be attained is the same, and the powers of the court in the premises are substantially the same. The only denial of the necessity for an increase of rate of fare on this railroad is found in the argument that the war with the German Empire and Austria is substantially over, and that the soldiers are rapidly returning home and to their accustomed avocations, and that reasonably it may be expected that business and industrial conditions will speedily assume or regain the normal, and that all necessity for an increase in the rate of fare will soon disappear, and also that this railroad company, as individuals and private corporations have done, should be willing to submit uncomplainingly and cheerfully to the losses growing out of war conditions.

This assumes that the financial ruin of this railroad company is not impending, and the foreclosure of the mortgages thereon and the "wiping out" of the stock held by the stockholders and large losses to general creditors are not imminent. It is within the knowledge of the court that already preparations are being made and steps taken to bring about a foreclosure of the mortgages, or at least one of them, on this road, and a sale of the property. Such action would destroy the value of the stock and result in large losses to the general creditors (unless it be certain preferred ones, whose claims may be preferred to the lien of the mortgage bondholders). The court is also informed, and has no reason to doubt, that it is not the desire of such interests to avail themselves of such foreclosure remedy, if it can be avoided without sacrificing the rights of the mortgage bondholders.

In the judgment of this court the true interests of the city of Binghamton and of the villages to and through which this railroad runs demand that action which probably would lead to the results indicated should be avoided, and that affirmative action should be taken if it reasonably can be done, which will make such results impossible. Every failure of a substantial character in almost any community is a blow to its financial and industrial prosperity. Sales of such properties as this, under present financial conditions, are sure to result in a great sacrifice by those who in good faith have put their money into the stock of the companies and those who in good faith have given credit without security, depending on their continued prosperity and ability to pay from current revenues. It would seem that those who use this road as a great public utility and convenience, and every interest in the city of Binghamton and the villages concerned, should be willing to pay temporarily an increased rate of fare for this service commensurate with its actual cost and the increased rate of wages paid to all workers, including those who operate the road, and by and to those industrial and manufacturing concerns which make and sell the iron, steel, and equipment necessary for the operation of this road. Adequate rates of fare under conditions prevailing prior to the war are inadequate under prevailing conditions, and those who enjoy the benefits of the service ought to be willing to pay a fair compensation therefor. It may be remarked, without digressing too far, that in several instances the rates of fare on similar lines of roads have been increased.

[5-7] A receivership is for the benefit and protection of all interests, general creditors, secured creditors (bondholders), and stockholders, and it is the duty of the court, so far as reasonably possible, to conserve and protect all interests. The court should not and cannot properly hold and manage such a property indefinitely. There must be revenues, not only to pay taxes, but to pay current operating expenses and current and necessary repairs; also to pay interest on bonds accruing, due and secured by mortgage, and which must be paid to prevent the trustee under such mortgages from declaring a default and proceeding to foreclose. This court has no power to enjoin such action by the trustee under a valid mortgage given to secure the payment of bonds. It has no power to issue receiver's certificates to raise money to pay such interest on bonds, and make the indebtedness thus created a first lien after operating expenses and taxes; that is, a lien prior to the lien of bonds themselves.

In Knickerbocker T. Co. v. O. C. & R. S. Ry. Co., 201 N. Y. 379, 385, 386, 94 N. E. 871, 873, the Court of Appeals, per Mr. Justice Cullen, after citing and quoting from the decisions of the Supreme Court of the United States, and speaking of receiver's certificates, said:

"It thus appears that the power is merely incidental to the possession by the court of some property or fund, and can be exercised only for the care, maintenance, and preservation of such property or fund, and not for the benefit or advantage of any particular claimant to the fund, except as such claimant may profit by the maintenance and preservation of the thing itself. The res or thing in the possession of the court in this case by its receiver was the railroad. Receiver's certificates might have been issued for the maintenance and preservation of the railroad, for its repair, the purchase of necessary rolling stock, and the payment of taxes under which the rolling stock might be seized and the operation of the road crippled or prevented. Had the application been made to issue certificates for any of such purposes, and the trustee given notice, it is probable that it would have been concluded by the determination of the court on the necessity of issuing certificates. The order made in this case, however, showed on its face that the certificates were to be issued for no such object, but to prevent the foreclosure and loss to the stockholders and creditors of the railroad. Probably payment of the defaulted interest and avoidance of a foreclosure would benefit the stockholders and creditors of the company, and so, also, would the issue of certificates, the proceeds thereof to be paid to creditors, benefit the creditors; but neither would benefit or enhance the value of the railroad, or save it from depreciation to the extent of a dollar, and the railroad was the only res in court. Nor would it contribute at all to the proper operation of the railroad, the thing in which the public was interested. The effect of the order was simply to pay bondholders by appropriating against their will part of their own property for the purpose. The order of the court was, therefore, not only erroneous, but void as in excess of its powers; and though the court in granting the order necessarily decided that it was within its powers, still the order may be attacked collaterally. Kamp v. Kamp, supra [59 N. Y. 212]. Persons purchasing the receiver's certificates were bound to take notice of his authority to issue the same as a paramount lien. Union Trust Co. v. Illinois Midland Ry. Co., supra [117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963]."

Therefore it is plain that to protect and preserve this railroad the receiver must depend on revenues and not on borrowing, and also that its protection depends on ability to pay the interest on its bonds as well as the operating expenses. This receiver cannot depend on

the good nature of bondholders, who expect their interest, and many of whom need it to meet living expenses, but under the circumstances of this case must and should appeal to that power, if there be one, which can authorize an increase in rate of fare and thereby secure the revenue absolutely essential to accomplish the main purpose for which he was appointed, viz. conserve and preserve this corporation and its property for the benefit of creditors, secured and unsecured, the general public who use it and the stockholders.

Alleged Contract.

Is there subsisting such a valid contract between this railroad company and the city of Binghamton, or between it and any or all of the villages concerned, as deprives the Public Service Commission of power to increase or authorize the increase of the rate of fare on the road above 5 cents? The answer to this question involves the decision of the other question: Are or were the other companies, consolidated to form the Binghamton Railway Company, this defendant, subject to the provisions of the general railway law of the state of New York?

The proper determination of these questions makes necessary an examination of the several charters of the several roads so consolidated, of the ordinances and consents under and pursuant to which they were created and entered on the streets of Binghamton, and of the subsequent ordinances, as well as of the laws of the state applicable to the situation, enacted from time to time since. From a small beginning, the creation of the Binghamton & Port Dickinson Railroad Company under and pursuant to a special act of the Legislature of the state of New York, passed May 1, 1868 (chapter 501, Laws of N. Y. 1868), operating on Main, Court, and Chenango streets, and also extending outside the city, the present road, Binghamton Railway Company, has come into existence by means of the organization, creation, extension, and consolidation of other roads, by authorization of laws duly enacted, and now covers about 52 or more miles of track. The city of Binghamton has increased in population from about 12,000 in 1868 to some 60,000 in 1918, and its business, manufacturing, and wealth have increased in proportion. The original lines, as authorized, conducted, and operated, with one or two unimportant exceptions, were operated by horse and mule power, and were limited by law or consents to the use of that motive power. This is important, as bearing on the effect of subsequent consents and ordinances of the city, and in determining whether or not subsequent consents and ordinances, changing motive power, did away with certain limitations contained in the original consents as to rates of fare authorized.

Binghamton & Port Dickinson.

The act creating the Binghamton & Port Dickinson Railroad Company contained the following:

"And the said company or their assigns shall be authorized to charge, collect and receive from each passenger for riding any distance upon said road not to exceed five cents a mile."

And also the following:

"The cars to be used on said railroad shall be drawn by animal power."

The act prohibited all persons from constructing or operating any other railroad upon or along said streets or any of them. This act made it mandatory on the local authorities to give their consent to the construction and operation of this road, and they did so; such consents containing no restrictions.

By agreement dated February, 1901, between the village of Lestershire, now Johnson City, and the railroad company, the rate of fare was restricted to 5 cents for riding any distance on this line but by a subsequent agreement of August 17, 1918, the provisions of that agreement were duly suspended during the continuance of the war and for two years thereafter, so this application could be made to the Public Service Commission, and neither Johnson City nor the village of Port Dickinson raise any question as to the power of such commission to authorize an increase of rate of fare on this line of road. In 1890 the limits of the city of Binghamton were extended, so as to include within its present boundaries all of the town of Binghamton upon the highways of which this road was built and operated, except the village of Port Dickinson.

Washington Street & State Asylum.

The Washington Street & State Asylum Railroad Company was incorporated on the 23d day of October, 1871, under and pursuant to the Railroad Law of 1850, being chapter 140, Laws of New York 1850. Section 28 of that act (repealed in 1890 [Laws 1890, c. 565]) defined the grant of powers, and subdivision 9 conferred the power to fix the compensation for transportation of passengers, but limited it to three cents per mile, and subdivision 5 of that section contained the following:

"Nothing in this act contained shall be construed to * * * authorize the construction of any railroad, not already located in, upon, or across any streets in any city, without the assent of the corporation of such city."

Section 33 of that act provided that:

"The Legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rate of freight, *fare*, or other profits, * * * but the same shall not, without the consent of the corporation, be so reduced as to produce, with said profits, less than ten per centum per annum on the capital actually expended."

That act is silent as to the imposition of any condition as to rates of fare by the city on giving its assent to the use of its streets.

Park Avenue Railroad Company.

May 6, 1882, the Park Avenue Railroad Company was incorporated under the said act of 1850.

Binghamton Central Railroad Company.

March 7, 1883, the Binghamton Central Railroad Company was incorporated under said act of 1850.

City Railway Company.

December 22, 1883, the City Railway Company was incorporated under the same act of 1850.

It is seen that the Washington Street & State Asylum, the Park Avenue, the Binghamton Central, and the City Railway Companies were incorporated under the same General Railroad Law, the act of 1850, and that each had the same rights and privileges and was subject to the same obligations then imposed by the act of 1850, unless in some way changed or qualified by the consents given as a condition of occupying the streets of the city.

Court Street & East End Railroad Company.

In March, 1886, the Court Street & East End Railroad Company was organized under and pursuant to the law of May 6, 1884 (chapter 252). This act provided for the construction, etc., of street surface railroads exclusively. In section 1 this act provided that:

"Such corporation shall also have all the powers and privileges granted, and be subject to all the liabilities imposed, by this act and by the act entitled 'An act to authorize the formation of railroad corporations,' and to regulate the same,' passed April 2, 1850, and the several acts amendatory thereof, except as the said acts are herein modified."

Section 3 of this act provided as follows:

"Any company organized as aforesaid, or any existing street surface railroad company or corporation heretofore organized for the purpose of building and operating a street railroad, may construct, maintain, operate, use and extend a railroad or branches on the surface of the soil, through, upon and along any of the streets, avenues, roads or highways of such cities, towns and villages, and also through, along and upon any private property which said company may acquire for the purpose, and may also construct such switches, sidings, turnouts and turntables and suitable stands as may be necessary for the convenient working of such road, provided that the consent in writing of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be after the passage of this act first obtained."

Section 9 contained the following reservation or grant of power to the local authorities of a city or village as to the enactment of ordinances, viz.:

"The local authorities having charge of streets, avenues, roads or highways in cities and incorporated villages may make such reasonable ordinances or regulations as to the rate of speed, mode of use of tracks, and removal of ice and snow, as the interest and convenience of the public may require. A corporation whose servants or agents willfully or negligently violate such an ordinance or regulation, as aforesaid, shall be liable to such city or village for a penalty not exceeding five hundred dollars."

Sections 12 and 13 of this act of 1884 provided as follows:

"Sec. 12. Any street surface railway company may in any case operate any portion of its road by animal or horse power, or by any power other than locomotive steam power, which may be consented to by the local authorities and by a majority of the property owners, obtained in accordance with sections three and four of this act.

"Sec. 13. No company or corporation incorporated under, or constructing and operating a railroad under the provisions of this act, shall charge any passenger more than five cents for one continuous ride from any point on its road or on any road or line or branch operated by it or under its control to any other point thereon or on any connecting branch thereof within the limits of any incorporated city or village. This section shall not be construed to apply to any part of any road heretofore constructed, and now in operation, unless such company shall acquire the right to extend such road, or to construct branches thereof under the provisions of this act, in which event its rate of fare shall not exceed its authorized rates prior to such extension."

Section 18 further provided:

"All acts and parts of acts, whether general or special, inconsistent with this act are hereby repealed."

West Side Railway Company

In September, 1887, the West Side Street Railway Company was organized under the said act of 1884.

Binghamton, Lestershire & Union Railroad Company.

In 1894 the Binghamton, Lestershire & Union Railroad Company was incorporated under and pursuant to article 4, chapter 565, Laws of New York 1890, being chapter 39 of the General Laws, and relating to "Street Surface Railroads."

Section 91 of the act of 1890 provides as follows as to consents:

"Such railroad shall not be built, extended or operated, unless the consent in writing, acknowledged as are deeds entitled to be recorded, of the owners of one-half in value of the property bounded on, and also the consent of the municipal authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad shall have been first obtained."

Section 98 provides as follows as to ordinances:

"And such authorities may make such reasonable regulations and ordinances as to the rate of speed, mode of use of tracks, and removal of ice and snow, as the interests or convenience of the public may require."

Section 100 of the act relates to motive power and changes thereof.

Section 101 of the act of 1890 provides as follows in relation to "rate of fare," viz.:

"No corporation constructing and operating a railroad under the provisions of this article, or of chapter 252 of the Laws of 1884, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof; and not more than one fare shall be charged for passage over the main line of road and any branch or extension thereof, whereof the right to construct such branch or extension has been acquired under the provisions of such chapter or of this article; but this section shall not apply to any part of any road constructed prior to the sixth day of May, 1884, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, or shall acquire such right under the provisions of this article, in which event its rate of fare shall not exceed its authorized rate prior to such extension. The Legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article."

These are the eight street railway companies which by consolidation and merger became the Binghamton Railway Company December 6, 1901; the final consolidation having been made under the provisions of the General Railroad Law then in force. The several mergers and consolidations were as follows:

Consolidations.

I. October 4, 1887, pursuant to chapter 108, Laws of New York 1875, the Washington Street & State Asylum Railroad Company consolidated with the Park Avenue Railroad Company and became the "Washington Street, Asylum & Park Railroad Company."

II. March 24, 1890, under and pursuant to the same statute, said Washington Street, Asylum & Park Railroad Company (resulting from the first consolidation) consolidated with the Binghamton Central Railroad Company and the City Railway Company, and these three companies became the "Binghamton Street Railroad Company."

III. August 22, 1892, under and pursuant to the railroad law of 1890, the said Binghamton & Port Dickinson Railroad Company and the said Binghamton Street Railroad Company consolidated and became the "Binghamton Railroad Company."

Merger.

March 31, 1894, the Court Street & East End Railroad Company and the West Side Street Railway Company were merged with or into and became the property of the said "Binghamton Railroad Company."

IV. December 6, 1901, under and pursuant to the provisions of the General Railroad Law of New York, the said Binghamton Railroad Company consolidated with the said Binghamton, Lestershire & Union Railroad Company and they became the "Binghamton Railway Company," this defendant.

Consents and Conditions.

Each of these original companies, on its incorporation, applied to the local authorities for permission to lay its tracks in and upon the streets and highways, and also for permission to extend their tracks upon streets and highways not covered by the original certificates of incorporation, certificates of extension being subsequently filed, and such consents were given, some with and some without restrictions or conditions.

Binghamton & Port Dickinson Railroad Company.

The consents given this company, both by the city and the towns, contained no restrictions.

Companies Organized under Act of 1850.

January 2, 1872, the city of Binghamton gave its consent to the Washington Street & State Asylum Railroad Company to use the streets named in its charter. May 12, 1873, the city gave its consent that said company extend its tracks across the bridge.

January 12, 1887, the city gave its consent to the said Washington

Street & State Asylum Railroad Company and to the Park Avenue Railroad Company to change their motive power from horses and mules to electrical power. Prior to this time all the roads had been operated by horses and mules as their motive power. The said Park Avenue Railroad Company was constructed wholly in the town of Binghamton, outside the city of Binghamton, and was not brought under its jurisdiction until the extension of the city limits in 1875.

May 7, 1883, the city gave its consent to the Binghamton Central Railroad Company to construct its road on the streets named, and July 1, 1885, it gave to this road the right to extend its tracks across the Rockbottom bridge and on Conklin avenue, and January 28, 1890, gave this road the right to extend its tracks on Henry and Eldridge streets. These permissions for extension of July 1, 1885, and January 28, 1890, were given after the general street railroad law of May 6, 1884, had become a law.

March 17, 1884, the said city gave to the City Railway Company the right to use certain streets named in its charter, and September 19, 1890, gave this company the right to extend its tracks on Clinton street. Consents were duly given this company to lay its tracks on the highways of the town of Binghamton outside the city. The extensions of the lines of these four roads, incorporated under the act of 1850, except that of Washington Street & State Asylum Railroad Company, which extension was authorized by the special act of 1873 (Laws 1873, c. 55), were made after the act of May 6, 1884, became a law.

Companies Organized under General Act of May 6, 1884.

May 10, 1887, the city gave its consent to the Court Street & East End Railroad Company to lay its tracks on Court and other streets. This company constructed its road on Court street and operated it for a time, but the Binghamton & Port Dickinson Railroad Company had the right under its charter (chapter 501, Laws of 1868) to occupy this street, and after the merger of the Court Street & East End Company with the Binghamton Railroad Company in March, 1894, its rights ceased to exist and the right to the operation of a street railroad on Court street has been in the Binghamton Railroad Company and its successors, derived from one of its consolidated companies. Kent v. Common Council of the City of Binghamton, 94 App. Div. 522, 88 N. Y. Supp. 34.

September 24, 1889, the city of Binghamton gave to the West Side Street Railway Company permission to lay its tracks on Oak, Leroy, and other streets of the city, and consent was also given by the local authorities of the town of Binghamton.

Roads Created under General Law of 1890.

January 12, 1895, the town of Union gave the Binghamton, Lestershire & Union Railroad Company permission to construct and operate its road along and on the highway of the town. The village of Union, in the town of Union, and Johnson City, formerly Lestershire, are entirely outside the city of Binghamton and westerly thereof.

The rate of fare over this road between the village of Union and

the village of Johnson City is fixed by agreement at 10 cents for a single trip and 15 cents for a round trip, and a 5-cent fare is in force between intermediate points on this line.

All of the above consents, given to the companies incorporated under the general street railway law of May 6, 1884, and the consents given to the extensions of the tracks of the companies incorporated under the act of 1850, and given after May 6, 1884, expressly provided that they were given subject to the provisions of section 4 of the law of May 6, 1884, so far as pertinent thereto.

Extensions after May 6, 1884.

After the enactment of the general street railroad law of 1884, the following extensions of the right to lay tracks and operate on the streets were granted by the city: May 25, 1896, to the Binghamton Railroad Company, on Front, Ferry, and Main streets; May 15, 1894, to the Binghamton Railroad Company on Fayette street and Floral avenue; December 18, 1893, to the Binghamton Railroad Company on Beethoven and Robinson streets; and August 25, 1903, to Binghamton Railway Company, this defendant, across the Tompkins street bridge and along Tompkins street.

All the consents to the extension of tracks to other streets of the city were given under the provisions of the General Railroad Law, and such consents provided, as required by that law, that the provisions of article 4 of the act of 1890, so far as pertinent should be applicable thereto.

February 21, 1893, an agreement was made between the Binghamton Railroad Company and the village of Port Dickinson, but it does not in any way relate to or concern the rate of fare.

Motive Power.

In view of the provisions of certain of the consents given, and of a certain ordinance of the city, to all of which attention will be specifically called, the question of "motive power" used by these roads becomes important. Until equipped for the use of electrical power in moving their cars, all these companies used horses and mules for the purpose, and in some cases were expressly limited to the use of such motive power or to "animal power."

January 11 or 12, 1887, the city of Binghamton gave to the Washington Street & State Asylum Railroad Company and to the Park Avenue Railroad Company permission to operate its cars by electrical power in place of horses and mules. September 24, 1889, the same right was granted by the city to the Binghamton Central Railroad Company, and October 16, 1890, the city extended the same right to the Binghamton Street Railroad Company, and this permission covered or included the following roads, which then, by the consolidations above set forth, had become the property of said Binghamton Street Railroad Company, viz.: Washington Street & State Asylum, the Park Avenue, the Binghamton Central, and the City Railway Companies.

To the other companies this right to change motive power from horses and mules to electricity was given as follows: March 28, 1892,

to the Binghamton & Port Dickinson Railroad Company; March 7, 1893, to the Court Street & East End Railroad Company and to the West Side Street Railway Company. All of the resolutions of the common council of the city giving the right of extension of lines, enacted after 1893, gave the right to use electricity as motive power in operating cars.

The consents to this change of motive power imposed no condition of any kind as to the rate of fare to be thereafter charged.

Reconstruction.

The change of power from horses and mules, or "animal power," to electrical power, involved and made necessary, substantially, a reconstruction of the several lines of road, great outlays of money, changes of cars and equipment and tracks, and the construction and installation of electrical power plants. Eventually there was a rebuilding and reconstruction of all except the roadbeds themselves, and these in many cases had to be improved or rebuilt.

Ordinance of January 2, 1872.

Soon after the incorporation, in October, 1871, of the Washington Street & State Asylum Railroad Company (the only other company then in existence in the city of Binghamton having been created by a special act of Legislature), the company applied for permission to construct and operate its road on and over the streets of the city named in the articles of incorporation. The common council of the city of Binghamton on the 2d day of January, 1872, thereupon adopted and enacted what it denominated "An ordinance in relation to street railroads," and enacted therein (I give only the pertinent provisions):

"The common council of the city of Binghamton do ordain as follows:

"The common council of the city of Binghamton will permit to be constructed in said city, by the Washington Street & State Asylum Railroad Company, a corporation organized under and by authority of the general railroad law, passed April 2, 1850, and the several acts amending the same, a railroad which shall commence at the south end of Washington street, near the covered bridge, and to run through and over Washington street, Lewis street, Prospect avenue, Eldredge street, Cemetery street and Robinson street, to the city limits, joining the town of Binghamton on the east, to be constructed, established, maintained and operated upon the terms, conditions and stipulations hereinafter prescribed."

Provision is then made for the construction and character of the road and care of and keeping open of the streets.

"Sec. 4. The cars to be used on the said road shall be drawn by horses or mules, only at a speed not exceeding the rate of seven miles an hour.

"Sec. 5. The company may charge and collect from any person on entering their cars or carriages, for riding any distance upon said road on the same continuous route, within the corporation limits, a sum not exceeding five cents; except that children under twelve years of age in going to and from school, shall not be charged by said company a sum exceeding four cents; and also except children under five years of age, accompanied by parents or other persons having them in charge, such children to ride free. * * *

"Sec. 23. The restrictions, requirements and regulations herein imposed upon said railroad company as the condition of this grant, shall be imposed, and required of all railroad companies using horse or mule power, which may

hereafter build, establish or maintain railroads in other of the streets in said city, and for such purpose this resolution is declared to be 'an ordinance in relation to street railroads.' "

This ordinance, after granting the right to construct and operate the road on the streets mentioned, expressly provides, in section 4, that:

"The cars to be used on said road *shall be drawn by horses or mules*, only at a speed not exceeding the rate of seven miles an hour."

This section limits the motive power to "horses or mules," and necessarily excludes the use of electrical power.

Section 5 relates to the rate of fare to be charged and, as matter of course, provides a rate of fare to be charged for a ride, as specified, upon cars drawn or moved on that road by either horses or mules, and no others. If the acceptance of the grant made this a contract between the ctiy and the railroad company, as it did, the contract was that the railroad must draw or propel its cars by horse or mule power, and that for a ride on any part of such line within the boundaries of the city on cars so moved by such power it could charge 5 cents and no more. The railroad company was also restricted in other respects not necessary to be noted. The language is plain and unequivocal, and the rights granted and restrictions imposed are definite and certain. Nothing is left to implication.

Section 23 expressly provides that the "restrictions, requirements and regulations *herein* imposed" (meaning those specified in the ordinance read as a whole, and which include rates of fare) as the condition of the grant of the right to construct and operate that road—

"shall be imposed [upon] and required of *all* railroad companies *using horse or mule power*, which may *hereafter* build, establish *or maintain* railroads in other of the streets of said city, and for such purpose this resolution is declared to be 'an ordinance in relation to street railroads.' "

That is, the entire resolution as one whole is an ordinance in relation to street railroads, and one applicable *to all such roads* which are within its description of roads, viz. *those roads operated by horses or mules as the motive power and to none other*. The Washington Street & State Asylum Railroad Company was within the description, for it was expressly limited and restricted to the use of horse or mule power in operating its cars on its road, and, in defining *other roads* to come within the provisions of the ordinance, they were specified to be and limited to "all railroad companies *using horse or mule power*" which might thereafter build, establish, *or* maintain railroads on other of the streets of said city. This included all such roads, except the one then in existence and operation, which had a special charter, and with which the common council could not interfere, except in so far as the special act might permit or authorize. This placed all roads thereafter authorized on a par with the Washington Street road, unless by subsequent action some departure was made.

I think it very plain that this ordinance of the city showed its policy and purpose in regard to street railroads within the city then and thereby authorized, or that might thereafter be authorized, viz. to

provide for the use of horse or mule power in moving cars thereon and exclude the use thereon of all other motive power; and, secondly, to prescribe and limit in amount the rate of fare that might be charged to the users of *such cars* when and while so drawn and propelled. The common council did not undertake to deal with the subject of fares on the Washington Street line, or any other line, when it or they should cease to be operated by horses or mules, and come, by consent of the city, to be operated by some other motive power. There is nothing to indicate either party had other than horses and mules in mind or contemplation as a motive power. Nor did the common council undertake to deal with rates of fare on street railroads thereafter authorized, except in a general way and by carrying the rate of fare mentioned along with and as a part of the provisions as to the motive power to be used. The one restriction is dependent on the other.

It seems clear that the ordinance of 1872 was intended to impose a double restriction on the Washington Street line of road then and thereby authorized, and also on all street car lines thereafter authorized and constructed, viz. confine them to the use of horses or mules in moving cars and the payment of a 5-cent fare only (except in case of children) for a continuous ride on any part of the line when and while the cars were moved by that power; that the one condition or restriction went with the other, and was associated with and dependent on it; that when, with the consent of the city, the restriction as to motive power fell, or was done away with, and another substituted, and nothing was said as to rate of fare after such change, the restriction as to rate of fare fell, or was done away with, with it. It was not the policy or purpose of this ordinance to fix rates of fare on street railroads using other than horses or mules as a motive power, and it did not undertake to do so, and hence, when the city authorized the change of motive power from horses and mules to electricity, and imposed no restriction or limitation as to fares to be charged, as it might have done, it left these roads under the provisions of the general railroad acts applicable.

The effect of consent by a city to change from horse power to electricity is considered in the following case: Minneapolis v. Street Railway Co., 215 U. S. 417, 431, 30 Sup. Ct. 118, 54 L. Ed. 259. In that case the city claimed that the railway company, by accepting a subsequent ordinance authorizing it to change its power from horse power to electric power, lost such rights as it had under the former ordinance; that, by accepting the later ordinance, it abandoned its rights under the first. The court said:

"It is contended that the original ordinance was limited to the right to operate street railways by horse or pneumatic power, and that when the ordinance of September 20, 1890, was passed conditions were entirely changed, and a new and different mode of operation was substituted, and rights existing under the original ordinance were terminated and abandoned."

The court then went on to point out that by the language of the ordinance it appeared that the parties had other power than horse power in mind when it originally accepted the grant, and that there was no express limitation to horse power in the first ordinance, and therefore,

as the railroad company under the first ordinance had the right to charge a 5-cent fare, it was not lost by the mere change of power authorized by the second ordinance and operation under it, and that this change did not authorize the city to reduce the fare.

In the instant case the ordinance of the city of Binghamton expressly limited the power to horse and mule power, and there is not a word to indicate any other power was in the minds of the parties. The subsequent ordinance authorizing a change to electrical power, and the use of such electrical power under changed conditions of cost of maintenance, etc., is silent on the subject of fares, and the question is: Did the limitation and restriction on fare named in the original ordinance remain in force under these new conditions and this change of power, and in view of the evident policy and purpose of the city to have the restriction apply only to roads using horse and mule power?

It seems to me clear that the ordinance imposed these restrictions on the street railroads then authorized and those thereafter authorized which used horse and mule power, *and no others,* and that when the Washington Street line was subsequently authorized to use electrical power it came under the general policy, and was not thereafter subject to any legislative or contract restriction, either as to speed or rate of fare. Clearly it was no longer controlled by section 23 of the ordinance of 1872. In short, I am of opinion that under the ordinance of January 2, 1872, the Washington Street & State Asylum Railroad Company was restricted to the use of horse and mule power in moving its cars and to a speed not exceeding the rate of seven miles per hour and to a 5-cent rate of fare; that this was declared to be applicable to all roads thereafter built and using *that power,* and showed the policy and purpose as to all *such roads*; that such restrictions *were not intended to apply,* and did not apply, to roads using electrical power, and never did. I conclude that, when the Washington Street line was *thereafter authorized to use electricity,* it came under the general policy and passed from under the restrictions as to speed and rates of fare. When the main and controlling restriction was eliminated, all those dependent thereon were nullified, except as otherwise provided. The language of section 23 of the ordinance is:

"Restrictions, requirements and regulations herein imposed upon said railroad company * * * shall be imposed and required."

The 5-cent rate of section 5 is a "restriction" on the charges to be made, surely, and the mandatory clause of section 4, "The cars to be used on the said road shall be drawn by horses or mules," is a "requirement," without doubt. It cannot reasonably be contended that section 23 of the ordinance did not apply to the Washington Street line. It was the Washington Street line that the ordinance was dealing with primarily. Everything in the ordinance down to section 23 applied thereto directly and in terms. Section 23 is a plain and unequivocal enactment that all the provisions of the preceding 22 sections shall apply to all other street car lines in the city thereafter established using horse or mule power. All are put on an exact equality. It is the same as if the common council had enacted an ordinance con-

taining all the sections, preceded by the statement, "The common council of the city of Binghamton do ordain and establish the following ordinance in relation to street railways in said city, to be constructed hereafter," using the plural, "such railroads," instead of the singular, "such railroad," in the various sections, and had then added:

"Permission is hereby granted to the Washington Street & State Asylum Railroad Company to construct and operate its lines of proposed road subject to, under and pursuant to the provisions of the above ordinance."

The Binghamton Central Railroad Company was incorporated March 7, 1883, and into the consent to use the streets of the city was placed some of the provisions of the above-mentioned ordinance of January 2, 1872; but the three provisions as to horse or mule power, speed, and rate of fare were brought together, so as to read:

"That the cars to be used by said railroad shall be drawn by horses or mules only at a speed not exceeding the rate of seven miles per hour; and the said company are hereby authorized and empowered to charge for and receive from each passenger carried on their road for any distance within the city of Binghamton a sum not to exceed five cents and the company may run cars without any other conductor but a driver."

This was the first company to which permission to use streets was given after the adoption of the ordinance of 1872. That ordinance had not been repealed, and the common council was but acting pursuant to its provisions. It was mere surplusage to incorporate its provisions into the consent.

July 1, 1885, permission was given the Binghamton Central Railroad Company to extend its tracks across R[illegible]bottom bridge and on Conklin avenue, as we have seen, and September 24, 1889, to extend its tracks on Henry and Eldredge streets, and no conditions whatever were expressly imposed. The cars on these extensions were drawn by horses or mules, or by both. Later consent was given for the substitution of electrical power on the whole line, and the substitution was made. By law these extensions were made under the provisions of the act of May 6, 1884.

March 17, 1884, the city granted to the City Railway Company the right to construct tracks from Spring Forest Cemetery to Eldredge street, "subject to an ordinance in relation to street railroads passed January 2, 1872," the one hereinbefore recited in part. The resolution of August 27, 1889, which gave the consent of the city to the City Railway Company to extend its tracks on Clinton and other streets makes no reference to the ordinance of 1872, and the resolution of September 19, 1890, gave the consent of the city that this last-named company might lay its tracks on the "streets covered by its charter with T-rails," and declared:

"Nothing therein contained shall relieve the company from any of the requirements of chapter 38 of the City Ordinances, or of any ordinance of the city."

Chapter 38 is the ordinance of January 2, 1872. This company also used horses and mules as motive power for a time.

The Binghamton & Port Dickinson Railroad Company, the Park Avenue Railroad Company, which was brought into the city of Bing-

hamton in 1875, the Court Street & East End Railroad Company, and the West Side Railway Company, from the time of their construction until by consent of the city electricity as a motive power was authorized, used horses and mules as their motive power. The ordinance of 1872 was never applicable to the Binghamton & Port Dickinson Railroad Company, as it acquired its right to use the streets and highways from its act of incorporation, and the consent of the city and town was made mandatory. The consents were given months before the ordinance of 1872 was enacted. The line of the Park Avenue Company was constructed in the town of Binghamton, and brought within the city limits, in 1875, by the extension of such limits, and that company never gave any consent to be bound by the ordinance of 1872, and it is very doubtful whether that ordinance ever became binding on it. However, if it did, it was only applicable so long as it used horses or mules as a motive power. The Court Street & East End Railroad Company was incorporated under the general street railroad law of May 6, 1884 (chapter 252, Laws of 1884). The consent of the city, given May 10, 1887, provided:

"But this consent is understood to be given subject to the conditions heretofore imposed and agreed to by the company, and upon the express condition that the provisions of the law under which the company is incorporated which are pertinent to said consent shall be complied with."

This company also used horse and mule power.

The West Side Railroad Company was given consent to use the streets of the city September 24, 1889, on the following conditions: (1) That the cars to be used might be drawn by horses or mules *or propelled by electricity.* (2) That the provisions of the act of the Legislature of May 6, 1884, and of the amendments thereto which may be pertinent thereto, shall in good faith be complied with; *also the reasonable ordinances and requirements of the city of Binghamton.*

This company was incorporated under the act of May 6, 1884, and it was made mandatory on the city to give its consent, subject to the provisions of that law. Its cars were drawn by horses or mules for about three years. I do not think it ever came under the ordinance of 1872; but, if it did, it was subject thereto so long as it used horse or mule power, and no longer. Section 13 of that act fixes the rate of fare as we have seen, and it is a general law. No act of the local authorities could modify or change that law, or take that road, or any road incorporated pursuant thereto, from under its provisions.

In People ex rel. South Shore T. Co. v. Willcox, 196 N. Y. 212, 89 N. E. 459, it was held:

"So far as the consent of the municipal authorities to the construction of the proposed line may be limited by conditions which are in conflict with the provisions of the Public Service Commissions Law, it is enough to say that the statute must prevail and such conditions are simply nugatory."

This is true as to conditions imposed which are inconsistent with the provisions of any applicable statute of the state, and it is held again and again that fixing rates of fare by law is essentially a legislative function or power.

Contracts.

[8-13] Contracts, to be valid and binding, when not implied by law from the existence of certain conditions, result from the mutual agreement of the parties to be bound thereby, and the terms must be agreed upon, not only as to the subject-matter, but as to the things to be done by each party. The minds of the parties must meet. There can be no valid and binding agreement to violate a law, but private legal obligations imposed by statute may be varied by an agreement which is not forbidden by law, or which is not in violation of or contrary to the public policy and spirit of the law. All the terms and conditions of the contract, assuming its validity, are to be taken and read together, and each provision is to be read and construed with reference to all the other provisions having any relation to it. The parties, by mutual consent, properly evidenced, may take out of a contract one provision and substitute another, or take out one or more provisions and leave the changed contract in force, provided such removal does not destroy the entire contract; but as a general rule it is never implied that the one party assents to a change which materially affects his rights, or remedies, or both, and creates new obligations, and substitutes nothing.

Here the contract, if it was such, fixed and limited the power to be used to horses or mules, and fixed and limited the fare to be charged on street car lines of that character, and on which cars so drawn by horses or mules were used. Both provisions, as well as that relating to speed, have reference to such roads and to no others, and both such provisions were of the very essence of the contract. The change in the one respect, that of power, was so fundamental, important, and far-reaching that it cannot be implied or surmised that the change of power was a mere substitution in the contract of one thing for another, leaving the contract as thus changed in full force and effect.

In 13 Corpus Juris, 588, it is said:

"As a contract is the result of agreement, so an agreement may put an end to a contract. Therefore a contract may be discharged at any time before the performance is due by a new agreement with the effect of altering the terms of the original agreement or of rescinding it altogether; and a claim under the original contract may then be met by the new agreement so far as the latter operates to alter or to rescind the former. The discharge may take the form either of a total obliteration of all contractual relations between the parties in regard to the subject-matter of the contract, or it may be effected by the substitution of a new agreement in place of the old one."

In American Fine Art Co. v. Simon, 140 Fed. 529, 536, 72 C. C. A. 45, 52, the Circuit Court of Appeals, Second Circuit, said:

"It is well settled that a contract not performed on either side may be discharged by agreement of the parties, and that *this discharge may be effected by a change in the terms* whereby a new contract is in effect substituted for the old one."

It is a question of what the parties intended, whether to merely make a change in one respect, leaving the contract in full force and effect otherwise, to make a new contract entirely, or to wholly discharge the old one; and in this case it cannot reasonably be supposed or held that

the railroad company, when the motive power was changed from horses and mules to electricity, thereby imposing great expense and new obligations, intended to remain bound by the provisions as to rate of fare contained in the ordinance of 1872, which might not be at all adequate or appropriate to changed conditions. New statutes applicable to such a situation had been enacted and were in force. Section 13 of the act of 1884 limited the rate of fare to be charged to 5 cents—

"for one continuous ride from any point on its road, or on any road or line or branch operated by it or under its control, to any other point thereon or on any connecting branch thereof within the limits of any incorporated city or village."

This was made more effective for the protection of the city and its people and the general public, and more beneficial to them, and it cannot be assumed it was contemplated, when changing from horse and mule power to electrical power, that it was intended or considered necessary to violate the spirit of the statute of 1884, by making a contract as to fares in disregard of its provisions. By coming under the provisions of that law as to fares, the only benefit the railroad company would derive was the right to avail itself of any statute then or thereafter enacted and in force allowing the Legislature to fix the rate of fare itself or by a public service or other commission. It must be borne in mind that all of the consents to a change of motive power from horses and mules to electrical power were given after the enactment of chapter 252 of the Laws of 1884, an act entitled "An act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns, and villages," and was broad and general in its provisions, and intended to be, and that its provisions applied in terms not only to companies organized under the act, but to *"any existing street surface railroad company or corporation heretofore* organized for the purpose of building and operating a street railroad" (see section 3, quoted above), and that it fixed rates of fare for all of such roads (see section 13), and also provided what ordinances affecting all such roads could be enacted by such cities, towns, and villages. No street surface railroad company or corporation was excepted from its provisions, and the purpose to bring them all under its provisions could not have been made plainer. It is, of course, true that the act did not purport or attempt to cancel or interfere with constitutionally protected existing valid contracts, for that it could not do. City of Minneapolis v. M. Street R. Co., 215 U. S. 417, 427, 30 Sup. Ct. 118, 54 L. Ed. 259. But the cities, towns, and villages acting under its provisions thereafter, and granting rights, privileges, and extensions, are presumed to have had knowledge of all the provisions of the act, and to have acted with reference thereto.

In Anson on Contracts, c. 2, pt. 5, p. 337, the different ways by which a party may be discharged from the obligations of a contract are stated:

"(1) By the performance of all the duties undertaken by either party and the satisfaction of the rights secured thereby. (2) It may be discharged by the operation of rules of law upon certain sets of circumstances."

Under the head of "Waiver" the author says (chapter 1, pt. 5, p. 338):

"A contract may be discharged by express agreement that it shall no longer bind either party. This process is called a waiver, cancellation, or rescission of the contract. An agreement of this nature is subject to the rule which governs all simple contracts, with regard to consideration. And the consideration for the promise of each party is the abandonment by the other of his rights under the contract. The rule, often stated, that 'a simple contract may, before breach, be waived or discharged, without a deed and without consideration,' must be taken to mean that, where the contract is executory, no further consideration is needed for an agreement to rescind than the discharge of each party by the other from his liabilities under the contract."

The restriction to a fare of 5 cents was inseparably connected with the use of horse or mule power. Then why did not the change to electricity, the abandonment of horses and mules as a motive power, and the acceptance of the improved method and consent thereto, operate as a waiver of the restriction as to fare so inseparably connected therewith?

The author further says (page 342):

"And it operates as a rescission in this way: That if it does not in terms express an intention that the original contract should be waived, it indicates such an intention by the introduction of new terms or new parties. The change of rights and liabilities, and consequent extinction of those which before existed, forms the consideration on each side for the new contract."

And at page 346 we find the following:

"A contract may contain within itself the elements of its own discharge, in the form of express provisions for its determination under certain circumstances. These circumstances may be the nonfulfillment of a specified term of the contract, the *occurrence of a particular event*, or the exercise by one of the parties of an option to determine the contract."

And the following:

"The parties may introduce into the terms of their contract a provision that the fulfillment of a condition or the occurrence of an event shall discharge them both from further liabilities under the contract. Such a provision is called a condition subsequent, and is well illustrated by the case of a bond, which is a promise subject to, or defeasible upon, a condition expressed in the bond."

Can it be doubted that making the rate of fare mentioned in the ordinance of 1872, and the restrictions and conditions therein contained, applicable to roads operated by horse and mule power exclusively, and to those only, operated as matter of law to render ineffective and inoperative such provision as to rate of fare, when the use of horses and mules was abandoned with the consent of the city and the new and improved and expensive electrical system was installed?

In Omaha Horse Ry. Co. v. Cable Tramway Co. (C. C.) 30 Fed. 324, the plaintiff company, by its charter, was given the exclusive "horse railroad" franchise of the city of Omaha for 50 years. It constructed its road. Cable roads were not then known, at least were not in use. Later a city ordinance granted the right to the defendant company to construct and operate a cable road on the same streets, or some of them, and it undertook to do so, and plaintiff sought to enjoin it,

claiming that this was an infringement of its grant. It was held, Judge Brewer, later of the Supreme Court of the United States, giving the opinion, that it was not an interference, and also:

"That even if the grant of the 'horse railroad' franchise meant a grant of the 'street railroad' franchise in the contemplation of the parties, yet a grant of a monopoly contemplated was only of such forms of transportation as were then known and in existence, not of such as might subsequently be devised and used."

In Saginaw Gaslight Co. v. City of Saginaw (C. C.) 28 Fed. 529, it was held that the grant of the exclusive right to light the city with gas for 30 years was not impaired by the subsequent grant to another company of the right to light the city with electricity.

These cases illustrate and emphasize the wide and fundamental distinction between the grant of a power to use horses and mules in drawing street cars, and the subsequent grant of the power to use electrical power on the same roads. The changes authorized and made struck to the very roots of the ordinance and alleged contract, and in effect provided for the entire reconstruction of the roads with new and different equipment and modes of operation. Many of the provisions of the ordinance of 1872, applicable to the movement and operation of the old horse cars drawn by horses or mules became wholly inappropriate, and inapplicable or inefficient, when applied to the operation of roads and cars operated and propelled by electricity. Not unlike a revolution in a government, actually accomplished by force or otherwise, when the new system and laws adopted by the new government are put in operation, especially with the consent of the old, it requires the enactment of no repealing statutes, and it is not essential that the new system differ in each and every respect in order to do away entirely with the old one.

[14, 15] It has been argued and contended that, even if the ordinance of January 2, 1872, and the construction and operation of these roads thereafter, did not constitute a binding contract, or if the authorized change of power from horses and mules to electricity abrogated such contracts, assuming their existence up to that time, that a contract as to rates of fare exists between said railroad companies and the city of Binghamton because of the insertion in the consents granted after the act of May 6, 1884, became operative, of the requirement imposed by section 4 of chapter 252 of said Laws, and the subsequent acts on the same subject, making it mandatory upon municipal authorities, in granting such consents to the construction and operation of street surface roads, to provide therein that:

"The consent of the local authorities shall in all cases be applied for in writing, and when granted shall be upon the express condition that the provisions of this act pertinent thereto shall be complied with, and shall be filed," etc.

It is evident that the Legislature inserted this provision in the law of 1884, to make certain that the cities and villages of the state did not grant consents to the use of their streets by street railroad corporations, except on compliance with all the conditions pertinent *to the grant of such consents.* This provision has nothing to do with rates

of fare, and is not an exaction that contracts in relation to rates of fare or the financial management of the road shall be entered into and incorporated in the consents. It is a restriction on the city and village authorities in granting consents. The act itself in section 13 fixes the rate of fare absolutely. It required no contract, no agreement, no limitation in the consents granted fixing the rates of fare, or consenting to the rate established by law. Section 13 applied, not only to roads thereafter constructed, but to all extensions of existing roads and necessarily to roads obtaining extensions. Nothing in the act of 1884 permitted or sanctioned the making of any contract as to the rate of fare. The fixing of rates of fare on such roads is a legislative function exercised in the interest of the public, and when such function was exercised by the Legislature any contract in relation thereto fixing a rate would have been unlawful and void. The making of such contracts would be contrary to the public policy of the state and evidenced by the general act of 1884, and subsequent acts whereby the Legislature of the state proceeded to assert and exercise its power in this regard. See Gulf, C., etc., Ry. Co. v. Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; Texas & Pac. R. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; New Haven R. R. Co. v. Interstate Com. Com'n, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515; 1 Page on Contracts, p. 177. It is a general principle that when the state, or the nation, has power to regulate and control a matter by law, until it does act parties are at liberty to contract with reference thereto, but when it does act and covers the subject the statute absolutely and exclusively controls.

State has Assumed to Control Rate of Fare.

[16] In and by the act of May 6, 1884, and from that time to the present, the state of New York has exercised its power to fix rates of fare on street railroads. See Railroad Law of 1890; section 1, c. 688, Laws of 1897. Chapter 688 of Laws of 1897, amended section 101 of chapter 565 of the Laws of 1890 (as amended by chapter 676 of the Laws of 1892), by adding thereto the following:

"The Legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article."

The present law, derived from the law of 1890, section 101, as amended in 1897, reads as follows:

"No corporation constructing and operating a railroad under the provisions of this article, or of chapter 252 of the Laws of 1884, shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof, within the limits of any incorporated city or village. Not more than one fare shall be charged within the limits of any such city or village, for passage over the main line of road and any branch or extension thereof if the right to construct such branch or extension shall have been acquired under the provisions of such chapter or of this article; except that in any city of the third class, or incorporated village, it shall be lawful for such corporation to charge and collect as a maximum rate of fare for each passenger, ten cents, where such passenger is car-

ried in a car which overcomes an elevation of at least four hundred and fifty feet within a distance of one and a half miles. This section shall not apply to any part of any road constructed prior to May 6, 1884, and then in operation, unless the corporation owning the same shall have acquired the right to extend such road, or to construct branches thereof under such chapter, * * * in which event its rate of fare shall not exceed its authorized rate prior to such extension. The Legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and the public service commission shall possess the same power, to be exercised as prescribed in the public service commissions law." Consol. Laws, c. 49, § 181.

This provides, as did the act of 1890, that:

"This section shall not apply to any part of any road constructed prior to May 6, 1884, and then in operation, *unless the corporation owning same shall have acquired the right to extend such road,* or to construct branches thereof under such chapter," etc.

And then follows the reservation.

August 25, 1903, the city of Binghamton by resolution duly and explicitly authorized the Binghamton Railway Company, the defendant, which *then* owned and operated *all of the roads,* to extend *its road* across the Tompkins Street bridge and along Tompkins street upon and subject to certain conditions, viz. a contract of April 26, 1892, relating to the amount the railroad company was to pay towards pavements, also certain provisions of article 4 of the act of June 7, 1890, known as the Railroad Law.

By the consolidations and mergers as shown the road of the defendant had become one road, and in applying for and obtaining benefits and privileges it was acting as a corporation, and the city in granting such extensions, etc., was granting it to the Binghamton Railway Company, and the resolution so expressly states, viz.:

"Whereas, the Binghamton Railway Company did on the 25th day of July, 1903, apply * * * for consent to extend, construct, operate and maintain: * * * Resolved, in consideration, * * * the consent of the common council of the city of Binghamton, N. Y., is hereby given, pursuant to law, to the Binghamton Railway Company to extend, construct, operate and maintain," etc., such extensions.

While it may be that each of the corporations existed and had not been wound up or dissolved, all the property and property rights, etc., had become the property of the Binghamton Railway Company, the present defendant, and it was acting in the premises, and the city was dealing with it, and not with some part of it, or some one of the old corporations. I think it very clear that the city, by its common council, not only recognized the right of the Legislature to fix fares for a ride on all the various lines thereafter, but by its action assented thereto. When such extension was granted, the entire line within the city by its consent came under the general Railroad Law.

It will be noticed that article 5 of chapter 481 of the Laws of 1910, chapter 49 of Consolidated Laws, known as the Railroad Law (section 170), and now in force, provides:

"The provisions of this article shall apply to every corporation which, under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate, a street

surface railroad, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons and property for compensation, upon and along any street, avenue, road, highway, or private property, in any city, town or village, or in any two or more civil divisions of the state, and every such corporation must comply with the provisions of this article."

It also has the same provisions as before quoted, giving power to pass ordinances, and excludes the enactment of an ordinance as to rates of fare.

In Milwaukee Electric Railway & L. Co. v. Railroad Commission of Wisconsin, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254, the court held not only that "the fixing of rates which may be charged by public service corporations [in this case a street car corporation] is a legislative function of the state," but that the grant or surrender of that power to the municipality cannot lightly be assumed or presumed. If such grant or surrender is made, *it must be made in plain and unequivocal terms.* The court quotes with approval the language of Mr. Justice Moody in Home Tel. Co. v. Los Angeles, 211 U. S. 265, 273, 29 Sup. Ct. 50, 52 (53 L. Ed. 176), viz.:

"The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the Legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. *Specific authority for that purpose is required.*"

The Railroad Act of 1850, in section 28, subd. 9, conferred on the railroad company power "to *regulate* the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor; but such compensation, for any passenger and his ordinary baggage, shall not exceed three cents per mile." But in section 33 of the same act the power to "*alter* or reduce the rate of freight, *fare,* or other profits," etc., *was expressly reserved.* The general act of 1884 (chapter 252), as seen already, restricts ordinances to rate of speed, mode of use of tracks, and removal of ice or snow, and contains no surrender or delegation of authority to fix or regulate rates of fare.

I think it clear that all of these roads have come under and are subject to the general railroad laws, and that there is no contract in force which prevents the Public Service Commission from now establishing or authorizing the fixing of rates of fare thereon, considered as one line.

In Milwaukee, etc., v. Railroad Commissions, etc., 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254, decided in 1915, the court called special attention to the fact that in Cleveland v. Cleveland City Ry., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, the Ohio courts had specifically held that the acceptances of ordinances of the character specified constituted a binding contract, and the statute of Ohio was set forth and held to specifically authorize a binding contract for the period of time named. Section 3443 of the Ohio statute provided:

"*Council, etc., may Fix Terms and Conditions.*—Council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such [street] railways may be constructed, operated, extended, and consolidated."

Here was found the express legislative grant of the necessary power to contract.

In Minneapolis v. Minneapolis Street Ry., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259, the ordinance which was held to constitute a binding contract as to rates of fare was specifically validated by a subsequent act of the Legislature.

In Milwaukee Ry. v. Wisconsin R. R. Comm., supra, the court quotes and approves the language of the Chief Justice in Manitowoc v. Manitowoc & N. T. Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056, viz.:

"No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation."

I cannot assent to the proposition, in view of the decisions, that where such ordinances as we find in the instant case were passed and consents granted under statutes reserving the power in the Legislature to *alter* or change rates, etc., that the acceptance of the conditions imposed by the municipality constituted a valid and binding contract *for all time, or during the life of the charter.* It seems to me the surrender of power, if there was such surrender, was for a limited period only; that is, that the contract remained valid between the parties to it until such time as the state should see fit to exercise its paramount authority, and no longer, and using the quotation, and applying it to this case, the contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. The authority of the state of New York in the premises has not been surrendered, and it has not approved or validated any of the alleged ordinances or contracts. The state from time to time has asserted its paramount authority by new legislation on the subject, and the municipality has recognized and acted under and availed itself of such new legislation by granting extensions of lines of roads, obtaining benefits, and otherwise, and the railroad has also recognized the validity of such laws and has availed itself of their provisions. Neither party has questioned the paramount power and authority of the state in the premises.

In Freeport Water Co. v. Freeport City, 180 U. S. 587, 600, 21 Sup. Ct. 493, 498 (45 L. Ed. 679), the question was as to the construction of a statute by which the city council was authorized to contract with any person or corporation to construct and maintain waterworks "at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." The court held:

"The words 'fixed by ordinance' may be construed to mean by ordinance once for all to endure during the whole period of 30 years, or by ordinances

from time to time as might be deemed necessary. Of the two constructions, that must be adapted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to *both parties might require at a particular time.*"

So the court held that the action of the council in reducing and charging the rate from that first established under and by a new ordinance enacted by it was justified. A valid contract binds both parties, if it binds either, and in that case under the holding of the court the water company itself could have applied to the Legislature for an increase of rate, and the Legislature could have granted it or authorized it.

In the instant case, under the act of 1850 (chapter 140, § 28, subd. 9, and section 33), while the city could enact an ordinance "to * * * regulate the compensation to be paid therefor" (transportation of persons), by section 33 the Legislature expressly reserved and retained the power to "*alter* or reduce the rate of freight, fare," etc. This it can do at any time. The consents were given and the road constructed subject to the act of 1850, and all its provisions must be read in connection with the ordinance. The ordinance could not, legally, be broader than the delegation or surrender of authority made by the Legislature.

[17] Matter of Quimby v. Public Service Commission for Second District, 223 N. Y. 244, 119 N. E. 433, is urged as decisive here. Notwithstanding the strong dissent in that case, it must be accepted as the law of the state of New York as to the power of the Public Service Commission in the Second District. Has the case any decisive application in the instant case?

The New York State Railways (a street surface railway), a corporation, applied to the Public Service Commission for an order authorizing it to increase its rate of fare in the city of Rochester from five to six cents. It was held that there was a valid and subsisting *contract* between the railroad and the city providing that a fare of 5 cents only could be charged, and that *the Public Service Commission had not been granted the power by the Legislature to increase the fare with such contract existing, even if the Legislature had reserved and retained to itself such power; that is, power to change or ignore the contract.* Whether such power had been retained was not decided; the court saying:

"It is, however, unnecessary, and therefore improper, to decide at this time what the limits of legislative power are in this connection. The delegation of legislative power to commissions and other administrative officers and boards need not be assumed, if the general words from which such delegation may be inferred are not reasonably so construed. In the absence of clear and definite language, conferring without ambiguity jurisdiction upon the Public Service Commission to increase rates of fare agreed upon by the street railroad and the local authorities, we should not unnecessarily hold that the Legislature has intended to delegate any of its powers in the matter, whatever its powers may be."

The court then goes on to say that three courses in fixing rates are open to the Legislature, viz.: To itself prescribe the rates; to delegate the power to the commission; to leave the matter to agreement

between the railroad company and the local authorities—and that by plain words the Legislature has conferred on the Public Service Commission power to regulate rates fixed by statute, but has used no word or words disclosing an intent in so doing to deal with the matter of rates fixed by *agreement* between the railroad company and the local authorities.

However great the doubt expressed as to whether the Legislature had reserved the power to regulate the fares, increase or diminish them, I think it settled that it is not necessary for the Legislature in fixing fares, or providing for consents to the use of streets by cities, to reserve any such power. It is reserved, or rather is not parted with. The power to regulate, etc., cannot be granted away or abrogated or abdicated by the Legislature. This is settled in Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. ——, decided January 7, 1919, by the Supreme Court of the United States. In that case the Georgia Public Service Corporation contracted with the Union Dry Goods Company for the term of five years to supply it with electric light and power at fixed rates. The parties acted under and pursuant to this contract for two years, when the Railroad Commission of Georgia made the following order, viz.:

"Ordered, that on and after March 1, 1914, and until the further order of the commission, the following schedule of rates shall be the maximum schedule of rates to be charged by the Georgia Public Service Corporation"

—and then followed the rates complained of, and which the Union Dry Goods Company refused to pay, setting up its contract. The court, in affirming a judgment upholding the validity of the order, said:

"The plaintiff in error did not assert in its pleadings, or offer evidence tending to prove, that these commission rates were unreasonable, but complained *only that they were higher than the contract rates, and for this reason, it argued, that to give effect to the order, as the state Supreme Court did, violated the provisions of the Constitution referred to.*

"The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state in the exercise of its police power. Munn v. Illinois, 94 U. S. 113 [24 L. Ed. 77]; Budd v. New York, 143 U. S. 517 [12 Sup. Ct. 468, 36 L. Ed. 247]; German Alliance Ins. Co. v. Lewis, Superintendent of Insurance of the State of Kansas, 233 U. S. 389, 407 [34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189].

"Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a state in an appropriate exercise of its police power, are invalid for the reason that, if given effect, they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the Railroad Commission.

"Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.

"That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in Manigault v. Springs, 199 U. S. 473, 480 [26 Sup. Ct. 127, 130 (50 L. Ed. 274)], it was declared that:

" 'It is the settled law of this court that the interdiction of statutes im-

pairing the obligation of contracts does not prevent the state from' properly exercising its police powers 'for the good of the public, though contracts previously entered into between individuals may thereby be affected.'

"This on authority of many cases which are cited.

"In Hudson Water Co. v. McCarter, 209 U. S. 349, 357 [28 Sup. Ct. 529, 531 (52 L. Ed. 828)], it is said that:

" 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter.'

"In L. & N. R. R. Co. v. Mottley, 219 U. S. 467, 482 [31 Sup. Ct. 265, 270 (55 L. Ed. 297, 34 L. R. A. [N. S.] 671)], this is quoted with approval from Knox v. Lee, 12 Wall. 457, 550, 551 [20 L. Ed. 287], viz.:

" 'Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to defeat the legitimate government authority.'

"In the same report, in Chicago, B. & Q. R. R. Co. v. McGuire [219 U. S.] 567 [31 Sup. Ct. 362, 55 L. Ed. 328], it is said:

" 'There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.'

"In Atlanta Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 558 [34 Sup. Ct. 364, 368 (58 L. Ed. 814)], the court said:

" 'It is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.'

"And in Rail & River Coal Co. v. Ohio Industrial Commission, 236 U. S. 338, 349 [35 Sup. Ct. 359, 362 (59 L. Ed. 607)], the state of the law upon the subject is thus aptly described:

" 'This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints, like that here involved, upon the freedom of contract, that we need only to refer to some of the cases in passing.'

"These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be affirmed."

It follows that the power of the Legislature of the state of New York in the instant case is unimpaired, and even if there were at one time contracts in existence as to rates of fare, they do not interfere with the right of the state itself to increase or diminish the rates.

[18, 19] However, this does not cover the proposition of the Quimby Case, supra, that the Legislature of the state of New York has not conferred authority on the Public Service Commission to regulate or increase rates of fare on street railroads in those cases where a valid contract is in force. Hence the necessity in this case of determining whether or not one or more valid subsisting contracts exist between the city of Binghamton and the railroad company as to rates of fare of such a nature and character as deprives the Public Service Commission of jurisdiction in this matter.

In City of Englewood v. Denver & South Platte Railway Co., 248 U. S. 294, 39 Sup. Ct. 100, 63 L. Ed. ——, decided by the Supreme

Court of the United States January 7, 1919, the city of Englewood while a town—that is, before its incorporation as a city—granted a franchise to the Denver & South Platte Railway Company to operate its railway and charge certain fares, provided it would arrange for passengers on its road to be transported without extra fare over the line of the Denver City Tramway Company from a point of connection, and in a like manner for passengers on that company's line to be carried over the line of the Denver & South Platte Railway Company without additional charge. The last-named railroad company (Denver & South Platte) operates its street railway under that franchise, which it accepted, but does not comply with the terms of the agreement; its defense being that the said tramway company charges 5 cents, the maximum fare allowed, for its part of the service, so that the South Platte Railway Company, defendant in the suit, gets nothing, and that it had filed a schedule of rates with the state Public Utilities Commission (as required by it), which had become its established rates and charges. The suit was instituted to compel the defendant to comply with its agreement under which it operated. On demurrer to the bill the Supreme Court of the state of Colorado held that:

"The town, at least, deriving its powers from legislative grant, could make no contract of this sort *that was not subject to control by the Legislature;* that the Public Utilities Commission *had been authorized by the Legislature to regulate the matter in controversy; that it had done so,* and that the proceeding (to compel the Denver & South Platte Railway Company to carry out its contract) should be dismissed."

The Supreme Court said:

"Of course we do not go behind the decision of the court that the matter in controversy was subject to regulation by the commission and was regulated by it in due form if the state could confer that power. The plaintiff says that the state could not confer it since to do so would impair the obligation of a contract. Upon that point we agree with the court below that clearer language than can be found in the state laws and this ordinance must be used before a public service is withdrawn from public control. Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 238 U. S. 174, 180 [35 Sup. Ct. 820, 59 L. Ed. 1254]. The cases generally are cases where the railroad or other company sets up contract rights against the city. *Whether, when the railroad consents, a Legislature would not have all the power that the city could have to modify even a constitutionally protected contract, need not be considered here.*"

Here, again, we have a case where it is conceded the Legislature of the state had conferred on the Public Utilities Commission the necessary power to act in the matter and deal therewith. But it is intimated very strongly that when, as in the instant case, a city is authorized by the Legislature to consent to the construction and operation of street car lines on its public streets, and such consents are given, and actual contractual relations are entered into, which have the protection of the constitutional provisions, the Legislature itself, *with the consent of the railroad,* may abrogate or disregard such contracts without the consent of the city. In other words, the Legislature may not bargain away its power, or abdicate in those matters relating to the police power of the state, to which the fixing of rates to be charged by a public utilities corporation belongs. These powers *are inalien-*

able even by express grant of the Legislature. Atlanta Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 558, 34 Sup. Ct. 364, 58 L. Ed. 721, supra.

I am not to be understood as assenting to the holding in the Quimby Case, supra, that the Legislature of the state of New York has not and did not intend to confer on the Public Service Commission full power and authority to regulate and increase rates of fare on all railroads in the state, including all street car lines, when the facts found by such commission were such as to bring such railroad within its provisions. As I read the Quimby Case the court places its decision on the ground stated:

"But our Constitution, by requiring the consent of the local authorities, recognizes that our municipalities are pro tanto independent of legislative control, exercising some fragment of power, otherwise legislative in character, which has been thus *irrevocably transferred by the fundamental law* (meaning the Constitution) from the Legislature to the locality."

Of course, if the framers of the state Constitution of the state of New York in fact destroyed the integrity of the state as a state possessing *all* the sovereignty of an independent state as to fixing fares on street railways, and have made each city and village an independent sovereignty in such matters, then the state and its Legislature has nothing further to do with the matter, and the local authorities are *supreme* in the matter of fares on street railroads. As I read the constitutional provision, it neither grants nor surrenders to the local authorities any supreme or paramount power or sovereignty. It merely *forbids* the Legislature to enact a law authorizing the construction or operation of a street railroad, except such law provides for two things: (1) The consent of the owners of one-half in value of the property bounded on that portion of a street or highway upon which it is proposed to construct and operate such road; and (2) the consent of the local authorities having the control of the street or highway on which it is proposed to construct and operate such road. If the law contains such provisions, it is a valid law; and if it does not, it is an invalid law. This constitutional restriction on legislation has nothing to do either with rates of fare or with a surrender or abandonment of sovereignty by the state to the local authorities, and it says nothing as to the making of contracts when consents are obtained which shall be beyond the power of the Legislature.

Undoubtedly the people of a state may by its Constitution surrender power to local authorities, but the language to that end should be plain and unequivocal. See cases cited as to surrender of legislative powers. In fact, the consent of the property owners is not necessary, for the Constitution itself says, if they do not consent, the court may say, through commissioners and a confirmation of their finding, whether or not the road ought to be constructed and operated. If the local authorities do not *consent,* the road cannot be constructed and operated, if objection is made. No requirement is imposed on the local authorities. The local authorities are *granted no power whatever* by this constitutional provision. Article 3, § 18, as amended in 1875. The section is headed:

"Cases in Which Private and Local Bills shall Not be Passed; Restrictions as to Laws Authorizing Street Railroads."

By its original charter the city of Rochester is given power "to contract and be contracted with." Laws 1907, c. 755, § 2. It is a legislative grant of power pure and simple, and is subject to the control of its grantor, the Legislature. The right and power of the local authorities to consent or not consent remain unaffected. The powers of the local authorities are neither greater nor less than they were before the adoption of this section 18 of article 3 of the Constitution. And the Constitution of the state of New York says nothing about power in the local authorities to make contracts respecting fares or otherwise when granting consents. If such contracts are made, they are subject to the paramount sovereignty of the state. The Legislature is not prohibited to impair them in such cases as this. See cases cited.

I cannot conceive of a broader jurisdictional power than that conferred by the Public Service Commissions Law (subdivision 1, § 49, as amended by Laws 1911, c. 546, § 1), of New York, which, so far as pertinent, reads as follows:

"*Rates and Service to be Fixed by the Commission.*—1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore *authorized by statute*, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed."

The opinion in the Quimby Case concedes that the New York State Railways (involved there) was within the jurisdiction of the Public Service Commission, so far as rates of fare *fixed "by statute"* were concerned, but the decision asserts that, as the rates of fare in that case were *fixed by contract* between the city of Rochester and the Railways Company, the Public Service Commission was without jurisdiction to change the rate of fare; in short, that when rates of fare are fixed by agreement between a city and the railroad company, the Public Service Commission has no jurisdiction. If there be any such limitation on jurisdiction, it must be found in the words "notwithstanding that a *higher* rate, fare, or charge has been heretofore authorized by statute," and by the words "or in any wise in violation of any provision of law." These words last quoted are clearly disjunctive, and it is not to be implied that the preceding and following words refer

to rates or fares fixed by some statute and exclude those fixed by agreement, and which agreements, if made, are and must be "authorized by statute." The last words quoted evidently refer to cases where the Legislature has fixed a rate and it is desired to *reduce* that rate, and hence the power is given to reduce a rate so fixed in explicit terms.

However, the holding in the Quimby Case is controlling as to the proper interpretation of the statute quoted, as there is no decision of the Supreme Court of the United States to the contrary. When the highest court of a state has interpreted a statute of such state, that interpretation is accepted by the Supreme Court; no infringement of the Constitution of the United States being involved, except when the Supreme Court has itself first passed thereon. This court is bound by the Quimby Case, as is the Public Service Commission of the state. Equitable Life Assurance Soc. v. Brown, 213 U. S. 25, 43–45, 29 Sup. Ct. 404, 53 L. Ed. 682; Peters v. Broward, 222 U. S. 483, 492, 32 Sup. Ct. 122, 56 L. Ed. 278; Hunter v. Pittsburgh, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151; Ughbanks v. Armstrong, 208 U. S. 481, 28 Sup. Ct. 372, 52 L. Ed. 582; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; Virginia-Carolina Co. v. Kirven, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179; Brown Forman Co. v. Kentucky, 217 U. S. 563, 30 Sup. Ct. 578, 54 L. Ed. 883; and see 40 L. R. A. (N. S.) 380, 398, 402.

This case and the action of the Public Service Commission, in view of the Quimby Case, must rest on the proposition that no valid binding contract as to and fixing rates of fare on the line of the Binghamton Railway Company is now in force.

That no such contract is in force is the conclusion reached and stated above. If this conclusion is correct, there is no obstacle in the way of favorable action by the Public Service Commission, for, as stated, the necessity in view of the facts is obvious. It is plain that the maximum rate of fare chargeable by the Binghamton Railway Company under the statutes to which reference has been made is not only unjust and in fact, confiscatory, but is insufficient to yield reasonable compensation for the service rendered, and is unjust and unreasonable, and that, therefore, the commission should exercise its power in the premises and determine the just and reasonable rates, fares, and charges to be hereafter observed and in force as the maximum to be charged by said railway company for the service to be performed. This court is at liberty to recommend to its receiver that he respectfully request the fixing of a certain fare, inasmuch as such receiver is but the arm of the court itself.

This court, in view of the facts and existing conditions, which are liable to continue, and so far as human foresight can determine will continue for at least two years without substantial change, therefore authorizes and directs its receiver, William G. Phelps, to apply to the Public Service Commission, Second Division, for an increase of fare from 5 cents to 6 cents during the continuance of the war and for two years thereafter, and to incur the necessary expense of such application.

The following figures should be presented here, viz.:

Since 1914, the operating expenses of the Binghamton Railway Company, this defendant, have increased from $321,473.32 to $446,545.26 in 1917, an increase of $125,071.94.

During the first six months of 1918, such expenses increased $31,173.82 over such expenses for the first six months of 1917.

During the first six months of 1918, the revenues of this road decreased $27,525.36 as compared with the corresponding period of 1917.

During the first six months of 1918, the Binghamton Railway Company, this defendant, had a deficit of $18,748.27, as against a surplus of $60,682.27 for the corresponding period of 1917.

During the four years last past the taxes levied against the defendant company have been as follows: 1914, $16,200; 1915, $18,000; 1916, $21,000; 1917, $30,800; 1918, $41,255.65.

Due to advance in prices, the expenditures of the railroad company have increased from $28,263.27, in 1914, to $104,701.65, in 1917.

The defendant's necessary outlay for materials used in repairs is about $50,000 per year.

The defendant company has been under the necessity of making four increases in wages during the three years last past—the fourth increase in October, 1918.

The receiver appointed by this court took possession of the road on the 10th day of October, 1918. His receipts from operation of the road and lighting plant from October 10, 1918, to October 31, 1918, and his necessary disbursements for the bare expenses of running the road for the same period of time, were as follows:

Receipts.

Cash on hand October 10, 1919	$ 2,461.09
Receipts, October 10 to October 31, 1918	27,229.63
	$29,690.72

Disbursements.

Expenses of operation paid during and for same period	$25,291.14	
Coal purchased and used, not paid for	4,500.00	29,791.14
Deficit		$100.42

This is the result of keeping the road running for that period of 21 days.

There were no payments on interest on bonds or other obligations, taxes, insurances, or any existing indebtedness or claims for damages, or betterments, or necessary general repairs.

There are three sets of bonds outstanding against the Binghamton Railway Company secured by mortgage, viz.:

On Binghamton, Lestershire & Union. Interest at 5 per cent.	$ 147,000.00
On Binghamton Railroad Company. Interest at 5 per cent.	502,000.00
On Binghamton Railway Company (first consolidation). Of these $68,000 are in escrow. Interest at 5 per cent.	1,813,000.00
The defendant owes for steel cars. On car trust certificates.	63,000.00
The note indebtedness of the defendant is	197,948.00
It owes on open account	76,691.13

The interest on the most of this indebtedness, and payable semi-annually, is past due.

It has been stated already that this financial condition has not resulted from waste, extravagance, overcapitalization, excessive salaries, or bad management. As heretofore stated, to continue to operate this road under present conditions at the present rates of fare, fixed by the statutes referred to, is impossible, as it will result in defaults on the mortgages and foreclosures.

[20] The rates now established and charged and chargeable *under such statutes* are also confiscatory. See the following authorities: Stone v. Farmers' Loan & Trust Co., 116 U. S. 307–331, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841–843; St. Louis & San Francisco R. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; Cotting v. Godard, 183 U. S. 97, 22 Sup. Ct. 30, 46 L. Ed. 92; Detroit United Railway Co. v. City of Detroit, 245 U. S. 673, 38 Sup. Ct. 8, 62 L. Ed. 541, decided January 13, 1919.

In St. Louis, etc., v. Gill, supra, the court said:

"A state law, which establishes a tariff of rates so unreasonable as to destroy the value of the property of a railroad company, may be held to be unconstitutional, as taking property without due process of law. * * * As to whether a state law fixing the rates of fare requires a railroad company to do business at a loss and therefore constitutes a taking of its property without just compensation or due process of law, the correct test is the effect of the law on the entire line of such railroad."

There are phases of this matter to which I have not called attention, as I am of the opinion that the Quimby Case is intended by the Court of Appeals to hold that the Public Service Commission is without jurisdiction in any case to increase or decrease a rate of fare which has been agreed to by the enactment of a statute fixing the maximum rate of fare, and followed by the granting of a consent by the municipality to the construction and operation of the road, and which consent specifies the rate of fare to be charged, assuming, of course, that the contract made by such consent and the acceptance thereof, and by constructing and operating the road, has not been modified or abrogated by subsequent action or agreement, and also that it is immaterial to the question of jurisdiction whether or not such agreement or contract was subsequently ratified or approved by legislative action.

It ought to be the law, and I think it is the law, that when these several roads within the city of Binghamton became merged and consolidated pursuant to the general law into the Binghamton Railway Company, and extensions were thereafter made, all such contracts as I have mentioned were abrogated and annulled or became inoperative, and that thenceforth the rate of fare chargeable became that fixed by the general law. In this case it is claimed that some six or more valid contracts are in existence as to rates of fare on parts of this road, as now consolidated in one, and, if so, which is to control? Suppose all were substantially different as to rates of fare? The final consolidation resulting in the creation of this defendant, the Binghamton Railway Company, was effected December 6, 1901, under the pro-

visions of the general law then in force, and there have been numerous extensions of the lines since, consented to by the city.

The defendant, Binghamton Railway Company, then became bound under the provisions of that law, so far as the city of Binghamton was concerned, to conform to the rates of fare and provisions as to rates of fare fixed by and found in that statute and subsequent statutes, irrespective of any prior contract or contracts or agreement or agreements *as to rates of fare*. After such consolidation and extensions the company could not, in the city of Binghamton, operate all these consolidated roads and extensions as one road, and still charge and collect a fare of 5 or more or less cents for a continuous ride within the city on each of these roads as fixed and provided by the alleged contracts. Thereafter it was to charge a single fare, fixed by statute, *not by contract,* for a continuous ride over those lines within the city of Binghamton. The subsequent legislation is to the same effect as to rates of fare. So far as necessary the statutes on this subject have been quoted hereinbefore. To all this the city of Binghamton has assented. It has availed itself of the terms and benefits of the consolidation, and of the law under which made, and I think the alleged contracts have been abrogated by mutual consent. In Knox v. Lee, 12 Wall. 457, 550, 551, 20 L. Ed. 287, cited and approved in Louisville & Nashville R. R. v. Mottley, 219 U. S. 482, 31 Sup. Ct. 270, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, the Supreme Court said:

"Long before the above cases were decided it was said in Knox v. Lee, 12 Wall. 457, 550, 551 [20 L. Ed. 287], that, 'as in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.'"

It seems to me impossible to hold or find that any contract as to rates of fare now exists between the city of Binghamton and this railway company, or with either of the companies named, which interferes with the jurisdiction and power of the Public Service Commission to authorize the increased rate above suggested and recommended, which under the present circumstances and conditions is conservative.

There will be an appropriate order of authorization and direction to the receiver as to the roads where an increase is desired, such as is above indicated.

TEXAS CO. v. ATLANTIC REFINING CO.

(District Court, E. D. Pennsylvania. March, 1918.)

No. 5528.

1. PLEADING ⊂=343—JUDGMENT ON PLEADINGS—SUFFICIENCY OF GROUNDS.
   A judgment should not be rendered on the pleadings unless the right thereto is clear.
2. PLEADING ⊂=348—MOTION FOR JUDGMENT ON PLEADINGS—FINDING OF DAMAGES.
   Motion by plaintiff for judgment for want of sufficient affidavit of defense denied, where, on the allegations of the pleadings, no finding of damages could be made as a basis for a judgment, and the right of recovery depended on questions which could better be ruled after the facts were developed on the trial.

At Law. Action by the Texas Company against the Atlantic Refining Company. On motion by plaintiff for judgment for want of sufficient affidavit of defense. Denied.

Foss, Walnut & Faught, of Philadelphia, Pa., for plaintiff.

Ira Jewell Williams and Brown & Williams, all of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This rule might be disposed of by an order simply allowing or refusing judgment. A "decent respect," however, for the opposing views of the parties and their counsel, who have discussed the questions involved with marked ability and clearness and brought to the aid of the court the fruit of much labor expended upon the preparation and presentation of their respective views, as well as the large sum involved, impels us to set forth with fullness the reasons which lead us to the conclusion reached.

The following general observations will show the grounds of the ruling now made:

Cases calling for a judicial judgment roughly classify themselves into uncontested and contested cases. We are concerned now only with contested cases. In each of these, as in the instant case, the court is asked to enter a judgment. Every judgment must proceed upon some finding of fact. Sometimes the finding is made by a jury or other trier of fact and judgment is entered on the verdict. Sometimes the facts are found as asserted, or explicitly or tacitly admitted to be, by the party against whom judgment is rendered. If the defendant disputes, not the facts, but the right of the plaintiff to judgment on the plaintiff's statement of facts, the judgment rendered proceeds upon the finding that the facts are as averred by the plaintiff. If the plaintiff accepts the defendant's version of the facts, the judgment proceeds upon a finding of the facts as averred by the defendant, and the judgment is a like demurrer judgment. If no such finding can be made, all issues between the parties become trial issues.

The theory of the system of practice governing the entry of judgments assumes that the ultimate facts upon which the judgment is

pronounced are either thus admitted or found, or that such evidential facts are admitted as permit of only one and that a certain ultimate fact finding.

[1] In the class of uncontested cases the machinery provided works with precision. It is only in some of the contested class that difficulties are encountered. Difficulties arise because the defendant throws into the machinery the proverbial "monkey wrench," which interferes with its operation. Every case has its psychology and its business or other ethics, as well as its facts, and the legal principles by which its legal justice is determined. Sometimes a defendant is merely contumacious and obstructive. He has no defense to the action and knows he has none. Sometimes, however, there has been something in the transactions between the parties leading up to the litigation which causes the defendant honestly (whether mistakenly or not) to feel no sense of obligation to the plaintiff, and to deny any legal obligation to exist. Such cases, if the defendant can bear the expense of litigation, are always fought to the utmost and to the end, because the defendant is defending himself against what he believes to be legal injustice. Such cases should always be patiently heard and the defenses fully considered in order that courts may fulfill their established mission, which is, not merely to strive to do legal justice, or even to do it, but also to act with such circumspection and care that the appearance and danger of doing injustice may as far as is practicable be averted. It is the part of practical wisdom not to enter summary judgments in such cases unless the right of the plaintiff to judgment is clear. It is not enough that the question raised may be ruled as a question of pleadings. As it may also be ruled as a trial question, it should be so ruled if the case is not entirely clear; and, on a view of the whole case, such is the better course to follow. This gives us a subdivision of contested cases into those in which there is no real, in the sense of honest, dispute, and those in which the dispute is real and honest on the part of the defendant, but perhaps baseless. If it is clearly baseless, however honest it may be, there is no justification for refusing to plaintiff the judgment to which he is entitled.

The class which we have in mind is that of cases in which there are real disputes, the merits of which are not entirely clear, but which, when they are decided, are decided in favor of the plaintiffs. In the class of cases in which there is no real defense, if the defendant swears to a state of facts on which, if found, judgment could not be entered for plaintiff, the case must go to trial in order that the true state of facts may be found by a jury. If, however, the defendant merely denies that plaintiff is entitled to judgment, and makes an uncandid and evasive statement of facts in which no real defense can be found, and the purpose to merely delay judgment is sufficiently manifest, the court should enter judgment. The real ground of the ruling is the finding that there is no defense, and that the affidavit is evasive and a feature of mere dilatory tactics. As, however, in their rulings in entering or refusing judgments the accompanying opinions have not been confined to the bald statement of this ground for the ruling, but have sought support for the finding in the phraseology of the

affidavit, the reported affidavit of defense cases may be cited in aid of almost any theory which may be advanced. This is because the cases are misquoted, in that the real ground of the ruling is sought to be found in the words of the affidavit, instead of where it is to be found in the finding of a defense or no defense, to which finding the words of the affidavit are merely contributory. Erie v. Butler, 120 Pa. 374, 14 Atl. 153, is a cited instance.

Let us, discarding from the statement of claim and the affidavit of defense the purely jurisdictional averments, which are not called in question, analyze the respective averments of fact made by the parties, and thus determine to which of the classes, above referred to, the present case belongs.

The plaintiff's cause of action thus disclosed is that the parties entered into a written agreement bearing the date of March 14, 1916, supplemented by a paper writing dated March 15, 1916, by which the plaintiff contracted to sell and deliver in successive part shipments, and the defendant to accept and pay for, 150,000 barrels of oil at an agreed price. By the bargain thus made the defendant was bound to accept the oil, and the further averment is made that the defendant refused (in part) to accept, and that out of this contract and breach a cause of action has arisen.

The affidavit of defense as a presentation of the theory of the defense to the cause of action thus pleaded is criticized because of the absence of clearness and definiteness in statement. There can be gathered from it, however, two thoughts. One is an unwillingness (at least) to admit that the contract is as set forth in the two writings Exhibits A and B.

The position taken in defense can be best stated circumstantially. The writing "A" is admitted to have been made and signed by both parties, but the inference that it thereby became the contract of defendant is denied, and the denial is supported by the averment of fact that it was not delivered, but had been signed and forwarded to be delivered upon condition that plaintiff should stipulate in writing that the defendant was not to be bound to accept further and future deliveries unless the earlier deliveries were found to be satisfactory in quality. Writing A was thus signed and committed to C. E. Bedford, to be delivered upon compliance with the above condition, or otherwise to be returned to defendant. Bedford, it is averred, was in this acting for plaintiff, but it is not averred that he had any authority from plaintiff to so act. The writing "B" is unilateral—signed only by plaintiff. Its receipt by the defendant is not denied, and a fair inference is that its receipt is admitted. A further fair inference is that it was at least intended by plaintiff to be a compliance with the condition imposed by defendant, of which plaintiff had been informed.

The defendant, at this point, might have challenged the judgment of the court upon the question of what was the contract—the one set forth in the paper writings, or the one set forth by defendant in this conditional delivery. This finding, however, we are not asked to make, but the affidavit of defense proceeds to the second thought, which is to challenge the correctness of plaintiff's construction of the contract

as disclosed by these paper writings. This construction is asserted to be that defendant was bound to accept all the oil, unless within the stipulated 15 days after receipt of the first shipment the plaintiff exercised its right to "cancel."

The proper construction of the contract as written, advanced by defendant, is that it had a reasonable time after receipt of part shipment within which to notify plaintiff of dissatisfaction and to discontinue further shipments, or, at least, if it became dissatisfied within the 15 days, that it had a reasonable time thereafter in which to notify the plaintiff.

This construction of the contract is given efficacy by the averment of the fact that within the 15 days defendant was dissatisfied, and within a reasonable time, to wit, 29 days, notified the plaintiff and exercised its right to "cancel."

The court would ordinarily be called upon to make the rulings thus invited by a finding of what the contract was and giving to it a judicial construction, and, if (and, of course, this possible finding is stated merely to present the point) the court found and construed the contract as defendant construes it, the court would be further called upon to determine whether the question of reasonable time is for the court or for the jury to determine, and, if for the court, whether the notice averred was reasonable.

If the case goes to a jury, it is unnecessary and practically unwise to decide now questions which may arise and can be determined as trial questions. Because of this, we, for the present, pass them until the preliminary question is itself decided. This is all which need be said upon the "cause of action" feature of the pleadings, and we pass to the only other feature requiring comment.

In breach of contract cases, the statement of claim must disclose, not only a cause of action, but also an averment of the fact of damage, and the sum for which judgment is asked. This latter requirement the plaintiff has met through making clear averments in accordance with the ordinarily accepted forms of good pleading. Indeed, from the viewpoint of plaintiff's theory of its case (and it has the clear right to adopt and sue upon its own theory), the statement of claim is in substance and form above criticism, and has not been criticized because it could not be. We have, however, qualified the statement made because of the opposing theory presented by the affidavit of defense. The measure of damages which the plaintiff asks to have applied is when applicable the accepted measure. It is the difference between contract price and market price at the time and place of delivery. This is the accepted measure, because, when available, it is the most certain and definite and in consequence satisfactory measure. It thus becomes practically the sole and exclusive measure (when we have it), and as a further consequence has come to be regarded as the measure of damages in all such cases. Although ordinarily practically accurate, this is an unscientific and incorrect conclusion. This is so because there not only may be, but there are, cases in which we cannot apply this measure, for the reason that the subject-matter of the contract is not dealt in as a market product and has no market

price. If this were the only measure, then all such cases would be injuria absque damno.

This leads to an inquiry into the indemnity rights of a vendor upon whose hands by a breach of contract has been thrown something for which he had the right to receive the contract price. In a certain sense, it may be said the vendor has the right to his contract price, but this is upon the assumption that he gives up the thing contracted to be sold. As in a common-law action his suit is for damages, he can recover only for the loss he has sustained. He is to be put back where he would have been had there been no breach. As he has the goods, he is entitled only to the contract price less whatever money value he can get out of the goods. Here comes into play the principle that the vendor is bound to minimize his damages by getting out of the goods all he reasonably can or can be expected to do. He may reasonably be expected to be able to get the market price, and cannot reasonably be expected to get more. Hence the acceptance of market price as an element in the measure of damages. It is clear, however, that it is not "the" measure, but a measure which when you can apply it becomes the measure. When it cannot be had, resort must be made to some other measure.

[2] Recurring to the statement of claim, it avers a market price of $2.15 as against a contract price of $3, and a consequent damage of 85 cents per barrel, and a total damage of $96,180.25.

The affidavit of defense denies that the plaintiff has suffered this sum of damage, and denies all damage. It denies the application of plaintiff's measure of damages by denying the market price to be $2.15, and further that the oil had any market price at the time and place of delivery. If the affidavit of defense stopped there, the logic of the plaintiff might be applied. We have credited defendant with a market price of $2.15. If it disclaims this credit, then our damages are more than 30 times the sum claimed, and judgment may be entered for the less sum. The fallacy in this lies in reading the affidavit as admitting that the oil had no value and that plaintiff could get out of it no part of the contract price. We would not be justified in so reading it. The point, so far as concerns the court, may be thus presented. We cannot enter judgment (as before stated) without a finding of some fact which will support it. To measure the damages, we must find a measure. We cannot find the market price to be $2.15, or any other sum, if the fact be that there was no market price at the place of delivery. The plaintiff's statement of claim provides us with no other measure.

Waiving the question of whether the defendant is bound to admit the existence of another measure not invoked by the plaintiff, we must have some measure, and, as the statement of claim provides us with none, there is no place of resort other than to the affidavit of defense. In this a substituted measure might be found by the expedient of resorting to the market nearest to the place of delivery, and adding to the price there the expense of transportation, or what has the same result, deducting from the contract price this market price as affected by the cost of transportation. This results, however, in finding the selling value of the oil to equal or exceed the market price. If this

be called the market price at the place of delivery, the affidavit is open to the criticism of making two inconsistent and contradictory statements, and invites the application of the principle which the plaintiff invokes that each statement is destructive of the other, and the averments of the statement of claim remain undenied.

This criticism is well founded only in a sense. The two averments are to be read together, and read also with the statement of claim. When so read, they may (and we think fairly) be taken to mean this: The plaintiff says the market price of this oil was $2.15. This we deny, if it refers literally to the place of delivery. Oil is not there bought or sold, and there is no such market. If the statement refers to the price in the market nearest to the place of delivery, then the cost of transportation should be added, and the market price then exceeds the contract price, or the price which plaintiff can get in such market plus what it saves in transportation nets it the contract price.

We do not find in the pleadings any warrant to find any sum as damages. The conclusions reached are as follows:

1. We cannot make a finding of any definite sum for which to enter judgment.

2. The right of the plaintiff to judgment depends upon questions which may as well be ruled as trial questions after the facts of the case are fully developed as to be ruled upon the facts to be found in the pleadings. The decision is preferably to be deferred as the damages must in any event be found.

At the cost of lengthening an already overlong opinion, these further observations are the due of counsel who (as already mentioned) have expended much time and labor upon the presentation of the case, and thereby very much lightened the labors of the court, and they may be of general aid in disclosing the attitude of the court in entering summary judgments. Cases to which there is no defense disclosed, and in which a finding of a merely delaying purpose may be made, are in a class by themselves. Cases in which the ultimate facts are not in dispute, and a satisfactory statement of which may be made so that there is in substance a case stated, constitute another class. Cases in which the facts are disclosed with sufficient definiteness so as to give the court a firm grasp of the whole fact situation and enable it to make a definite fact finding form still another class. In all such cases summary judgments may well be entered. If, however, judgments are entered in doubtful or close cases, there is small promise of any saving of time in case an appeal is taken, and, if the appeal is successful, the appellate court has a possible double burden cast upon it, and litigants must endure no small part of the curse which the system of appeals from interlocutory judgments, which prevails in some jurisdictions, visits upon litigants there, entailing the evils of delays and expenses which operate as a practical denial of justice.

The rule for judgment is discharged.

UNITED STATES v. NORRIS et al.

(District Court, N. D. Illinois, E. D. December 16, 1918.)

No. 1387.

1. MONOPOLIES ⟸12(1) — COMBINATIONS AND CONSPIRACIES — ANTI-TRUST LAWS.

Clayton Act Oct. 15, 1914, § 20, legalizes orderly and peaceful strikes "involving or growing out of a dispute concerning terms or conditions of employment," and takes combinations or agreements to bring about such strikes out of the purview of section 1 of Sherman Act July 2, 1890, but has no application to irregular or malicious strikes, having no relation to such disputes.

2. MONOPOLIES ⟸31—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE —INDICTMENT.

An indictment under Sherman Act July 2, 1890, § 1, for conspiracy in restraint of interstate commerce, which alleged the things which were to be done by defendants, *held* sufficient, although it did not charge the means by which they were to be accomplished.

3. MONOPOLIES ⟸31—CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE —INDICTMENT.

Since an overt act is not an element of the offense of conspiracy under Sherman Act July 2, 1890, § 1, it need not be charged in the indictment.

Criminal prosecution by the United States against Michael Norris, John Haley, and John Lynch. On motions in arrest of judgment. Overruled.

Charles F. Clyne, U. S. Dist. Atty., and Robt. T. Neill, Special U. S. Dist. Atty., both of Chicago, Ill.

David D. Stansbury, of Chicago, Ill., for defendants Haley and Norris.

Cruice & Langille, of Chicago, Ill., for defendant Lynch.

SANBORN, District Judge. [1] The indictment filed January 26, 1915, charges a conspiracy to violate section 1 of Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. § 8820), denouncing conspiracies in restraint of interstate commerce and making any such violation a misdemeanor. It was found after the passage of the Clayton Act, effective October 15, 1914 (38 Stat. 730, c. 323), but describes an alleged conspiracy formed before the adoption of the latter act. My construction of section 20 of the Clayton Act (Comp. St. § 1243d) is that it legalizes regular and proper strikes by trade unions, and takes combinations or agreements to bring about that class of strikes out of the purview of section 1 of the Sherman Act, but that it does not apply to irregular or malicious strikes, those not entered into for the betterment of labor conditions. The section in question provides that no restraining order or injunction shall issue in any case between employer and employé, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or property right, nor for peaceful picketing, or paying strike benefits. The second paragraph of section 20 provides

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that no injunction shall prohibit any person from quitting work, advising or peacefully persuading others to do so, or peacefully persuading or communicating information, or peaceful boycotting, peaceful assembly, etc.

"Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The strike in this case had nothing to do with a dispute over wages, as the jury found; so the Clayton Act is entirely inapplicable. I think that section 20 was intended to legalize lawful strikes, and peaceful, lawful persuasion of workmen. The orders which were issued to workmen in this case were dishonest and corrupt, and they were given no reason for their ceasing work. The statute has no application to such a situation. The Sherman Act is thus left in full force in cases like this. The Clayton Act does not authorize molestation of employés by strikers. Kroger Grocery, etc., Co. v. Retail, etc., Co. (D. C.) 250 Fed. 890. Nor does it apply to an unlawful act like a secondary boycott. United States v. King (D. C.) 250 Fed. 908.

[2] The most serious objection to the indictment is that it does not inform defendants of the nature of the charge against them. It states that McLaughlin Building Material Company was doing an interstate commerce business; that on June 24 and 25, 1914, a large number of unloaded cars in such business were in Chicago; that certain other like cars of materials arrived in Chicago June 24 and 25; that some cars had reached their destination for unloading, others which, on account of the interference of defendants to be alleged, were in the railroad yards on other than unloading tracks, and still others, on account of such interference, were diverted in Chicago while en route to their destination, to persons other than the McLaughlin Company, and to places in Chicago other than those to which consigned. Then follows a complete list of the cars, showing carrier, contents, place and date of shipment, and date of arrival or diversion in Chicago. The interstate commerce character of the business is then alleged, and that the McLaughlin Company and the railroads were engaged in such commerce under section 1 of the Sherman Act.

It is then alleged that on June 23, 1914, defendants unlawfully and knowingly conspired together and engaged in a conspiracy in restraint of interstate commerce, which conspiracy "was a conspiracy for restraining interstate trade and commerce of said McLaughlin Building Material Company and said railroads in the several ways and by the several means now here set forth and described": (1) By preventing the hauling of sand, etc. (2) By causing the sand, etc., to remain upon and in the cars in the possession of said railroad companies so transporting the materials to their destination which materials were then in interstate commerce, "said defendants planned and intended to prevent the delivery of said materials contained in said cars." It also states that defendants did prevent such delivery. (3) By influencing and causing the persons employed to unload and haul the sand, etc., not to do so.

While it is not directly charged that defendants agreed to obstruct commerce by preventing delivery of the cars or material to the Mc-

Laughlin Company, yet that is plainly what it means, so that the only fair criticism is that the means or mode of operation do not appear in any way. How were the "preventing," causing to remain on the cars before their delivery to the building company, the "influencing" and "causing" the workmen not to unload—how were all these things to be done? What authority did defendants have over the haulers or unloaders, or over the railroads, to keep the loaded cars in their possession? If the indictment had disclosed (as the proof was) that defendants were business agents of labor unions, and as such had authority over the members, and that they influenced them to quit work, all would have been quite clear.

But there is nothing to show what influence defendants could have with the workmen, that there was any strike, that defendants levied blackmail on McLaughlin and called a strike to bring him to time, that the workmen quit, and that this caused the railroads to reroute the material cars, as a direct result. Not one of these things is even hinted at. The prosecution could equally well have proved threats to kill the workmen if they hauled for McLaughlin, or persuasion or any other form of influence. A labor dispute over wages with a teaming company for whom the teamsters worked, causing a lawful strike, might have been shown, and this was attempted by the defense. Defendants were in no way informed of the details of what they were required to meet and prepare to disprove. They were given no hint that they would be charged with collecting $2,000 blackmail from McLaughlin, and calling a strike on him because he refused to pay $500 more, or to comply with a later demand for $5,000.

The question is, therefore, whether this indictment can be held sufficient under the liberal rule now existing. Defendants have raised the question in every possible way, by demurrer, motion to dismiss and discharge on the trial, motion to direct a verdict, motion to quash, and finally in arrest.

[3] Indictments under the Sherman Act are more simple than those under Rev. St. § 5440 (Comp. St. § 10201), because the offense is the agreement alone, no overt act being a part of it. The agreement being the crime, that must be charged, and nothing more. If the indictment relates the elements of the agreement in sufficiently clear terms, defendants are informed of what they are required to meet. They need not be told what means or measures they had decided on to carry out their agreement, or that any act was done by any person in the execution of the agreement.

The modified rule of sufficiency of indictment is stated by the Circuit Court of Appeals of this circuit in Jelke v. United States, 255 Fed. 264, — C. C. A. —, October term, 1916, where the prosecution was under section 5440, requiring the pleading of an overt act. In that case it was alleged that defendants agreed that they would "cause" certain named persons to mix artificial coloring matter with oleomargarine to cause it to look like butter of a shade of yellow, and agreed among themselves to furnish and cause to be furnished to such named persons tub liners for packing the colored product, and paper wrappers for packing it, also to "cause" said persons to do other things definitely stated, all in order to escape taxation. How the defend-

ants had agreed to "cause" the persons named to do the things charged does not appear. The court held that a conspiracy to defraud the government out of the tax on oleomargarine is an offense, even though the details of how they would carry it out, and cause such persons to assist, may not have been agreed on, and that the law does not require the defendant to be informed of all the details or means, which may not have been fully arranged.

The rule of the Jelke Case is thus stated by Judge Evans:

"An indictment is generally sufficient which charges a statutory crime substantially in the words of the statute, except in such cases where other precedents have been firmly established in analogous offenses at common law, or where such a charge would not fairly inform the accused of the nature of the charge."

This statement of the law rejects all objections merely technical, so that it is necessary only to consider whether this indictment fairly informs the accused of the nature of the charge. In applying this rule the court in the Jelke Case approves decisions holding that section 5440, by requiring the pleading of an overt act, intended to relieve the pleader from the necessity of setting out the means agreed on by which the conspiracy was to be carried out. United States v. Dennee, Fed. Cas. No. 14,948; United States v. Goldman, Fed. Cas. No. 15,225. Bannon v. United States, 156 U. S. 468, 15 Sup. Ct. 469, 39 L. Ed. 494, is also cited as authority, in which it is said:

"At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with a particular of his charges. Rex v. Gill, 2 Barn. & Ald., 204; Rex v. Hamilton, 7 Car. & P. 448; U. S. v. Walsh, 5 Dill. 58, Fed. Cas. No. 16,636. But this general form of indictment has not met with the approval of the courts in this country, and in most of the states an overt act must be alleged. The statute in question changes the common law only in requiring an overt act to be alleged and proved."

People v. Arnold, 46 Mich. 268, 9 N. W. 406, is also approved, in which Judge Cooley said:

"It is conceded that, if the act which the conspirators combine to perform is unlawful, it is not necessary to set out in the information the means intended to be employed in accomplishing it. * * * But if the end in view is lawful or indifferent, and the conspiracy only becomes criminal by reason of the unlawful means whereby it is to be accomplished, it becomes necessary to show the criminality by setting out the unlawful means."

The Court of Appeals also distinguished United States v. Cruikshank, 92 U. S. 542, 557, 23 L. Ed. 588, and Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830.

Since it is the agreement or conspiracy which is made unlawful by the Sherman Act, and no overt act is required to complete the offense, as is the case under section 5440 (United States v. Patten [C. C.] 187 Fed. 664, United States v. Cowell [D. C.] 243 Fed. 730), the question is only whether the agreement is sufficiently stated. The indictment purports to state the means by which the offense was to be carried out, but does not give all the particulars. The agency for the unions, the blackmailing, a further demand for money, and then

the strike are not stated. These, however are only the "means" of executing the offense. They may not have been considered at all by the defendants when they made their first, or even the last, demand on McLaughlin, deeming that the implied threat would be sufficient. Thus these things may not have constituted any part of the combination or agreement, only determined on at the last moment, when it was found that they could conceal their real purpose by using the dispute between the teaming company and the unions regarding wages, and use it for their own ends. It is the conspiracy which is denounced by the law, and that was complete when there was a meeting of minds to obstruct commerce. The commerce described in the indictment and found by the jury was interstate, and was directly restrained by the acts of defendants. Southern Pac. T. Co. v. I. C. C., 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 37 Sup. Ct. 623, 61 L. Ed. 1181; Western Union v. Foster, 247 U. S. 105, 38 Sup. Ct. 438, 62 L. Ed. 1006.

The motions in arrest of judgment should be overruled.

PRIMOS CHEMICAL CO. v. FULTON STEEL CORPORATION.

(District Court, S. D. New York. November 20, 1918.)

1. COURTS ⟸268—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT.
   A federal court has jurisdiction of a creditors' suit against a corporation, where defendant has either fixed or personal property within the district, although the greater part of its property is in another district, in view of Judicial Code, § 55 (Comp. St. § 1037).
2. COURTS ⟸276—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT—WAIVER OF OBJECTIONS.
   The jurisdiction of a federal court of a creditors' suit against a corporation cannot be questioned by creditors on the ground that it is a nonresident of the district, when the defendant has voluntarily appeared and submitted to the jurisdiction.
3. RECEIVERS ⟸206—ANCILLARY RECEIVERSHIP.
   An ancillary bill for sequestration of assets does not essentially differ from an original bill. Each is an equitable attachment of property within the district in which such bill is filed, and of that property only.

In Equity. Suit by the Primos Chemical Company against the Fulton Steel Corporation. On motion to dismiss for want of jurisdiction. Denied.

See, also, 254 Fed. 454.

W. Cleveland Runyon, of New York City, for complainant.

Kellogg & Rose, of New York City (L. Laflin Kellogg, of New York City, of counsel), for objecting creditors.

AUGUSTUS N. HAND, District Judge. [1] Certain creditors, by a special appearance, question the jurisdiction of this court in the above cause upon the ground that the suit is of a local nature. The suit cannot be of a local nature, if there is personal property in this district

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and no fixed property. If the leasehold interest belonging to the defendant is fixed property in this district, the cause was properly brought here, and the receivers would have full jurisdiction over all the property in the circuit under section 55 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102 [Comp. St. § 1037]). I allowed an amendment to the bill to set up these facts, without, however, passing in any way upon the effect of the allegations. About the time the original bill was filed, I suggested that an ancillary bill should be filed in the Northern district, where the factory and most of the property were, and that is the practice that I still think should have been and should be followed. However, that this court would not have jurisdiction over all the property within the circuit does not in any way militate against its jurisdiction over property within this district.

[2] I am informed that there was at the time of the filing of the bill a leasehold interest, the equipment of an office and a bank account of approximately $4,000 within the Southern district of New York. There can therefore be no doubt about the jurisdiction of this court over that property. Moreover, its jurisdiction, as was said by the Supreme Court in the case of Central Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, in a case like this, cannot be questioned by creditors, where the defendant has voluntarily appeared and submitted to the jurisdiction.

[3] According to my understanding, an equity receivership, except in certain limited cases covered by the Judicial Code, extends only to property within the district in which the suit is brought. An ancillary bill for sequestration of assets does not essentially differ from an original bill. Each is an equitable attachment of property within the district in which such bill is filed and of that property only, and, whether the bill filed in the second district be termed "original" or "ancillary," orders in that district are necessary to affect property therein.

If a reorganization is offered, it should be approved by the court in both districts. After a bill is filed in the Northern district, I should say the offer should first be submitted to the court in that district, where by far the greater part of the property of the corporation is situated, and, if approved there, I can hardly imagine any doubt about its immediate approval here.

For the foregoing reason, the motion to dismiss the bill for lack of jurisdiction is denied.

Ex parte BERNAT.

Ex parte DIXON.

(District Court, W. D. Washington, N. D. December 17, 1918.)

ALIENS ⊂=54—GROUNDS FOR DEPORTATION—ADVOCATING AND TEACHING SABOTAGE.

Order for deportation of aliens under Act Feb. 5, 1917, § 19 (Comp. St. 1918, § 4289¼jj), for "advocating and teaching unlawful destruction of property," *held* sustained by evidence, where defendants testified that they believed in, and distributed I. W. W. literature, which openly advocated and urged sabotage by destroying and disabling machinery or other property used by employers.

Applications by Samuel H. Dixon and Charles Bernat for writs of habeas corpus. Denied.

Hinman D. Folsom, Jr., of Seattle, Wash., for the United States.

Ralph S. Pierce and Geo. F. Vanderveer, both of Seattle, Wash., for defendants.

NETERER, District Judge. These cases were submitted to the court together. The issue is identical. The facts are similar, but of different emphasis. The cases will be disposed of together.

Each petitioner is ordered deported upon the ground "that he has been found advocating and teaching the unlawful destruction of property." Dixon is a subject of England; Bernat is a subject of Russia.

Each petitioner seeks release on the ground that he has been denied a fair hearing, that there is no evidence to support the charge against him, and that the order of deportation is arbitrary, and unsupported by fact or law. If the alien has been accorded a fair, though summary, hearing, and the finding is supported by competent testimony, however slight, the court may not interfere.

From an examination of the testimony, in the light of this rule, we find, after some testimony as to membership in the I. W. W. organization, the following questions and answers appear in Dixon's testimony:

"Q. Being a member that long, and being a delegate and taking an active part in the order, you actually believe in the teachings as advocated by the I. W. W.? A. I do.

"Q. You have read their preamble and constitution? A. Yes.

"Q. You believe in the teachings advocated in that? A. I do.

"Q. Are you familiar with the I. W. W. Song Book? A. Yes.

"Q. Do you believe in the teachings indicated in that book? A. Yes; most of them; I do. There are some I haven't seen, but what I have seen, I believe."

As to reading I. W. W. literature, he was asked:

"Q. 'The I. W. W., its History, Structure and Methods,' by St. John? A. I have read that.

"Q. Believe in the teachings as advocated in that book? A. Yes.

"Q. Have you read the Industrial World? A. Yes.

"Q. Believe in the teachings advocated in that paper? A. Yes; I do. * * *

"Q. Now, you have been collecting for the defense fund; you have been a delegate quite a number of times; you have solicited members, sold the Industrial Worker, and distributed other I. W. W\ literature? A. Yes.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"Q. And in any way you possibly could secured new members for the order? A. Yes; I have.

"Q. How many times have you been arrested? A. I have been arrested several times lately in the I. W. W. troubles. * * *

"Q. Your I. W. W. cards, your delegate credentials, and this other literature mentioned in your hearing, together with any other I. W. W. literature which we may deem to have a bearing in your case, will be introduced and made exhibits in your hearing. A. Yes."

This is the general trend of the testimony with relation to the teachings of the I. W. W., as disclosed by the literature, and, I think, establishes the fact that he is in full sympathy with the propaganda and practices as disclosed by the literature, and has distributed such literature.

The doctrine and practices of the order, as disclosed by the attached literature, may be indicated by short excerpts from "The I. W. W., its History, Structure and Methods," by Vincent St. John and others:

"As a revolutionary organization, the International Workers of the World aims to use any and all tactics that will get the results sought, with the least expenditure of time and energy. The tactics used are determined solely by the power of the organization to make good in their use. The question of 'right' and 'wrong' does not concern us. * * *

"Failing to force concessions from the employers by the strike, work is resumed and 'sabotage' is used to force the employers to concede to the demands of the workers."

Sabotage is defined by several I. W. W. writers:

The New Unionism, by Andre Tridon:

"We may distinguish three forms of sabotage.

"(1) Active sabotage, which consists in the damaging of goods or machinery. * * *

"(3) Obstructionism, or passive sabotage, which consists in carrying out orders, literally, regardless of consequences."

The Voix du Peuple:

"The first thing to do before going out on strike is to cripple all the machinery. * * * Are bakery workers planning to go on strike? Let them pour in the ovens a few pints of petroleum, or of any other greasy or pungent matter. After that soldiers or scabs may come and bake bread. The smell will not come out of the tiles for three months. Is a strike in sight in steel mills? Pour sand or emery into the oil cups."

Sabotage, by Emile Pouget:

"If the workers disable the machines, it is neither for a whim, nor for dilettantism, or evil mind, but solely in obedience to an imperious necessity. * * *

"To list out the thousand of methods and ways of sabotage would be an endless rosary. The shoe workers have an infinite variety of tricks. So have the bakers. To the timber workers it cannot be difficult to use the ax so that the tree or log is split in all its length. To the painters, also, it must be easy to dilute or condense their colors as best they see fit."

Sabotage, Its History, Philosophy & Function, by Walker C. Smith:

"Sabotage is a direct application of the idea that property has no rights that its creators are bound to respect. * * *

"The question is not, Is sabotage immoral? but, Does sabotage get the goods? * * *

"A bar of soap in the boiler would keep the soldiers at home, or else force them to march to the strike. If this were not possible, there are water tanks were the tender must be filled, and the saboteur can 'let the gold dust twins do the work.' * * *

"Sabotage is discredited by those who believe in property rights. It is the weapon of those who no longer reverence the thing that fetters them. Its advocacy and use helps to destroy the 'property illusion.' The parasites, who have property, oppose sabotage, while the producers, who have poverty, are commencing to wield that potent weapon."

Excerpts from "Industrial Workers of the World":

"The I. W. W. opposes the institution of the state."

"What is this sabotage that so worries politicians, preachers, profit grabbers, and parasites generally? It is a realization on the part of the working class that property has no rights that its creator is bound to respect. It means that the workers know that might makes right, and that they are possessed of a tremendous might in the productive process. It means that they are conscious of the fact that any action which weakens the employer and strengthens the worker is justified. * * * A slashed warp, a loosened bolt, an uncaught thread, a shifting of dyes, will make Billy Wood see the 'justice' of the men's demands quicker than all the votes cast since Billy Bryan commenced to run for office.

"Sabotage is an individual act performed for a class purpose. It may be denounced as 'anarchy,' but that scares no workers in these rebellious days. * * *

"These migratory workers have lost all patriotism—and rightly so. Love of country? They have no country. Love of flag? None floats for them."

One of the songs attached as an exhibit:

Christians at War.

By John F. Kendrick.

(Tune: Onward Christian Soldiers.)

Onward, Christian soldiers! Duty's way is plain;
Slay your Christian neighbors, or by them be slain;
Pulpiteers are spouting effervescent swill;
God above is calling you to rob and rape and kill.
All your acts are sanctified by the Lamb on high;
If you love the Holy Ghost, go murder, pray, and die.

Onward Christian soldiers! Rip and tear and smite!
Let the gentle Jesus bless your dynamite.
Splinter skulls with shrapnel, fertilize the sod;
Folks who do not speak your tongue deserve the curse of God.
Smash the doors of every home, pretty maidens seize;
Use your might and sacred right to treat them as you please.

Onward Christian soldiers! Eat and drink your fill;
Rob with bloody fingers, Christ O. K.'s the bill.
Steal the farmer's savings, take their grain and meat;
Even though the children starve, the Savior's bums must eat.
Burn the peasant's cottages, orphans leave bereft;
In Jehovah's holy name, wreak ruin right and left.

Onward Christian soldiers! Drench the land with gore;
Mercy is a weakness all the gods abhor.
Bayonet the babies, jab the mothers, too;
Hoist the cross of Calvary to hallow all you do.
File your bullets' noses flat, poison every well;
God decrees your enemies must all go plumb to hell.

Onward Christian soldiers! Blighting all you meet,
Trampling human freedom under pious feet;
Praise the Lord whose dollar sign dupes his favored race;
Make the foreign trash respect your bullion brand of grace.
Trust in mock salvation, serve as pirates' tools;
History will say of you: "That pack of G—— d—— fools."

The literature attached to the record is replete with the advocacy of sentiment as above set forth. To teach, as defined by the Standard Dictionary, is:

"To impart knowledge by means of lessons; to give instruction in; communicating knowledge; introducing into or impressing upon the mind as truth or information."

To advocate means, according to the same authority:

"To speak in favor of; defend by argument; one who espouses, defends, or vindicates any cause by argument; a pleader, upholder, as an advocate of the oppressed."

There are several ways by which a person may teach or advocate. It need not be from the public platform, or through personal utterance to individuals or groups, but may be done as well through written communications, personal direction, through the public press, or through any means by which information may be disseminated, or it may be done by the adoption of sentiment expressed or arguments made by others which are distributed to others for their adoption and guidance.

The testimony shows that Bernat has been a member of the I. W. W. for the last ten years, and secretary of Branch No. 500, Seattle, for some time. His duties as such secretary were to distribute literature, collect dues, handle accounts, and solicit new members. From the activity, as disclosed in the record, the court cannot say there is no evidence upon which to predicate the finding of the Commissioner General in each case; and it would appear that the conclusion of the Commissioner General, based upon the facts stated, is within the purpose and intent of the Congress in enacting section 19 of Act Feb. 5, 1917, c. 29, 39 Stat. 889 (U. S. Comp. St. § 4289¼jj), and this is emphasized by the passage of the act approved October 16, 1918, entitled:

"An act to exclude and expel from the United States aliens who are members of the anarchistic or similar classes."

The matter is not before the court for review, but merely to determine whether there is any evidence upon which to base the finding. Under the law, the conclusion of the Department of Labor, if there is any evidence, is final.

The application for writ will be denied in each case.

PETERSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3185.

1. CRIMINAL LAW ⊜37—DEFENSES—ENTRAPMENT.
Where officers of the law have incited a person to commit the crime charged, and lured him on with the purpose of arresting him in its commission, the law will not authorize a verdict of guilty.

2. CRIMINAL LAW ⊜739(1)—QUESTION FOR JURY.
In a criminal prosecution, where the defense was that defendant was incited and induced to commit the offense by officers for the purpose of entrapment, the refusal of instructions submitting that question to the jury as one of fact, and the giving of instructions treating it as one of law, and charging that it presented no defense, was error.

In Error to the District Court of the United States for the Southern Division of the Northern District of California; Edward S. Farrington, Judge.

Criminal prosecution by the United States against Ida Peterson. Judgment of conviction, and defendant brings error. Reversed.

A. P. Black, of San Francisco, Cal., for plaintiff in error.

Annette Abbott Adams, U. S. Atty., John W. Preston, Sp. Asst. Atty. Gen., and James E. Colston, Sp. Asst. U. S. Atty., all of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. [1] It is the settled rule in this circuit that where the officers of the law have incited a person to commit the crime charged, and lured him on to its consummation with the purpose of arresting him in its commission, the law will not authorize a verdict of guilty. Taylor v. United States, 193 Fed. 968, 113 C. C. A. 543; Woo Wai v. United States, 223 Fed. 412, 137 C. C. A. 604; Sam Yick et al. v. United States, 240 Fed. 60, 153 C. C. A. 96. The distinction between such a case and the well-recognized rule authorizing the use of decoy letters to detect a crime already committed was clearly pointed out by this court in the case of Holsman v. United States, 248 Fed. 193, 199, 200, 160 C. C. A. 271.

[2] In the present case the plaintiff in error was charged by indictment with selling intoxicating liquor, namely, three bottles of beer, to a soldier named George Garis, who was a corporal, while in uniform, on the night of August 11, 1917. The case as made by the evidence showed, among other things, that the defendant owned a three-story house on the corner of Devisadero and Lombard streets, San Francisco, known as the Fairview Hotel, the lower floor of which was used as an ice cream parlor, in which were also sold tobacco, cigars, candy, soft drinks, and like articles. The two upper floors contained 20 rooms, 4 or 5 of which were used by her family, and the remainder rented to roomers and boarders as occasion offered.

There was certainly ample evidence given tending to show that the

plaintiff in error willfully violated the law in selling to the soldier the intoxicating liquor, and that, complaints having been received by the officers of the law from different sources that she was engaged in such unlawful traffic, Garis and another soldier, as well as a police officer named Hand, all dressed in United States uniform, were sent to her place to investigate, and that during such investigation the defendant did in fact sell to Garis, for money, three bottles of beer; but the defendant testified in her own behalf, among other things, as follows:

"On the evening of August 11, 1917, two boys came in and asked me for a room, rang the bell, and I came out. I brought them upstairs in room 15, and they registered under a fictitious name. Corporal Garis said, 'Say, I want to see you about something.' He called me off to one side. He said, 'Can you slip me a couple of cold bottles of beer?' I says, 'No, sir; I cannot slip you any cold bottles of beer; and, furthermore, if you want any beer, you get out.' He says, 'You need not be afraid of me; I am not one of those fly cops, or a stool pigeon, or anything like that; you need not be afraid of me.' He says, 'I know you sell it; you might as well sell it to me.' I says, 'If you think you are going to get any beer from me, you are badly mistaken; I never sold a bottle of booze here.' He kept on nagging me, and I says, 'I have got to go downstairs and attend to business.' I should judge this was around 6 o'clock, because we generally eat about then, and I got called away from the supper table. I cannot say exactly the minute; I am always busy. After having refused beer to Corporal Garis, I went back to my supper table. It is on the second floor, and they are on the third floor. He came downstairs and called me out. He came out the door, and said he wanted to see me. He says, 'Where is that beer you promised me?' I said, 'What are you talking about? I do not sell any beer. What is the matter with you?' He says, 'Well, I have to have some beer; I never mind the price; I have paid as high as a dollar a quart on the Coast; I do not care what you charge me; I have to have it; I have been hiking all day.' I refused him. I said, 'I have no beer for soldiers; there's no use trying to get it; you might as well go back to your room.' I then went down to the candy place.

"There were two men registered in room 15. I only saw two that were present at that time. I am not acquainted with either Officer Hand, Corporal Garis, or Corporal Conley, and had never seen them before, that I remember. My recollection is that it was Corporal Garis who did the talking. The first request for beer was made when they rented the room. They called me off to one side. I should judge that it was 15 minutes after that that one of them came down to my living room on the second floor. That was Corporal Garis, as I remember. He knocked at the door; he called me off to one side, and he said, 'Where is that beer that you promised me?' I repeated the same thing. I said, 'There is no use wasting any time with you; I have got to go downstairs and attend to the ice cream parlor.' It was full of soldiers because it was pay day. When I went down to the ice cream parlor it must have been between a quarter to 7 and 7 o'clock. It is hard to tell exactly how long I stayed in the ice cream parlor, as I was very busy, and to tell you the truth I cannot tell the time exactly to a minute. Between 7 and 8 o'clock Officer Hand came down and says, 'I would like to have a little change; I would like to have that beer you promised to bring up.' He told me he was drilling six hours a day; that they were exhausted; he had to have the beer, it did not make no difference how much it cost. He just kept on nagging me. He says, 'You look pretty good-natured'—I guess because I am good-natured and fat—'you might as well come across and give us some beer; we have to have it.' I said, 'I cannot sell any beer. What is the matter with you? Do you want to get me in trouble?' He said, 'Oh, that is all right; you can bring us up a couple of bottles.'

"Q. Did you say that in a very kindly tone, or did you say it positively? A. I was all excited. I slammed the door in front of their room the first time. I told them to leave me alone. First Garis came down twice; then Hand came down. They kept on nagging me for about three hours. They told me,

'Everybody sells it around the corner; you might as well give us a couple of bottles.' I went and gave them a couple of bottles. A soldier by the name of Rose came up the stairs, and he said, 'What is this argument?' I said, 'They want beer.' He says, 'Who are they?' I said, 'I don't know; it is no interest of mine who they are; I don't know.' I did not see Rose afterwards. Rose roomed at my place on and off. He is in the guardhouse now.

"Q. What time of the night was that, that you finally gave them the three bottles of beer? A. I think it was about half past 9; maybe it was a little later. I never made the remark, 'Here I come to be arrested.' The only thing, one of them said to me, 'What's the matter? Haven't you any use for soldiers?' I said, 'Why shouldn't I? My own son is in the army; he volunteered, and the other is ready to go. I have been dealing with soldiers for the past 19 years; why shouldn't I have use for soldiers?' By 'dealing with soldiers' I mean I was in the laundry business, and I washed for soldiers in the Post Laundry. We called it that, so as to get the soldier's trade. We are just one block from the Presidio, and our business has been almost exclusively with soldiers for the last 20 years.

"Mr. Black: Q. What induced you to sell that beer to those soldiers? A. They worked my good nature, I guess, and my sympathy; because I see them drilling in front of my door, and they come in by the dozens and get ice cream; my boy is in the army; when he started to drill, he was all stiff and sore; I know what it is. They said they had to have it, and I was feeling bad for them; I didn't mean to do any wrong. Furthermore, I never asked them no price. Room 20 is right above my office on the third floor, and room 14 is right opposite from room 20, and room 15 is just a little bit triangle from that. There are 10 rooms on the third floor and 10 rooms on the second floor. I saw a soldier named Slabin there that night. Garis was talking to me when I saw Slabin. I should judge my door was 15 or 20 feet from Slabin's room when Garis was talking to me."

And there was testimony given by other witnesses tending to support that of the defendant upon the point in issue.

The record shows that the trial court refused to give to the jury, to which refusal an exception was duly reserved, the sixth and seventh instructions requested by the defendant, which are as follows:

"Sixth. The defendant is charged with selling beer to an officer or member of the military force of the United States Army while in uniform. The defendant claims that she was entrapped into selling three bottles of beer through the instigation of the government agents, and that the beer would not have been sold at all, if it had not been for the importunities and false statements made by the officers and detectives who went to her rooming house, admittedly for the purpose of entrapping her into the commission of the offense; and in this connection I charge you that, if you believe from the evidence that the defendant was induced by the importunities of the government agents to violate the law, and that through the instigation of either Police Officer Hand or Corporal Garis representing the government, the defendant, Mrs. Peterson, was induced to sell them three bottles of beer, and that she otherwise would not have violated the law, then you should return a verdict of 'not guilty,' as it is the policy of the United States courts not to uphold a conviction in any case where the offense was committed through the instigation of the government agents.

"Seventh. If you find from the evidence that Police Officer Hand, accompanied by Corporal Garis of the United States Army, went to the rooming house of the defendant and hired a room from the defendant, and thereafter importuned the defendant to sell them some beer, which the defendant refused to do, and that thereafter they induced one Harry Rose, a soldier who was rooming in the house of the defendant, to go to the defendant and again importune her to give to Police Officer Hand and Corporal Garis aforesaid, two or more bottles of beer under the statements that the last two named persons were friends of Rose, which statements were willfully false and made for the purpose of deceiving and inveigling the defendant into a viola-

tion of the law, and that, yielding to the importunities, the defendant did procure from her private stores of liquor, the three bottles testified to by Officer Hand and Corporal Garis, and you further believe that the defendant without such solicitation and importunity would not have violated the law, then it is your duty to acquit the defendant, for the reason heretofore stated, that the federal courts do not uphold convictions for offenses committed through the instigation of the government agents."

Instead the court in its charge instructed the jury as follows:

"The defendant on the witness stand has admitted that she gave the beer to Garis, and that she received in exchange money. The excuse and defense offered by her is that she was solicited to sell the beer to the man Garis. There is raised only one real question of law in the case. It is needless for me to say that the government is not engaged in the business of manufacturing criminals; for an officer to go to a law-abiding citizen and by solicitation and persuasion induce him to commit a crime is something abhorrent to all our sense of decent administration of law; and where the crime is committed under such circumstances, the courts have always been inclined to say that a crime thus induced, if so shown, is not sufficient to support a conviction. That is decided in the Chinese smuggling case of United States v. Woo Wai. That case, as I stated yesterday, was precisely of that character. A Chinese, not suspected, so far as the record shows, of being engaged in the business of smuggling Chinamen into the United States, was approached by an officer who professed to be in that business, and induced Woo Wai to enter into a scheme to smuggle Chinese from Mexico. Of course, the conduct of the officer was reprehensible, and the Circuit Court of Appeals characterized it just as it should be, and characterized it very severely. But there is a class of offenses, like the unlawful selling of intoxicating liquor, frequently committed by people who are cunning, and it is difficult to secure the evidence necessary to a conviction by any other means, except by the use of decoys; and you are instructed that if it appears in this case that the officers had information which led them to believe, and they were justified in believing that the premises occupied by the defendant was a place where an unlawful business was being conducted, that is, that the defendant was engaged in selling intoxicating liquor to members of the military service, while in uniform, it was very proper for them to initiate an investigation, and if the two soldiers, Garis and Conley, and Police Officer Hand, clad in military uniform, went there and solicited beer and offered to buy it, and urged her to sell it to them, the fact that they urged her to sell the beer to them is no excuse."

It is apparent from what has been said that the sole defense of the defendant was that she was instigated to commit the crime by the officers, which was purely a question of fact for the determination of the jury. If she was, then the law is, as above pointed out, that a verdict of guilty could not be sustained, from which it follows that the instructions requested and refused should have been given. The difficulty with the learned judge of the court below was that he treated the question as to whether or not the defendant was instigated to commit the crime by the officers as a question of law and not of fact, as is evident from the portion of his charge which has been quoted, in which, as will have been seen, he expressly said to the jury:

"There is raised only one real question of law in the case," and in its conclusion that "if the two soldiers, Garis and Conley, and the Police Officer Hand, clad in military uniform, went there and solicited beer, and offered to buy it, and urged her to sell it to them, the fact that they urged her to sell the beer to them is no excuse."

It is obvious that the case did not present any question of law for the jury to determine, and only one controverted question of fact—

that is to say, whether or not the defendant was instigated by the officers to sell the beer.

It results that the judgment must be and is reversed, and the case remanded for a new trial.

MARYLAND CASUALTY CO. v. CAMPBELL.

CAMPBELL v. MARYLAND CASUALTY CO.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1919.)

Nos. 3290, 3309.

INSURANCE ⊂⊃376(1)—ACCIDENT INSURANCE—BREACH OF WARRANTY—WAIVER.

The insurer cannot be deemed to have waived a warranty in the application that insured had not received medical attention within two years, because its agent knew the statement to be untrue, where the policy expressly withheld such authority from the agent, and provided that no waiver should be valid, unless indorsed thereon and signed by the president or secretary.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action by Daniel Curry Campbell against the Maryland Casualty Company. Judgment for plaintiff, and both parties bring error. Reversed.

A. H. King and H. L. Anderson, both of Jacksonville, Fla., for plaintiff below.

F. P. Fleming, Jr., of Jacksonville, Fla., for defendant below.

Before PARDEE and WALKER, Circuit Judges.

WALKER, Circuit Judge. This was an action by Daniel Curry Campbell against the Maryland Casualty Company on a contract, which was set out in the declaration, by which the latter insured the former, subject to provisions and conditions stated, against bodily injuries, effected independently and exclusively of all other causes, through external violent and accidental means, and against specified disabilities so effected. The parties will be referred to as the plaintiff and the defendant, respectively. The claim asserted was that the plaintiff was entitled to the indemnity stipulated for—

"if such injuries shall, independently and exclusively of all other causes, continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation."

It was averred that the plaintiff, a practicing lawyer, was so disabled continuously from on or about October 9, 1914, to the time of the bringing of the suit, by an injury resulting from his lower lip being violently and accidentally struck by and against a piece of furniture. The claim asserted was resisted upon the grounds, among others, that the disability alleged was not effected, independently and exclusively of all other causes, by the wound to the plaintiff's lower lip,

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

which there was evidence tending to prove was accidentally inflicted on or about October 9, 1914, and that there was a breach of a provision contained in the contract sued on, whereby the plaintiff warranted the truth of a statement that he had not received medical attention within two years next preceding the date of the contract, in that during the month of February, 1914, he did receive medical attention for traumatism or cancerous condition on his lower lip at the place where he alleged he received said injury on or about October 9, 1914. The defendant moved the court to direct a verdict in its favor at the conclusion of the evidence offered by the plaintiff, and also at the conclusion of all the evidence. Exceptions were reserved to the overruling of those motions.

A phase of the evidence clearly tended to prove that whatever disability existed after the happening of the incident of October 9, 1914, was attributable in part at least to a diseased condition of the plaintiff's lower lip which existed prior to that date. Evidence which was without conflict proved that there was an unsound condition of the plaintiff's lower lip prior to the infliction of the wound relied on, and that that lip was the subject of examination and treatment by physicians for months prior to that date, and prior to and when the defendant's original policy was renewed by a written instrument, dated August 1, 1914, whereby it agreed to continue the policy in force for 12 months, from August 10, 1914, to August 10, 1915, "provided the statements in the application or the schedule of warranties in the original contract are true at this date," etc. There was uncontroverted evidence to the effect that for months prior to October 9, 1914, that lip was the subject of treatment by physicians or pursuant to their directions, which had not been discontinued when the alleged accidental hurt relied on occurred. The testimony of several of those physicians was adduced. It was uniform to the effect that there was a cancerous condition of the lip before as well as after October 9, 1914. The plaintiff, as a witness in his own behalf, stated that his lip was well before he received the wound relied on. He asserted that the treatment it was receiving immediately prior to that occurrence was a precautionary measure.

In behalf of the defendant it is contended that a verdict in its favor should have been directed, on the ground that whatever disability existed after October 9, 1914, was so conclusively proved to be due, in part at least, to a cancer which existed before as well as after that date, as to make it the duty of the court to set aside a verdict for the plaintiff; circumstances the existence of which was not disputed being such as to establish the impossibility of the truth of the plaintiff's assertion that his lip was well before the wound relied on was suffered, whether it was or was not believed by him to be true. This contention need not be passed upon if, on another ground, the defendant was entitled to have a verdict in its favor directed.

By the terms of the original policy, which was renewed as above stated, the undertakings of the defendant, which it evidenced, were stated to be made "in consideration of the statements in the schedule of warranties hereinafter contained and made a part hereof, and of

$120 premium." The policy, which embodied plaintiff's application for insurance, contained the following provision:

"All the warranties made by the assured upon the acceptance of this policy are true, viz.:

"Schedule of Warranties.

* * * * * * * * * *

"16. I have not received medical attention within the past two years, except at follows: No exceptions."

By the terms of the last renewal receipt the original policy was continued in force—

"provided the statements in the application or the schedule of warranties in the original contract are true at this date, and that nothing exists at the date hereof to render the hazard of the risk greater than or different from that shown by said application or schedule."

By pleas the defendant averred the existence of the above-quoted warranty, and that prior to the date of the issuance of the last renewal the plaintiff did receive medical attention, to wit, during the month of February, 1914, and that said medical attention was received for traumatism or cancerous condition on said lip at the place where plaintiff alleges he received said injury on or about October 9, 1914. The pleas mentioned further averred:

"That said medical attention was not disclosed to the defendant, nor did defendant have any knowledge thereof, at the time of the issuance of said last renewal, and said warranty was material."

The policy contained the following provision:

"An agent has no authority to change this policy, or to waive any of its provisions, nor shall notice to any agent or knowledge of his or any other person be held to effect a waiver or change in this contract, or any part of it. No change whatever in this policy, and no waiver of its provisions, shall be valid unless an indorsement is added hereto, signed by the president or secretary of the company, expressing such change or waiver. In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company."

There was undisputed evidence to the effect that the plaintiff received medical attention as alleged in the pleas above mentioned. The plaintiff testified that in January or February, 1914, while he had silver foil on his lip, he met Mr. R. R. Rosborough, the defendant's general agent in Florida, through whose office the policy and renewals were issued, and mentioned to him that his lip had been injured, and that the doctors had put silver foil over it to protect it. He also testified that, when an employé of Mr. Rosborough delivered to the plaintiff the last renewal receipt, he told that person about the doctors treating his lip. There was no evidence tending to prove that any one connected in any way with the defendant, other than the two persons just mentioned, was informed, at the time of or prior to the issue of the last renewal, or before the alleged disability occurred, that the plaintiff's lip had been injured, or that he had received medical attention.

The pleas above mentioned set up as a defense to the suit a breach by the plaintiff of a warranty contained in the contract sued on. The

last-quoted averment of those pleas, upon which issue was joined, negatived a waiver by the defendant of the alleged breach of warranty. Such being the manifest purpose and effect of that negative averment, it cannot properly be said that its falsity in any material respect is shown by evidence having no tendency to prove a waiver by the defendant of the breach of warranty alleged. By the explicit terms of the policy the only persons in any way connected with the defendant, who were shown by any evidence to have had knowledge of the falsity of the plaintiff's statement that he had not received medical attention, were without power to waive the warranty of its truth. The last above quoted provision negatived the existence of authority in either of those persons to change the policy, or to waive any of its provisions, and stipulated against notice to them having the effect of a waiver or change in the contract. Embodied in that provision was the stipulation that:

"No change whatever in this policy, and no waiver of its provisions, shall be valid unless an indorsement is added hereto, signed by the president or secretary of the company, expressing such change or waiver."

There was no such indorsement. The defendant, like any other principal, could limit the authority of its agents, and thus bind all parties dealt with to whom such limitation was disclosed. An insurer cannot be deemed to have waived a breach of a warranty contained in its policy, because its agent had notice or knowledge of the breach, where the policy expressly withheld from such agent authority to change the policy, or to waive any of its provisions, and provided that notice to such agent or knowledge of his should not be held to effect a waiver of the contract or any part of it. New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; Prudential Insurance Co. v. Moore, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. 367; Ætna Life Ins. Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356.

The following Florida statute was referred to in argument as having a bearing on the question presented:

"Any person or firm in this state, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual." General Statutes of Florida, § 2765.

In the case of Mutual Life Insurance Co. v. Hilton-Green, 241 U. S. 613, 623, 36 Sup. Ct. 676, 60 L. Ed. 1202, the statute quoted was under consideration. That was a suit on a life insurance policy, which contained the following provisions:

"This policy and the application therefor, copy of which is indorsed hereon or attached hereto, constitute the entire contract between the parties hereto."

"Agents are not authorized to modify this policy or to extend the time for paying a premium."

It was contended that the insurance company was chargeable with notice of facts known to Hogue, the agent who solicited the insurance, to Torrey, the agent through whom the application for the policy was forwarded to the company, and to the physicians, who examined the applicant. In adversely disposing of that contention the court said, in reference to the statute just quoted:

"Section 2765 of the Florida Statutes, ante, undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and third persons and certainly does not raise special agents with limited authority into general ones possessing unlimited power. We assume Hogue, Torrey, and the medical examiners were in fact designated agents of the company with power to bind it within their apparent authority; and in such circumstances the statute does not affect their true relationship to the parties." Mutual Life Insurance Co. v. Hilton-Green, supra, 241 U. S. 623, 36 Sup. Ct. 680, 60 L. Ed. 1202.

That statute does not have the effect of conferring a power which the contract of the parties shows was explicitly withheld. Though each of the persons who, according to the plaintiff's testimony, was informed of the falsity of his statement that he had not received medical attention was an agent of the defendant, he was an agent from whom, by the terms of the contract entered into, the principal withheld any authority to change the contract or to waive any of its provisions, and notice to whom or whose knowledge it was stipulated should not be held to effect a waiver or change in the contract.

The terms of the defendant's contract were such as to make the truth of the above statement of the plaintiff, made in his application for the original policy and repeated when he accepted a renewal, a condition precedent to the existence of a right to recover on the renewal of the policy. It was in express words made a warranty. Mutual Life Insurance Co. v. Hilton-Green, 211 Fed. 31, 127 C. C. A. 467. The evidence without conflict showed the falsity of that statement. The result was, in the absence of any evidence showing a waiver by the defendant, that plaintiff was not entitled to recover. The court erred in overruling the motion of the defendant that a verdict in its favor be directed.

The plaintiff presents for review a ruling of the court against a claim, based on a Florida statute, that the plaintiff was entitled to recover attorney's fees. The conclusion that, on the evidence adduced, he was not entitled to maintain the demand asserted, dispenses with the necessity of passing on the ruling of which he complains.

Reversed.

WILCOX v. EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R.

(Circuit Court of Appeals, First Circuit. December 3, 1918.)

No. 1311.

1. COURTS ⟸347—FEDERAL COURT—PLEADING—DISREGARDING TECHNICAL DEFECTS.
Under equity rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii), requiring the court to disregard defects in the proceeding which do not affect the substantial rights of the parties, facts alleged in a cross-bill, although it does not meet the technical requirements of such a pleading, may be considered as a part of the answer.

2. MORTGAGES ⟸463—FORECLOSURE SUIT—DEFENSES—FRAUD.
Evidence *held* to substantiate allegations in the answer in a foreclosure suit that a stipulation in a deed by which defendant assumed and agreed to pay a mortgage on the property, not then of record, was inserted by fraud and without his knowledge.

3. MORTGAGES ⟸559(3)—LIABILITY FOR DEFICIENCY—ASSUMPTION OF MORTGAGE BY GRANTEE.
In a suit to foreclose a mortgage, and also to enforce the personal liability of a grantee of the property under a provision of the deed by which he assumed and agreed to pay the mortgage, the validity of the deed is a material issue.

4. ACKNOWLEDGMENT ⟸20(3)—INTERESTED PARTY AS NOTARY.
Under Notarial Act Porto Rico, § 20, providing that instruments containing any provision in favor of the notary executing the same, or witnessed by his relatives, clerks, or employés shall be void, a deed to mortgaged property in which the grantee assumed and agreed to pay the mortgage, acknowledged before a notary who was president and a substantial stockholder of the bank owning the mortgage, and witnessed by his employés, is void.

5. EQUITY ⟸339—PLEADINGS AS EVIDENCE—SWORN ANSWER.
It is a general rule in chancery that, when an answer is under oath, such parts of it as are responsive to the bill are evidence equal to the testimony of one credible witness, and are to be taken as true, unless outweighed by a preponderance of evidence.

Appeal from the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Suit in equity by El Banco Popular de Economias y Prestamos de San Juan, P. R., against Elias B. Wilcox. Decree for complainant, and defendant appeals. Reversed.

Ben A. Matthews, of New York City (Jose R. F. Savage, of San Juan, P. R., on the brief), for appellant.

Frank Antonsanti, of San Juan, P. R., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an appeal from a decree in the United States District Court for Porto Rico in an equity suit brought by El Banco Popular against Elias B. Wilcox, June 9, 1914, to foreclose certain mortgages. In the bill, after setting out the citizenship and residence of the respective parties, it is alleged:

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

(1) That on July 29, 1909, one Landron and wife executed a mortgage before Damian Monserrat, Sr., as notary public, in favor of the bank, to secure the sum of $4,600, with interest at 1 per cent. per month for the term of one year; that the interest was to be paid in advance every four months, and, in case of failure to pay the same as agreed, the mortgage should be considered overdue. The mortgagor was to keep the property insured for the amount of the mortgage, and, in case it became necessary to institute judicial proceedings to enforce collection, the mortgagor was to be liable for an additional sum of $500 to cover costs, disbursements, and attorney's fees; that the mortgage had not been paid in whole or in part, and that interest was due thereon from August 2, 1913, to March 3, 1914, amounting to $322.

(2) That on December 3, 1912, said Landron and wife executed another mortgage before Damian Monserrat, Sr. (Jr.), as notary public, to secure the sum of $1,700, and interest at 1 per cent. per month for the term of one year; that the interest was to be paid in advance every four months, and in case of failure so to do the mortgage was to become due; that the mortgagor was to keep the property insured for the amount of the mortgage debt, which he failed to do, and that the bank had been obliged to pay for insurance premiums the sum of $108.68; that an additional sum of $200 was provided for to pay costs and attorney's fees in case of foreclosure; that said mortgage had not been paid, and that interest was due thereon from August 3, 1913, to March 3, 1914, in the sum of $119.

(3) That both mortgages were upon the same property, consisting of a house and lot situated in the district of Santurce, San Juan.

(4) That on January 14, 1913, Landron and wife conveyed said house and lot by deed executed before Damian Monserrat, Sr., as notary public, to the defendant Wilcox, who therein assumed and agreed to pay the mortgages above stated.

(5) That there is now due and owing from the defendant to the bank, on said mortgages, the sum of $7,549.68; that no part of said sum or the interest thereon since March 3, 1914, had been paid, though the same was overdue and payment thereof had been demanded of the defendant.

It prayed that Wilcox be required to answer—

"the several matters and things hereinbefore stated, as fully and particularly as if they were herein again repeated, and he was thereunto especially interrogated, and that the premises aforesaid may be sold for payment of your orator's claim, with interest as aforesaid, and that your orator may have such further or other relief as his case may require."

July 20, 1914, the defendant filed an answer and a cross-bill. August 3, 1914, the plaintiff filed motions to strike the answer and the cross-bill. July 29, 1915, these motions were denied. October 26, 1915, no demurrer, plea, or answer to said cross-bill having been filed, although it should have been before the rule day of the preceding month, the defendant filed a motion for a decree pro confesso upon the cross-bill. November 15, 1915, plaintiff filed motions to dismiss the answer and to dismiss the cross-bill. January 27, 1916, the court rendered an

opinion and entered an order denying the defendant's motion for a decree pro confesso, and granting the plaintiff's motions to dismiss the answer and the cross-bill unless they were amended within a limited time, to which rulings the defendant excepted.

In the opinion the court disposed of the motion to take the cross-bill pro confesso by saying that it was not pressed or insisted upon, and he regarded it as waived; and, having pointed out that a motion to strike related to formal matters, while a motion to dismiss took the place of the old demurrer and related to "questions of law and of equity," he proceeded to consider whether the answer and the cross-bill stated an equitable defense or ground for relief, and held that, inasmuch as it was not alleged in either of them that the stipulation in the deed of January 14, 1913, whereby Wilcox assumed and agreed to pay the two mortgages, was inserted in the deed through fraud and without his knowledge or consent, but only alleged that the stipulation was not the contract entered into between him and the Landrons, the allegation did not state an equitable defense, as the conversations leading up to the execution of the deed were merged in it, and that neither the answer nor the cross-bill asked for reformation of the deed, but sought to avoid it "on the ground of parol conversations beforehand."

As to the allegations in the cross-bill—that the deed of January 14, 1913, was null and void because the notary before whom it was executed was, at the time, a stockholder in and president of the bank, and that the witnesses to the deed were then in the employ of the notary, either of which facts would render the deed null and void under section 20 of the law concerning notaries (section 1998 of the Revised Statutes and Codes of Porto Rico)—the court did not undertake to determine whether they set forth a valid defense, saying that he did not consider the question as at present before the court; that "if it be a valid defense, it arises out of the transaction sued on by the plaintiff, and is therefore within the scope of equity rule 30 (201 Fed. v, 118 C. C. A. v) as to set-off and counterclaim," and, such being the case, it "can be set up in an answer, and does not need a cross-bill."

July 5, 1916, the defendant filed an amended answer, wherein, among other things, he alleged that prior to the date of the execution of the deed of January 14, 1913, he was the owner of a second mortgage upon the property in question, which he had proceeded to foreclose, so far as to obtain a decree of foreclosure, and was about to sell the same to satisfy his judgment, when, at the instance of Damian Monserrat, Sr., he was induced to forego the selling of the property and to enter into an agreement to assume payment of the mortgage for $4,600 and cancel his judgment against the Landrons, upon Landron and wife agreeing to deed the property to him; that said Monserrat, being aware of the terms of the agreement, was to prepare the deed for execution; that the terms of the agreement between him and Landron were reduced to writing; that thereafter said deed of January 14, 1913, was prepared by Monserrat; that it was written in the Spanish language and was of great length; that, on being assured by Monserrat that it faithfully stated the agreement between him and the Landrons, he was induced to accept and sign the deed; that he never promised to

pay the $1,700 mortgage, and did not know of its existence until after the deed of January 14, 1913, was made and accepted; that Monserrat was, at the time he prepared the deed, the president and attorney of said bank and a stockholder therein; that he was largely, if not wholly, responsible for the loan to Landron; that the mortgage of December 3, 1912, for $1,700, was a third mortgage upon the property, and was a loss to the bank if it existed; and that the change made in the deed from that of the agreement entered into between him and the Landrons was a fraudulent effort to unload the $1,700 indebtedness upon the defendant. It was further alleged that Monserrat, at the time he took the acknowledgment of the deed, was the president, legal representative, and a heavy stockholder in the bank, and that the witnesses to the execution of the instrument were in his employ, all of which was in violation of law and rendered the instrument null and void. He prayed (1) that the bill be dismissed and the plaintiff take nothing thereby; and (2) that the deed of January 14, 1913, be held for cancellation and declared null and void. This answer was made under oath.

A trial having been had, on August 25, 1916, a decree of foreclosure was entered, in which it was adjudged that the defendant, by virtue of the deed of January 14, 1913, purchased the property in question and assumed and became liable to pay the two mortgages held by the bank, and that there was then due and owing it on said mortgages the sum of $9,631.92. It was further ordered and decreed that the defendant pay the complainant said sum, with interest, within 90 days, and, in default thereof, that the mortgaged property be sold and all rights of the respondent forever barred and foreclosed.

At or about the time this decree was entered an opinion was filed in which it appears that the court viewed the question presented by the evidence to be whether the defendant was informed of the existence of the $1,700 mortgage of December 3, 1912, which was not recorded until January 28, 1913, at the time he accepted the deed of January 14, 1913, without regard to whether he then in fact knew of the stipulation inserted in the deed of January 14 with reference to the mortgage for $1,700, and held that, regarding, as he did, the deed of January 14 as the primary source of evidence in the transaction, he felt controlled by the stipulation therein contained as to the $1,700 mortgage, for he could not regard the evidence of fraud of such persuasive character as to convince him that the deed did not state the real transaction. He did not consider the defense set up as to the invalidity of the deed by reason of the notary, Monserrat, being the president and a large stockholder in the bank, and the witnesses to the deed being the employés of the notary.

[1] We do not deem it necessary to consider at length the questions presented by the motions to dismiss the original answer and the cross-bill. Neither that answer nor the cross-bill alleged that the stipulation relied upon by the plaintiff was introduced into the deed of January 14, 1913, through fraud; and the answer contained no allegations, as did the cross-bill, with reference to the nullity of the deed. There would seem to be no reason, however, why the court below,

even though the cross-bill did not answer the requisites of such a bill when tested by the technical rules of pleading in equity, should not have regarded it as an answer and decided whether the defense set up as to the nullity of the deed presented a valid defense; for in rule 18 of the general equity rules (198 Fed. xxiii, 115 C. C. A. xxiii) it is provided that "unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished," and in rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii) that "the court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." In other words, it seems to us that the purpose sought to be accomplished by the general equity rules is that, if the substantial rights of the parties may be ascertained and determined according to the allegations contained in the pleadings, it is the duty of the court to consider and decide them without regard to the form in which they are presented, if they may be rightly understood.

But, inasmuch as the defendant was allowed to file an amended answer, which he did, and in which he set up, among other defenses, the defense of nullity of the deed because of the interest of the notary and the witnesses being his employés, we think that the defendant was in no way injured by the granting of the motion to dismiss the cross-bill without the merits of the defense having then been determined.

[2] It remains to be considered whether the allegations of fraud and nullity set up in the amended answer present valid grounds of defense, and, if so, whether the weight of the evidence calls for findings in accordance therewith.

It is in substance conceded and there can be no doubt, if the stipulation with reference to the assumption by the defendant of the $1,700 mortgage was inserted in the deed through the fraud of the notary, that it is a valid ground of defense as to that mortgage, for the defendant could not be charged with its payment, as was sought to be done in the bill and as was in fact done in the decree. The object of setting out in the bill of complaint the stipulation wherein it is alleged that the defendant assumed and agreed to pay the two mortgages for $4,600 and $1,700 was (1) to make the $1,700 mortgage, which in the absence of the agreement in the deed would be a third mortgage, a second mortgage and enlarge the amount which the defendant would be required to pay in order to redeem; and (2) to conclude him as to the balance due on the judgment after applying the sum realized from the sale of the mortgaged property when he is sued for that balance. Although the decree rendered in the foreclosure suit does not expressly provide for a deficiency judgment, the defendant would nevertheless be concluded by that decree as to his obligation to pay the balance due, which could be recovered against him in a subsequent suit. Coney v. Winchell, 116 U. S. 227, 230, 6 Sup. Ct. 366, 29 L. Ed. 610.

If, however, the stipulation as to the $1,700 mortgage was inserted through fraud, this alone would not militate against a judgment of foreclosure being entered against the defendant as to the mortgage for $4,600 and charging him with the payment of the debt secured therein. But if the stipulation in the deed as to the payment of the $4,600 mort-

gage was rendered invalid by reason of the deed being a nullity, having been executed before a notary not authorized to act in the premises, or because witnessed by his employés, we think a judgment charging the defendant with the payment of the amount of the debt secured by that mortgage could not be sustained, and for the reasons above given.

As to the question of fraud the defendant's evidence showed that, having procured a judgment of foreclosure in the sum of $1,465.35 on a mortgage which he held on the property, which mortgage was a second mortgage to that of the bank for $4,600, and being about to sell the property at public sale to satisfy the judgment, Damian Monserrat, Sr., came to him to see if there might not be a way of settling the matter without subjecting Landron, the mortgagor and a fellow lawyer, to the humiliation of advertising his property at public sale, and requested the defendant to go to the office of Landron to discuss the matter; that shortly thereafter he met Monserrat, Sr., at Landron's office, and that a Mr. Timpson accompanied him there; and after discussing the matter it was finally agreed between Landron and the defendant that the latter would take a transfer of the property in satisfaction of his judgment and would become responsible for the mortgage indebtedness recorded on the books of the registry of property of a date prior to the defendant's mortgage; that nothing was said about a mortgage of $1,700, or any other mortgage indebtedness, except that which the bank held for $4,600; that, after the terms had been agreed upon, Monserrat, who was to draw the deed, left the office; that shortly thereafter the agreement entered into between the defendant and Landron was, on January 13, 1913, reduced to writing and signed by the parties, one copy of which was given to Landron and the other retained by the defendant, and that Timpson signed the agreement as a witness to Landon's signature; that by the terms of this agreement Landron, representing himself and as attorney in fact for his wife, contracted to sell the house and lot in question to the defendant; that the consideration therefor should be the amount of the judgment stated in the decree in the defendant's foreclosure proceeding; that the defendant would assume the duly registered incumbrances on the property appearing of a date prior to the defendant's mortgage; that if within 30 days from the date of the agreement Landron desired he might repurchase the property for the judgment plus the sum of $500 and all expenses necessary in connection with the resale of the property; that in case he did not conclude to repurchase the same within 30 days he should vacate the property promptly and pay as rental for the time he remained therein a sum "equal in amount to the interest for that time, payable to the Bank of Porto Rico upon the mortgage held by said bank against said property"; that on the following day, to wit, January 14, 1913, the parties met at the office of Monserrat, Sr., the notary, and executed the deed that contained the provision stating that the defendant assumed the mortgage of $1,700 held by the bank, as well as that he assumed the mortgage for $4,600; that the defendant did not read the deed, which was written in longhand in the Spanish language and covered several pages, as he was in a hurry, and that it

was not read to him; that before signing it the notary, Monserrat, Sr., assured him that it was drawn in accordance with the agreement which the parties had made, and that, relying on this, he signed and accepted the deed; that he had not seen Monserrat, Sr., from the time he was at the office of Landron when the agreement was made up to the time the parties met at the office of the notary to sign the deed; that a few months after this transaction took place the defendant called at the plaintiff bank and paid the interest claimed to be due on the bank's mortgage; that, thinking that the interest which he was called upon to pay was greater than it should have been, he thereafter examined the deed, and for the first time learned that it contained a provision whereby he assumed the payment of the $1,700 mortgage; that this was the first knowledge that he had of this provision of the deed; and that he thereafter declined to pay, and did not pay, any further interest. Mr. Timpson was called as a witness and testified that he was present at Landron's office at the time the agreement was entered into and that Monserrat, Sr., was present; that afterwards, on the agreement being reduced to writing, he took a memorandum of the agreement drawn up in duplicate to Landron's office, who read and signed it; and that he himself signed the paper as a witness.

On behalf of the plaintiff, Monserrat, Sr., testified that he did not recall being present at Landron's office at the time the agreement was made; that the only knowledge he had of the agreement between Landron and the defendant was obtained from the defendant himself, who called to see him at a time prior to the parties appearing at his office to execute the deed; that the defendant then told him the terms of the agreement, of which he made a memorandum, from which he afterwards drew the deed, and that the deed was made in accordance with the instructions thus received; that at the time the parties met to sign the deed the defendant read the deed himself, and that he, the notary, also read the deed to the defendant and the witnesses to the deed. The plaintiff did not call the witnesses to the deed to testify, but did call Landron, who testified that, while he remembered that Wilcox came to his office to talk about the settlement, he did not remember that Monserrat, Sr., was there with him at that time; that he signed the document that had been agreed upon, drawn up, as he supposed, by Wilcox, and brought to him by an American whose name he did not know, but who used to attend to some business for Wilcox. His testimony was inaccurate and confused as to the details of the different transactions, and he gave no testimony as to whether at the time the deed was signed it was read over by Wilcox or by Monserrat, Sr., the notary, in the presence of Wilcox.

It was agreed that Monserrat, Sr., at the time the deed was executed, was the president of the bank and a stockholder therein, and the allegation in the sworn answer of the defendant that Monserrat was largely, if not wholly, responsible for the loans from the bank to Landron was nowhere denied in the testimony.

The written memorandum of January 13, 1913, was offered in evidence by the defendant, and was excluded subject to exception, but was permitted to be read. Why this document was excluded, and why

its contents were permitted to be read into the record is not entirely clear. It surely was competent evidence to be considered, together with other proof upon the question of fraud. Whether any weight was given to it as evidence we have no way of ascertaining. The reasonable conclusion would seem to be that, having excluded it, the court gave it no weight, but allowed it to be read into the record, to show the nature of the agreement in case its exclusion might subsequently be brought in question. It was an important piece of testimony upon the question of fraud and should have been received. It showed that Wilcox had agreed with Landron to assume the mortgage given to the bank, which was duly registered and bore a date prior to the defendant's mortgage, and that Landron, in case he did not repurchase the property, was to pay as rental, for the time he occupied the premises, the amount of the interest upon the mortgage held by the bank. That this was their agreement seems to be clearly established, and the question is, if we assume that Monserrat, as he testified, received his information as to the terms of the agreement from Wilcox, whether it is reasonably probable that Wilcox, having made the agreement that he did with Landron, could have told Monserrat that he had agreed to assume, not only the $4,600 mortgage held by the bank, but also the $1,700 mortgage, or that he read the deed, or the provision in it binding him to pay the $1,700 mortgage, or that the deed was read to him by Monserrat. What was he to gain by entering into such a transaction? He held a mortgage upon the property that antedated the $1,700 mortgage, upon which he had obtained a judgment of foreclosure, and the property had been advertised for sale on the 5th of the following month, when the equity of Landron would be extinguished. He stood to lose, not to gain, by making such an agreement, and the reasonable inference is that he did not do so.

But the interest of Monserrat, Sr., in the transaction was quite different. He was the president of the bank that held the $1,700 mortgage, he had been largely instrumental in making the loan from the bank to Landron, and he was individually interested in the welfare of the bank, being a stockholder in it; and it seems to us that the evidence, when taken as a whole, demonstrates that he purposely concealed from Wilcox the fact that the deed obligated him to pay the $1,700 mortgage, and that the court below erred in finding that Wilcox was responsible for and bound to pay the sum called for by that mortgage.

Section 20 of the Notarial Law of Porto Rico of March 8, 1906 (section 1998 of the Compilation of 1911), reads as follows:

"The following public instruments shall be null and void:

"First. Those in which the notary authorizing same has intervened as a party thereto, or which contain any provision in his favor.

"Second. Where the relatives of the parties concerned therein, or the relatives, clerks or servants of the notary authorizing the instrument, are witnesses thereto."

As above pointed out, if Monserrat, the notary before whom the deed was constituted, intervened as a party to the deed, or it contained

any provision in his favor, or was witnessed by his relatives, clerks, or servants, the deed was a nullity, and the obligation contained therein by which Wilcox assumed to pay the mortgage of $4,600 became unenforceable.

[3] The plaintiff contends that it acquired no interest whatsoever under the deed by Wilcox's assumption of the mortgage indebtedness for $4,600, or by his assumption of the mortgage for $1,700, even if that was not brought about through fraud, and that it could at any time foreclose the mortgages either against Wilcox or Landron, as the "right of action was always against the property and not against the person." But this contention loses sight of the fact that, in this proceeding, the bank is not seeking simply to foreclose the rights of Wilcox in the property, but to charge him with the obligation to pay the indebtedness secured by the mortgages, and that its right to do so depends upon the validity of the deed and the provisions contained therein as to Wilcox's assumption of the indebtedness secured by the mortgages (Ayres v. Wiswall, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210; Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Union Life Ins. Co. v. Hanford, 143 U. S. 187, 190, 12 Sup. Ct. 437, 36 L. Ed. 118; Garnsey v. Rogers, 47 N. Y. 233, 241, 7 Am. Rep. 440), and that the bill of complaint alleges the assumption of these obligations as a ground for effecting this result.

[4] We are therefore of the opinion that the bank, if the deed was valid, would acquire an interest in Wilcox's assumption of the $4,600 mortgage, and the question is whether Monserrat, Sr., the notary, by reason of his being the chief executive officer of the bank and a substantial stockholder, had such an interest as would disqualify him from acting as notary in the transaction within the meaning of the notarial law above quoted.

While the provisions of this law are old, being taken from the Spanish notarial law, no decisions of the Spanish courts construing them have been called to our attention, and it is asserted by counsel that none are to be found, for the reason that under the notarial law of Spain a notary could not take part in his notarial district in the administration of a bank of discount, or a brokerage establishment or any commercial or industrial company, and that a notary, not being permitted to be an executive of a bank, no occasion for a construction of the law has arisen.

The provision of law prohibiting a notary from taking part in the administration of a bank in his notarial district is not now in force in Porto Rico, but inasmuch as it was embodied in the old notarial law of the island, of which section 20 was a part, it would seem that it might be availed of in ascertaining the meaning of the section. But, however this may be, we think that section 20 is capable of but one of two constructions; that either it means that a deed should be void if the notary before whom it was acknowledged had any interest in the transaction, however slight, or that it should be void only in case it was made to appear as a fact that his interest was sufficiently large to cause him to be biased. Opinion of the Justices, 75 N. H. 613, 72 Atl.

754, and cases there cited. And on either construction it seems to us the defendant must prevail, for we are of the opinion that, inasmuch as the notary was the president and a substantial stockholder in the bank, he had a material interest in the transaction which would disqualify him to act as notary and that the deed is a nullity.

[5] We are also of the opinion that the deed was null and void, and the provision in question unenforceable, for the reason that the witnesses to the deed were the clerks or servants of the notary. In the amended answer, which was under oath, the defendant has alleged as a fact that the witnesses to the execution of the deed were in the employ of Monserrat, the notary. The bill of complaint did not waive an answer under oath, but called upon the defendant to make answer to the several matters and things therein stated as fully and particularly as though they were again repeated, and he was therein especially interrogated. The plaintiff offered no evidence whatever in denial of those allegations. It is a rule in general chancery practice that, when an answer is under oath, such parts of it as are responsive to the bill are evidence equal to the testimony of one credible witness and are therefore to be taken as true unless outweighed by a preponderance of evidence. Kennedy v. Custer, 174 Fed. 972, 98 C. C. A. 584; Jacobs v. Van Sickle, 127 Fed. 62, 61 C. C. A. 598; Campbell v. Northwest Eckington Co., 229 U. S. 561, 574, 579, 33 Sup. Ct. 796, 57 L. Ed. 1330; Vigel v. Hopp, 104 U. S. 441, 26 L. Ed. 765; Clark's Executors v. Van Riemsdyk, 13 U. S. (9 Cranch) 153, 160, 3 L. Ed. 688; 1 Whitehouse, Equity Practice, § 282.

The bill should have been dismissed; it having been brought against Wilcox as the owner of the equity, when in fact he was not the owner, the deed to him being a nullity, and Landron not having been made a party. Terrell v. Allison, 88 U. S. (21 Wall.) 289, 22 L. Ed. 634; Whitehouse, Equity Practice, § 68.

The decree of the District Court of Porto Rico is reversed, and the case is remanded to that court, with directions to enter a decree dismissing the bill, and the appellant recovers his costs.

WELCH et al. v. KIRBY et al. *

(Circuit Court of Appeals, Eighth Circuit. November 18, 1918.)

No. 5109.

1. WILLS ⟸289—CONTEST—BURDEN OF PROOF.
In a suit attacking the validity of a will subject to the laws of the state of Missouri, the defendants, as proponents of the will, assume the burden of proving the proper execution.

2. WILLS ⟸118—EXECUTION—ACKNOWLEDGMENT BY TESTATRIX.
Under Rev. St. Mo. 1909, § 537, declaring that every will shall be signed by testator or by some person by his direction, no particular expression or acts are required by the testator, where he signs by proxy; so, where testatrix signed by proxy, it was immaterial that she did not acknowledge the instrument to the witnesses.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 17, 1919.

3. WILLS ⟸111(3)—DIRECTION BY TESTATRIX TO SIGN FOR HER—"UNDER DIRECTION OF TESTATRIX."

Where testatrix was blind, and signed her will by proxy, *held*, that the one signing the will acted "under the direction of the testatrix," within Rev. St. Mo. 1909, § 537, and such signature was sufficient.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Under the Direction of.]

4. WILLS ⟸111(3), 123(5)—EXECUTION—"PRESENCE OF TESTATRIX."

Where testatrix was blind, and subscription by witnesses occurred in a room connected by an open archway with the room occupied by testatrix, so that she could have seen the same, had she not been blind, the subscription was in the presence of testatrix, as required by Rev. St. Mo. 1909, § 537.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Presence of the Testator.]

Wade, District Judge, dissenting in part.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by W. C. Welch and another against George W. Kirby, administrator of the estate of Mary E. Scott, deceased, and others. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

I. N. Watson, of Kansas City, Mo. (John B. Gage and Raymond E. Watson, both of Kansas City, Mo., on the brief), for plaintiffs in error.

Dorsey A. Jamison, of St. Louis, Mo., and William T. Jamison, of Kansas City, Mo. (Howard L. Jamison, of Kansas City, Mo., on the brief), for defendants in error.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

STONE, Circuit Judge. Suit attacking validity of will subject to the laws of the state of Missouri. From a judgment on a directed verdict at close of plaintiffs' evidence upholding the will, plaintiffs bring writ of error.

The peremptory instruction is attacked on the three grounds that the legal execution of the will was not so clearly shown as to justify a withdrawal of that question from the jury and that the evidence of both mental incapacity and of undue influence was sufficiently substantial to require the finding of the jury upon each of those issues.

[1] Under the Missouri practice, in a cause of this character the proponents of the will (defendants) assume the burden of proving the proper execution of the will. At the conclusion of defendants' proof upon this phase of the case plaintiffs demurred and were overruled, after which they put in their evidence of incapacity and undue influence.

[2, 3] The statutes of Missouri (Rev. St. Mo. 1909, § 537) provide that:

"Every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

This will was not signed by the testatrix in person, but by another. Plaintiffs claim that the proof fails to show that such signature was by her express direction or adopted by her; that she acknowledged the paper after such signature to be her will to the attesting witnesses; that such signature or those of the attesting witnesses were made in her "presence."

A distinction is to be observed between a challenge of the paper presented as the will on the ground of fraud, because it was not the paper intended to be executed, on account of substitution, alteration, or deception, and between a challenge of it because not executed in the manner required by the statute. Here the sole attack in this respect is that the statutory requirements were not met. It is therefore a question of what the above statute requires and what was done in this instance. Where the signature is by proxy, as here, the statute requires that it be "by some person by his direction." The obvious construction of "by his direction" is that the testator shall by word or action clearly indicate to the proxy a desire to have his name signed to the instrument. The statute requires no particular expression or acts. Any signifying the above desire suffice. St. L. Hosp. Ass'n v. Williams, Adm'r, 19 Mo. 609, 612. Here the testimony is that the testatrix, who was blind, in the presence of the two witnesses and her attorney, who had drawn the will, suggested that a Mr. Hamilton be requested to sign for her. One of the witnesses endeavored to find Mr. Hamilton and ascertained that he was not in town. There was then some discussion between the attorney and testatrix, resulting in the suggestion that Dr. Ford be called. The witnesses are not clear as to the details of this discussion; one of them stating that the attorney suggested Ford, and asked the testatrix if he would be acceptable; the other stating that either the attorney or the testatrix made the suggestion. Both are clear that Dr. Ford was acceptable, and one of them went for him and brought him. Ford, who was a witness hostile to the will, testified that he had no knowledge of being wanted to sign for the testatrix until one of the witnesses came for him; that the attorney, in the presence of the witnesses and testatrix explained that he was wanted to sign her name to a paper which was her will, because she could not do so; that he did so without hesitation. Dr. Ford was the husband of the niece of the testatrix, who was a guest in their home at the time. There can be no question that all four men understood there in her presence at that time that Dr. Ford was carrying out the wishes of the testatrix. We think they were justified in so believing, and that the statute was in that respect fully met.

We are not impressed by the contention that it was necessary for the testatrix, after such signature, to acknowledge the paper as her will to the witnesses. Before Mr. Hamilton was sought, the attorney had, in the presence of the witnesses, stated to testatrix that he had her will, and asked if she desired the two persons present to witness it for her, to which she expressed assent. He then stated that, as she was blind, it would be necessary to read the will. This he did to her and the two witnesses; testatrix requesting the rereading of that portion thereof which is the cause of the present suit. It was also later

stated in her presence to Dr. Ford, when he came, that the instrument was her will. There can be no doubt that every one present clearly understood what the instrument was, and all but Ford had just heard its contents. It is difficult to see what purpose would be served by a formal declaration by testatrix after signature, unless the signature had been made outside her presence, so that a declaration afterwards could operate as an adoption thereof.

[4] The final contention upon this part of the case is that the signatures by Ford and the two witnesses were not in the "presence" of the testatrix within the statutory meaning. The facts are that there were two small rooms about 12 feet square, connected by an open archway of about half that width; that testatrix was in one room, and the signatures were written on a dining room table standing 3 or 4 feet beyond the archway, in the other room; that, had testatrix had her eyesight, she could have seen the attaching of the signatures from where she was sitting about 10 feet away. Under the circumstances we think the two rooms were, for practical purposes, one. Unquestionably the statute would have been satisfied, had she been able to see. No case in Missouri has directly defined the statutory "in the presence" of the testator. In two cases there are obiter statements as follows:

"The witnesses must subscribe their names in the presence of the testator in order that they may not impose a different will on him. * * *" Cravens v. Faulconer, 28 Mo. 19, 21.

"Of course, the word 'presence' necessarily includes knowledge of the act and acquiescence thereto upon the part of the testator." Bingaman v. Hannah, 270 Mo. 611, 628, 194 S. W. 276, 281.

The prime reason for requiring the signatures to be attached in the presence of the testator is that he may have knowledge that the witnesses have actually signed the instrument he intends as his will. Therefore this protection is ordinarily afforded when, and only when, the witnesses are near enough to and within the view of the testator for him to gain this knowledge by observation. But how can this knowledge be gained by a blind person? Such a one has to rely upon touch and hearing. Together they would be little protection, as it would be easy to substitute papers in the presence of a blind person without his knowledge. There is but one way in which a blind person could gain that security which the statute easily gives a normal person. That would be by writing his own will, signing it himself, and having it witnessed, all without letting it leave his own manual possession. This would mean that most blind persons, particularly if otherwise enfeebled, through lack of ability to write or through failure to exercise the above excessive degree of caution, could not make a valid will. Surely the Legislature did not intend by a provision of this character to debar the blind from making wills. At the same time there was no intention to except the wills of blind persons from the statutory requirement.

The statute must receive a rational, practical construction, which will enable reasonably careful blind people to execute wills. The statutory "presence" certainly requires as much in the case of a blind testator

as of one who can see. Does it require more? If it does, it must require at least that the testator hear the act of writing the signatures, for that act is the only one covered by the statute. It may be considered that at best all that the testator could know by ear would be that some one was writing something upon some paper near him; that the writing of a signature involves little or no sound; that ordinarily careful people would rarely think to witness or sign wills so close to the testator's ear as to remove all doubt as to his having heard it, and few such testators would think to require such; that most wills are made in middle or advanced life, when the hearing is naturally often defective. The Legislature's object was to protect testators in disposing of their property, not to make it impossible or precarious for them to attempt to do so. In our judgment, the rule for a blind testator is the same as that which would be applied to him if he had sight. The execution of the will now involved complied with the statute.

The claim that the matter of proper execution was for the jury is not well founded. The testimony was sufficient and undisputed. It is true that even undisputed testimony depends upon the credibility of the witnesses and may be disbelieved. But the credibility of the witnesses in such a situation as here is a question primarily for the trial judge. Whatever the rule may be in the Missouri state courts, the rule of the federal courts is that the court will by direction prevent a verdict which it would set aside as unsupported by substantial evidence. McGuire v. Blount, 199 U. S. 142, 148, 26 Sup. Ct. 1, 50 L. Ed. 125.

The matter of testamentary capacity is whether the testimony here reveals any substantial doubt as to this testatrix possessing that standard of mentality required by the settled adjudicated rule in Missouri. The entire testimony has been carefully read and considered. In our judgment it establishes beyond substantial question the capacity required by the Missouri decisions. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129.

A careful study of all of the evidence reveals no substantial testimony of any undue influence.

The judgment is affirmed.

WADE, District Judge (dissenting). The majority opinion announces:

> "In our judgment, the rule for a blind testator is the same as that which would be applied to him if he had sight. The execution of the will now involved complied with the statute."

With this statement I cannot agree. The statute requires that the will "shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator." I agree that "the statute would have been satisfied, had she [the testatrix] been able to see"; but, as stated in the majority opinion, "the prime reason for requiring the signatures to be attached in the presence of the testator is that he may have knowledge that the witnesses have actually signed the instrument he intends as his will." I cannot agree

that this protection against possible imposition is secured by having the will attested under conditions which would bring the witnesses within the "presence" of the testator if able to see. Not that a more strict requirement would absolutely preclude every possible chance for substitution of some other document, but that it would minimize, so far as practicable, such opportunity.

In Calkins v. Calkins, 216 Ill. 458, 75 N. E. 182, 1 L. R. A. (N. S.) 393, 108 Am. St. Rep. 233, the Supreme Court of Illinois, expressing the meaning of the phrase "in the presence of the testator," says:

"An attestation is not in the presence of the testator, although the witnesses are in the same room and close to him, if some material obstacle prevents him from knowing of his own knowledge, or perceiving by his senses, the act of attestation."

"In case of a blind person, his will would be attested in his presence if the act was brought within his personal knowledge through the medium of other senses. But whether a person is blind or can see, an attestation is certainly not in his presence if he has no conscious personal knowledge of the act and is merely told that it has been performed in another room." Drury v. Connell, 177 Ill. 43, 52 N. E. 368.

In Page on Wills, § 214, it is said:

"(a) It has been held by some authorities that the act, if done so that it would be in the presence of one who could see situated in the place of the blind person, is done in the presence of such person.

"(b) A safer test, and one indorsed by the better line of authorities, is that the act must be done in such proximity to the blind person, that he can by means of his remaining senses know what is being done."

In Underhill on Wills, § 196, in speaking of the meaning of the word "presence," it is said:

"In order that a signing shall be in the presence of the testator, in the statutory sense of the word, he must be mentally conscious of what is going on about him. He must have the power to recognize the acts of the witnesses, if not by sight, then by and through the avenue of some other sense."

In Ray v. Hill, 3 Strob. (S. C.) 297, 49 Am. Dec. 647, in speaking of the capacity of a blind man to make a will, the court says:

"If the witnesses to the will of a blind man attest and subscribe the will within the reach of the testator's remaining senses, when he is conscious of what they are doing, and may, if he choose, ascertain that they are subscribing the same will that he had signed, the subscribing will be 'in the presence of the testator.'"

The court further says:

"In the case of a blind man, the superintending control, which in other cases is exercised by sight, must be transferred to the other senses; and if they are, or may, at his discretion, be made sensible that the witnesses are subscribing the same will that he had signed, I should think it ought to suffice. * * * According to the evidence, the subscription by the witnesses was within two feet of the testator. Robinson says, 'I think the testator knew what we were doing when we signed—he might have heard the scratching of the pen."

It is solely a question as to whether or not the blind person knows what is being done. Not being able to see what is being done, the act must be done in such proximity to the testator that he "can by

means of his remaining senses" have a knowledge of what is being done. His source of knowledge need not necessarily be his hearing. A person deprived of sight has a certain capacity for "sensing" what is going on about him, not possessed by those who see. In truth, his sense of hearing, so far as movement of the pen upon the paper is concerned, would be of little value in the way of protection. Even if the testator heard the scratching of the pen, it might not, in my judgment, serve the purpose of the statute, because such sound would be the same, whether the witnesses were signing the document read to the testator, or a substituted document. But, if the parties are in close proximity to the testator, it would at least materially minimize the opportunity to substitute some other paper, which is the main purpose of the requirement that it shall be in the presence of the testator. Such substitution could not well be made without some movement which might be clearly discernible—such as the withdrawing of another document from the pocket, or from some other place; the incident of delay might be suggestive; the movement of the parties about the table might have some suspicious significance; and if the capacity of the testator to "sense" these things failed to furnish the protection which the statute contemplates, I would go to the extent of holding that a document must be signed upon a table or stand, sufficiently close to the testator, so that he might hold his hand upon the paper during the attestation.

If the statute were construed to require that the testator, after the reading of the document, should place his hand upon some portion of it as it rested upon a table in front of him while his signature was being written, and while the witnesses attached their signatures, it would in no manner furnish an obstacle to the execution of a will by a person deprived of sight. It would be as easy to execute it in such manner as in the manner shown by the testimony in this case. The only burden it would put upon the parties would be to have the table moved to the testator, or have the testator sit at the table with the witnesses.

I am afraid that the rule of the majority opinion will leave the blind, desiring to execute a will, to the mercy of designing persons, and inasmuch as this establishes a rule of law, not only applicable to this case, but to all other cases, I cannot concur in the majority opinion upon this point. I feel that at least it was a question for the jury, under proper instructions as to the purpose of the statute, to determine whether the acts done were such as to enable testatrix to be conscious of such acts in such detail as to furnish her the protection which the law provides.

I concur with the majority in holding that the "direction" that Ford attach the name of the testatrix to her will was proven, but for the foregoing reasons I do not believe that he attached such signature in the "presence" of testatrix.

Assuming (without reference to the facts in this case) that there was a conspiracy to substitute a will, there would not be the slightest difficulty in slipping a spurious document from the pocket of any of the parties as they walked from the testatrix to the adjoining room.

The act of such substitution, or any noise incident thereto, would be covered by the movement of the parties across the floor. I think it is fair to assume that the purpose of the statute requiring attestation in the presence of the testator is not only intended to enable the testator to know what is being done, but that it contemplates that such requirement may be a restraint upon those who might be inclined to perpetrate such a fraud. The psychology of the matter must not be overlooked.

I concur in the conclusion of the majority that the plaintiff failed to establish by the testimony that testatrix lacked testamentary capacity.

In re LIEBIG et al.

Petition of HOLLEY.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 8.

1. SALES ⊜199—TITLE—TRANSFER.
   Transfer of title depends upon the intention of the parties, however indicated, and where there is no manifestation of intention, except what arises from the terms of the sale, the presumption is that, if the thing to be sold is specified, and is ready for immediate delivery, the contract is an actual sale, unless there is something to indicate a different intention.
2. BANKRUPTCY ⊜212—RECLAMATION PROCEEDINGS—WHAT LAW GOVERNS.
   Where the rights of the trustee and the petitioner in a reclamation proceeding depended upon whether title passed under a sale, the bankruptcy court will follow the law of the state where the contract was made and was to be performed.
3. SALES ⊜43(1)—FRAUD.
   Fraud and deceit upon the part of the buyer, operating to induce the sale, is sufficient to authorize the seller to rescind the sale.
4. SALES ⊜44—FRAUD—INTENT NOT TO PAY.
   A purchase of goods, with a preconceived intent not to pay for them, is such fraud as enables the seller to repudiate the sale.
5. SALES ⊜219(4)—RESCISSION—EFFECT.
   A seller, upon exercising his right to rescind on account of the fraud of the buyer, may recover the goods in specie, or their value and proceeds.
6. BANKRUPTCY ⊜140(2)—CREDITORS—CLAIMS OF.
   Where the bankrupt, without any intention to pay for goods, but promising to pay cash, obtained possession, and in violation of his agreement disposed of them, and placed the proceeds in a fund which came into the possession of the trustee, the seller, being entitled to rescind the sale, may recover the proceeds.
7. BANKRUPTCY ⊜212—RECLAMATION PROCEEDINGS—PETITION.
   A petition in reclamation proceedings by a seller, who rescinded a sale for the bankrupt's fraud, etc., and sought to recover the proceeds, which had been traced to the hands of the trustee, *held* sufficient.
8. BANKRUPTCY ⊜140(2)—RECLAMATION PROCEEDINGS—SALES.
   A seller *held* entitled to recover the proceeds of its goods, which it sold to the bankrupts, and which had been traced into the hands of the trustee, notwithstanding the manager of the bankrupts negotiated the sale, which the seller rescinded for fraud, and at one time had possession of the proceeds in his own safety deposit box.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

9. SALES ⊂=201(4)—"C. O. D."—WHAT ARE.
A shipment C. O. D. means that the goods are to be delivered by the carrier upon payment to it of the charges due to the seller for the price, and those due to the carrier for its carriage, and a mere agreement that payment should be made before goods were delivered is not a C. O. D. sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, C. O. D.]

10. SALES ⊂=219(4)—C. O. D. SALES—RESCISSION.
Though a sale be considered a C. O. D. sale, the seller may reclaim the goods or proceeds, if the sale was brought about through fraud.

Petition for Revision of an Order of the District Court of the United States for the Southern District of New York.

In the matter of Max Liebig and Cecelia Kochman, individually and as copartners doing business as Kochman & Co., bankrupts. Petition of Myle J. Holley, as trustee, to revise an order of the District Court in favor of petitioner in a reclamation proceeding. Petition to revise denied, and order affirmed.

This cause comes here from the United States District Court for the Southern District of New York on petition to revise an order made by that court on February 8, 1918. The facts appear in the opinion.

Archibald Palmer, of New York City (Maurice S. Hyman, of New York City, of counsel), for trustee.

Dallas Flannagan, of New York City, for claimant.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This is a reclamation proceeding. The bankrupts were engaged in the city of New York in the business of buying and selling eggs. The petitioner was engaged in the same business and in the same city.

The bankrupts, through one Bernard Kochman, agreed on April 16, 1917, with one O'Shinsky, a salesman in the employment of the petitioner, to buy from the latter a carload of storage packed eggs then in transit, for which the bankrupts were to pay at the rate of 36½ cents a dozen. It does not seem to have been known at that time exactly how many dozen eggs the car contained. Bernard Kochman is the brother-in-law of Max Liebig, of the firm of Kochman & Co., bankrupts, and a son of Cornelia Kochman, the other member of the firm. He represented the firm throughout the whole of the transaction complained of.

As the bankrupts were already indebted to the petitioner to the amount of $900 on a credit which was not to exceed $1,200, it was agreed that the sale was to be a cash transaction, and that on the arrival of the car the seller was to notify the buyer before making delivery.

The carload of eggs arrived on April 19th, and the manager of the petitioner's business called Bernard Kochman on the telephone and informed him of its arrival, and that it was on the tracks of the Mer-

chants' Refrigerating Company at Jersey City, and that it contained, besides storage packed eggs, some undergrades, known as strains, checks, and current receipts. Kochman said that he would buy the under grades, too, and wanted the eggs delivered. He was again informed that payment was expected on delivery. Kochman replied that he understood the terms of sale and wanted delivery made. Thereupon petitioner telephoned the Merchants' Refrigerating Company to deliver the eggs at the petitioner's store, and they were brought there that afternoon on trucks. It was then ascertained that the car had checked 10 cases short, and that no record had been taken of the various commodities to ascertain what items were short, which was unfortunate, as the prices were different on each item.

Thereupon Kochman was again called on the telephone, the situation was explained, and Kochman said it would be all right to send the eggs around to his store, where they could be unloaded and the quantities ascertained, and the petitioner's representative could call for the money. The trucks were sent around to Kochman's store, and the eggs were unloaded, and the quantities ascertained. Thereupon Kochman telephoned the quantities to the petitioner, and its salesman, O'Shinsky, immediately went to the Kochman store and demanded the money. He was informed by Kochman that he (Kochman) was very sorry, but that he had been disappointed in not getting in several large checks that afternoon, and that, while he knew he had agreed to pay cash, he would have to be given a day or two. Kochman was reminded that this was not in line with the agreement, and that the petitioner would not do any business in that way. A considerable discussion followed, and Kochman was taken by O'Shinsky to the petitioner's store to talk things over with those in authority. On his arrival there Kochman was again told that petitioner wanted the money or the eggs and that the trucks would be sent up for the eggs. Kochman then said he did not think that ought to be done, that Kochman & Co. was a good big concern, and that everything would be all right; that it would not be a very nice thing to have the eggs taken out of his store after having them delivered; that it would look bad in the eyes of the other creditors to see a load of eggs go in and be taken out by the same concern; it would hurt his credit, and he said that he would pay for the eggs in a day or so.

Quite an argument followed and Kochman was told that his promise to pay in a day or two was not at all satisfactory, but inasmuch as the eggs were already in Kochman's store they might be left there under one consideration, and that was that he was not to touch those eggs, or move them, or sell them to anybody, and that the goods were to remain the property of George F. Hinrichs, Incorporated, until they were paid for. Kochman told him that this was perfectly agreeable to him. Kochman was asked when payment would be made and said that he might pay for them the next day or the day after, depending on when he got in the big checks he was expecting, and that at any rate he would pay for them not later than April 25th. Kochman was asked to sign an agreement to that effect, but no agreement was signed; Kochman saying:

"Now, here, Mr. Boerum, we are doing business with you right along, and we expect to do business with you right along. We have got a good little concern. I personally made a statement to Bradstreet's where I showed I was worth $29,000 in last November, and we have made money since, and there is no reason for acting in this way. If you cannot take our words for anything, we may as well stop doing business. Everything will be all right."

On April 25th payment had not been made, and has never been made. On April 21st Kochman sold 100 cases of the eggs to the National Biscuit Company for $982.50. On April 25th he sold to the same company 13 other cases for $127.72. These two invoices aggregated $1,110.22, and were paid for in a check, covering those invoices and others, which check was deposited in the Fidelity Trust Company on April 26th. On April 23d Kochman sold 80 cases of the eggs to Honigsberg & Co. for $855.60, receiving therefor a check for that amount, which he deposited the next day in the Fidelity Trust Company. On April 25th Kochman sold 150 cases of the eggs to W. F. Hofstatter, for which Kochman received a check for $1,575. This check Kochman cashed and placed the money in a safe deposit box in the Harriman National Bank, which box Kochman kept under the name of Louis Harris.

All of these sales were, of course, made by Kochman in violation of the agreement under which the eggs were allowed to remain in his possession. Kochman's testimony shows that, in addition to the deposit in his safe deposit box in the Harriman National Bank of the $1,575 above noted, he also deposited in that box cash aggregating in addition $7,487.50, which he drew out of the Fidelity Trust Company between April 24th and April 27th. On April 25, 1917, the firm's balance in the Fidelity Trust Company amounted to $3,684.31. On April 26th its balance was $4,399.36. On April 27th it was $3,281.49. On April 28th it was only $33.49. On April 27th $3,237.50 had been drawn out and put in the safe deposit box. On April 26th $2,750 had been drawn out and similarly disposed of. So on April 25th a like disposition was made of $1,000, and on April 24th of $500.

The contents in the safe deposit box were taken possession of by the receiver in bankruptcy, and were in his possession when the motion was made by the respondent herein for an order requiring him to turn over to the respondent $3,540.92 of the moneys so received, as being a trust fund derived from the proceeds of the eggs, which the bankrupts wrongfully converted. The referee in bankruptcy recommended that the prayer of the respondent be granted. The District Judge confirmed the report, and has entered an order directing that the petitioner recover of the trustee in bankruptcy the sum of $3,540.-82, with interest thereon from May 10, 1917; that being the date when the return thereof was demanded by the respondent. The petition to revise is from this order.

The trustee claims that the title to the eggs sold to Kochman & Co. passed from the seller and that the latter's rights are those of a general creditor. The respondent, who was the seller, insists that it never parted with its title, that the sale of the eggs by Kochman & Co. was made without right, and that the proceeds which Kochman & Co. received from the sale, having been traced into the hands of the

trustee in bankruptcy, were properly ordered to be paid to George F. Henrichs, Incorporated.

[1] In Roman law the title to the thing sold was not transferred until delivery and payment of the price. But if the sale was on credit the title to the thing sold passed when the property was delivered. Inst. 2, 1, 41; Dig. 19, 1, 11, § 2; Dig. 18, 1, frag. 19 and 53; Dig. 14, 4, 5, § 18. This rule of the Roman law we are informed is found in the modern law of Austria, Germany, and Spain, but is not now in the law of France and Italy. See Sherman's Roman Law in the Modern World, vol. 2, p. 344.

In England in early times the law required a delivery of the goods in order to pass the title. 15 Juridical Review, 391, 395. But after a time the principle was recognized that payment of the money was sufficient; and finally the rule became clearly established that the transfer of title depends upon the intention of the parties however indicated. Shepherd v. Harrison, L. R. 5 H. L. 116, 127; McEntire v. Crosslet [1895] A. C. 457, 463. And such is generally regarded to be the rule in the United States. In Hatch v. Oil Co., 100 U. S. 124, 25 L. Ed. 554, it is said to be the general rule that the agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject-matter, and the attendant circumstances. And it is added that where there is no manifestation of intention, except what arises from the terms of the sale, the presumption is, if the thing to be sold is specified, and it is ready for immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention. But every presumption of the kind must yield to proof of a contrary intent.

[2-5] The parties in this case agreed upon a sale for cash. In his work on Sales (1909 Ed., § 341) Professor Williston says that—

"Where a seller refuses to sell except for cash, it may mean that he refuses to part with the possession of the goods until the price is paid, but does not decline to transfer title, or it may mean that he declines to transfer title. Although a transaction of either sort might as an original question be appropriately termed a cash sale, in fact that name has generally been used for transactions of the latter sort only, and to avoid confusion its use should be so confined."

And he adds that cash sales are therefore not regarded as within the scope of the statutes requiring record of conditional sales, since the separation of titles which is characteristic of conditional sales is not contemplated in cash sales. And the same writer in section 343, discussing the true test of a cash sale, says:

"If the parties when they make their bargain contemplate an exchange of the goods for the price immediately on making the bargain, the sale is to be regarded as a cash sale. There is no occasion to invoke the doctrine of a sale subject to a lien. On the other hand, if the parties do not contemplate an immediate exchange of the money for the goods, even though they do contemplate that possession of the goods shall not be delivered until the price is paid, it is presumptively an absolute sale as soon as the parties are agreed on the terms of the bargain and the goods are in a deliverable state in accordance with the rules previously given. In case of doubt it seems better to assume that the latter kind of bargain was intended."

If the doctrine thus stated is sound, then it follows that under a contract such as the parties made, assuming that it was not induced by fraud or otherwise invalid, title to the property passed to the buyer when the bargain was concluded, with a lien in the seller to retain possession until payment was made.

But the courts have held in a long line of decisions that in sales for cash title does not pass to the buyer until the price is paid or payment is waived. Hirsch v. Leatherbee Lumber Co., 69 N. J. Law, 509, 55 Atl. 645; Adams v. O'Connor, 100 Mass. 515, 518, 1 Am. Rep. 137; Ballantyne v. Appleton, 82 Me. 570, 20 Atl. 235; Sanborn v. Shipherd, 59 Minn. 144, 60 N. W. 1089; Burditt Bros. v. Howe, 69 Vt. 563, 38 Atl. 240; People's State Bank v. Brown, 80 Kan. 522, 103 Pac. 102, 23 L. R. A. (N. S.) 824; City of South Bend v. Martin, 142 Ind. 53, 41 N. E. 315, 29 L. R. A. 531; Wheeler & Wilson Mfg. Co. v. Irish & American Dime Savings Co., 105 Ga. 57, 31 S. E. 48; Drake v. Scott, 136 Ala. 261, 33 South. 873, 96 Am. St. Rep. 25; Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080; Coleman v. Reynolds, 207 Mo. 477, 105 S. W. 1070. It is not necessary that we should now inquire which of these two theories is supported by the better reason, for both theories assume that the sale agreement was valid. And we do not need to inquire, under the circumstances of this case, which one of those theories has been adopted by the courts of the state of New York, or whether the law of that state has been changed by its substantial adoption in 1911 of the Sales Act (Personal Property Law [Laws 1911, c. 571; Consol. Laws, c. 41] §§ 82–158), as recommended by the Commissioners on Uniform Laws.

If it were necessary to the decision of this case to determine the question whether title passed or did not pass, this court unhesitatingly would decide that question according to the New York law as the contract was made in New York and was to be performed in New York. But it is the law of New York, as it is of all the other states, that fraud and deceit upon the part of the buyer, operating to induce the sale, is sufficient to authorize a seller to rescind the sale. Bliss v. Sickles, 142 N. Y. 647, 36 N. E. 1064. And a purchase of goods with a preconceived intent not to pay for them is such fraud as enables the seller to repudiate the sale. Hennequin v. Naylor, 24 N. Y. 139. And the seller, upon exercising his right to rescind, may recover the goods in specie or their value or proceeds. Beloit Bank v. Beale, 34 N. Y. 473.

[6, 7] If the bankrupts obtained possession of the eggs by fraud, misrepresentation, and deceit, and then fraudulently and wrongfully sold them, and afterwards collected part of the proceeds of the sale, which have been traced into the hands of the trustee in bankruptcy, there is no doubt but that the respondent is entitled to the order which the District Judge has entered. The claim that the allegations of the petition are inadequate for the relief sought is without merit.[1]

[1] "That heretofore, and on or about the 16th day of April, 1917, the said bankrupts, by fraud, misrepresentation and deceit, obtained from your petitioner the physical possession of certain eggs (about one carload), the property of your petitioner. Thereafter, while the property and title to said carload of eggs remained in your petitioner, the bankrupts, by and through the larceny of their managing agent and representative, Bernard Kochman, fraudu-

[8] So the claim that the respondent is not entitled to the proceeds of a wrongful sale traced into the hands of the trustee in bankruptcy of the firm of Kochman & Co., because Bernard Kochman, who bought the eggs for Kochman & Co., obtaining them by fraud, and who sold them contrary to his agreement, and who deposited the proceeds at first in the firm account, and then checked them out and hid the proceeds in his safe deposit box, was not a member of the firm of Kochman & Co., but simply the manager thereof, seems to us devoid of all merit. The evidence shows that at the time Kochman bought these eggs he was converting the assets of the firm into cash, and accumulating and concealing the money so obtained in a safe deposit box under an assumed name, and was contracting for the sale of eggs at a less price than that for which he was purchasing them. The referee has found that at the time the bargain was made the buyer had no intention to pay for the eggs, and all the time was fraudulently planning to obtain possession of the vendor's eggs, in order to dispose of them and hide the proceeds. The only inference to be drawn from the facts is that Kochman never had any intention of paying for the eggs, and that all his representations as to a payment were false, and made with intent to defraud. The law is too well settled to need any citation of authorities that under such conditions the seller is entitled to reclaim the goods if in possession of the buyer, and if he has disposed of them then he may have the proceeds if he can trace them.

[9, 10] The referee in his report found that the bargain "was one for cash on delivery in the ordinary course of business at or about the time of delivery." And the trustee in his argument in this court asserts that this was a finding that the transaction was a "C. O. D." sale. It was, of course, nothing of the sort. A shipment "C. O. D." means that goods are to be delivered by the carrier upon payment to it of the charges due to the seller for the price and those due to the carrier for its carriage of the goods. State v. Peters, 91 Me. 31, 39 Atl. 342; State v. Mullin, 78 Ohio St. 358, 85 N. E. 556, 18 L. R. A. (N. S.) 606, 125 Am. St. Rep. 710. In the case at bar there was no agreement of this nature. Those in charge of the trucks had no instructions to collect at the time of delivery either the price of the eggs or their own charges. And if it had been a "C. O. D." sale, and if in such a sale title passes, it would still be true that the seller might reclaim the goods or the proceeds if the sale was brought about by fraud.

It is apparently conceded by counsel that the sum directed to be paid by the trustee to the respondent came from the sale of the eggs, and that question does not need to be considered. We may say, however, that no error was committed in this respect.

The petition to revise is denied, and the order of the District Court is affirmed.

lently and wrongfully sold said eggs of your petitioner and collected part of the proceeds therefor, amounting to the sum of $3,540.82. That thereafter the said receiver was appointed, and the said bankrupts have now turned over the said sum to said receiver, who is now in possession thereof. That demand for said sum upon said receiver has been duly made by your petitioner, but he wrongfully refuses to turn over the same to your petitioner."

BOSCH MAGNETO CO. v. RUSHMORE.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 23.

1. CONTRACTS ⟸278(2)—BREACH.
In an action for damages for breach of contract providing that the buyer of an established business for the making of automobile starters should continue to advertise the starters under the name of the seller, or pay a stipulated sum, *held*, that the covenant for advertising, which must be deemed single, was broken by the buyer.

2. DAMAGES ⟸78(1)—PENALTY—LIQUIDATED DAMAGES.
Where a contract for the sale of an established business for the manufacture of automobile starters required the seller to remain out of such business for two years, but also provided that the buyer should continue to advertise the starters under the name of the seller for three years, and in event of failure should pay $100,000, *held*, that the provision for payment was one in the nature of liquidated damages, and was not invalid as a penalty.

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action by Samuel W. Rushmore against the Bosch Magneto Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff below sued for breach of contract executed on the 20th of May, 1914. Prior thereto the plaintiff below was engaged in the manufacture and sale of automobile dynamos, engine starters, automobile lamps, projectors, locomotive headlights, and other goods of a like character, under the tradename of the Rushmore Dynamo Works, with a factory at Plainfield, N. J. He was the sole owner of certain foreign and United States letters patent, as well as the real estate and factory buildings equipped with machinery, which he used in conducting his business. The name "Rushmore" had obtained a reputation in the trade for this line of goods, and particularly the "Rushmore starter" had reached fame and considerable patronage. The defendant below purchased the business of the plaintiff below for $750,000, under the terms of the contract sued on herein, and in addition the real estate, factory, and equipment, and the patents referred to. Under the contract the plaintiff below was not to engage in a similar line of business for a period of two years, and the defendant below covenanted as follows:

"It is further understood and agreed by and between the parties hereto that the party of the second part [defendant below] shall for a period of three years beginning May 20, 1914, and ending May 20, 1917, describe any starter or starters manufactured under the patents hereby agreed to be sold by the party of the first part, in all of its advertisements and printed matter and on all name plates or in any of the manners or styles of advertising as the Rushmore starter, or the Bosch-Rushmore starter, or System Rushmore; * * * that this agreement shall for said period of three years above specified be binding on the successors and assigns of the party of the second part herein, and the party of the second part hereby further covenants that in any sale or license of the patents or patent rights during said period to any person, firm or corporation it will require and bind any such persons, firm or corporation so purchasing or acquiring any of said patents or patent rights to the same extent as it, the party of the second part, has agreed to in this paragraph; * * * and it is further understood and agreed by and between the parties hereto that upon the expiration of said three year period the obligations of the party of the second part as contained in this paragraph shall cease and determine. * * *

"It is further understood and agreed by and between the parties hereto that any time during the three year period specified in the last paragraph the party of the second part shall upon payment to the party of the first part of the sum of one hundred thousand dollars ($100,000) be freed and absolved from the further performance of its obligations as set forth in said paragraph last above contained, and the party of the first part will upon the receipt of the said sum of one hundred thousand dollars ($100,000) fully and in all respects release the party of the second part from the further performance of its said obligations; * * * and it is further agreed that in case of breach of the provisions of the foregoing paragraph by the party of the second part, this sum of one hundred thousand dollars ($100,000) shall be paid to the party of the first part as liquidated damages."

After the sale and until the middle of July, 1914, the plaintiff below managed the business for the defendant below, continuing the advertisements at its expense. Thereafter the defendant below published advertisements announcing to the trade the purchase of the business of the plaintiff below and its future continuation, and thereafter and until January 19, 1917, advertised extensively. The defendant below was engaged in a line of business similar to that of the plaintiff below. Out of 996 advertisements in trade papers and other publications, only 14 contained any advertisement mentioning the name "Rushmore," "Rushmore starter," or "System Rushmore." Of these, about 64 specifically referred to starters and of these 14 comprised advertisements of starters manufactured pursuant to the Rushmore patents; but 50 advertisements which did not mention the name "Rushmore" have, as part of the advertising matter, photographs of the "Rushmore" starter. Rushmore's name is not in any way used in the advertisement, and it would appear to the ordinary reader that it was a starter of the Bosch make. Under a business arrangement with the manufacturers of the Marmon car, the starting system is advertised, but without using the name "Rushmore." Of the 14 advertisements in which the name "Rushmore" is used, 11 were published in 1915, 2 in 1916, and none in 1917.

Both litigants move for the direction of a verdict, and the District Judge, holding that there was a substantial breach of the contract and that the parties had agreed upon $100,000 as liquidated damages, gave judgment for the plaintiff below in said sum. Defendant below appeals.

William G. Fitzpatrick, of Detroit, Mich. (Abram I. Elkus, of New York City, of counsel), for plaintiff in error.

George C. Dean, of New York City (Irving M. Obrieght, of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge (after stating the facts as above). [1] Under the contract, the defendant below obligated itself to advertise for three years, to describe any starter or starters manufactured under the patents conveyed in all of its advertisements and printed matter, and on all name plates or in any of the manners or styles of advertising, as the "Rushmore starter," or the "Bosch-Rushmore starter," or "System Rushmore." It bound its assignees and successors to do likewise, and the parties agreed that, in lieu of such advertisement, the defendant below might pay $100,000 and thus be freed from the obligation so to do, and in the event of a breach of this obligation to advertise the parties agreed upon $100,000 as liquidated damages.

A reading of various samples of the advertisements and printed matter which the defendant below used and the method it indulged in, indicates a clear desire to so advertise as to convey to the mind of the average reader, and to the trade, that the ignition, lighting, and

starting of the motor car could best be served by products of the defendant below, and while there is an actual picture displaying the starter of the plaintiff below, nowhere is credit given, as required by the terms of the contract, to Rushmore for the starter, but in rather precise words the reader is led to believe that it is in fact the Bosch starter.

The defendant below urges that the clause of the contract providing for $100,000 as liquidated damages is, in fact, a provision fixing a penalty, and that, if it be treated as a question of liquidated damages, the contract was substantially performed by the Bosch Company, and there was no breach.

We agree with the District Judge that there was a substantial breach of the contract to advertise the Rushmore starter. It is plain the parties intended to permit the defendant below to follow one of two courses: First, it might, if it saw fit, do no advertising whatever at a price of $100,000 as fixed upon by the parties, and the plaintiff below, upon the doctrine of alternative obligations, could have recovered that sum if it was not paid. But the defendant below did, in fact, do some advertising and choose to pretend to carry out its obligation of the contract by advertising, and thus did not seek to avoid or cancel the advertising obligation as it might have done. It is clear that the contracting parties valued the advertising as worth $100,000 to Rushmore. While the defendant below could eliminate advertising by paying $100,000, yet if it started to do so, and failed of substantial performance, the plaintiff below measured his loss at $100,000, and the defendant below agreed that this would be his damages.

[2] The fixed amount of $100,000 was not intended as, nor was it, a penalty. Many of the authorities determined the question of penalty as distinguishable from liquidated damages, by considering the reasonableness of the agreement, and attempted to ascertain what the liquidated damages bore proportionately to the loss actually suffered. Where it was found that the sum named is not disproportionate to the damages that might result from a breach, the stipulation was regarded as one of liquidated damages; otherwise, it was called a penalty.

In United States v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731, the court said:

"There has in almost innumerable instances been a question as to the meaning of language used in that part of a contract which related to the payment of damages for its nonfulfillment, whether the provision therein made was one for liquidated damages, or whether it meant a penalty simply, the damages to be proved up to the amount of the penalty. * * * The courts at one time seemed to be quite strong in their views, and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. * * * The question always is: What did the parties intend by the language used? When such intention is ascertained, it is ordinarily the duty of the court to carry it out."

The determination of the question depends upon the meaning and intent of the parties, as gathered from a full view of the provisions of the contract, the terms used to express the intent, and the peculiar circumstances of the subject-matter of the agreement. The true question is: What was the contract? 13 Cyc. 90.

In Stone, Sand & Gravel Co. v. United States, 234 U. S. 270, 34 Sup. Ct. 865, 58 L. Ed. 1308, the contract provided for "a forfeiture of all moneys and retained percentages due or to become due in case of failure to perform and due notice thereof"; and the court held this to be liquidated damages.

In Maryland, etc., Co. v. United States, 241 U. S. 184, 36 Sup. Ct. 545, 60 L. Ed. 945, a provision fixing a penalty for failure to complete on time of $20 per day was held to be liquidated damages.

In Wood v. Niagara Falls Paper Co., 121 Fed. 818, 58 C. C. A. 256, this court, through Wallace, J., said:

"It is not disputed that, in view of the subject-matter and nature of the agreement and the difficulty of estimating the exact damages likely to be sustained by the defendant in the event of a breach by the plaintiffs, it was competent for the parties to agree upon a fixed sum as liquidated damages for a breach; nor is it disputed that by the contract they did so agree. It is urged, however, that when it is made to appear in an action for the breach that no actual damages have arisen, notwithstanding the parties have agreed upon stipulated damages, the party in default is entitled to be relieved. That proposition is not sanctioned by the weight of authority. On the contrary, according to authority which is controlling upon this court, the law is that the naming of a stipulated sum in such a contract, to be paid for the nonperformance of a covenant, is conclusive upon the parties in the absence of fraud or mutual mistake, and evidence aliunde in respect to the damages actually arising from the breach cannot be received."

It is apparent here the intent, as expressed in the contract and the stipulated facts, was that Rushmore was to stay out of the starter business for two years, and the defendant below was not only to manufacture and market his former product, but was to advertise it for a period of three years. Plaintiff below valued the advertising, which would keep his name before the public, and thus render it easier for him to enter business after the expiration of two years, at $100,000. We think the defendant below intended the same thing. The contract of advertising consisted of one covenant. We do not think that the covenant of advertising can be said to be separable. It consisted of one covenant, which has been breached in a very substantial way, and the damages agreed upon by the contracting parties must flow therefrom.

Judgment affirmed.

WARD, Circuit Judge (dissenting). The relevant language of the agreement is that the Bosch Company shall "describe any starter or starters manufactured under the patents hereby agreed to be sold by the party of the first part in all of the advertisements and printed matter and on all the name plates or in any of the manners or styles of advertising, as the Rushmore starter or the Bosch-Rushmore starter or System Rushmore." This provision applies naturally, and I think obviously, only to advertisements of the Rushmore starter. I can-

not construe it as requiring the Bosch Company to advertise the Rushmore starter in every advertisement it published of any of its various equipments. I think the Bosch Company did not obligate itself either to sell or to advertise the starter. It owned it, and might prefer to suppress it, or it might prefer to sell it without advertising, and advertise better or more profitable starters. Unless under this contract complainant could compel the Bosch Company to advertise and sell his starter throughout the three years, he cannot complain of its not advertising it in the 932 advertisements in which it is not mentioned at all, because the company in those advertisements was advertising its own Bosch starter. For what the Marmon Company did in its catalogues the defendant is, as Judge Hand found, not liable, having merely sold the equipment to that company. But the 50 advertisements in which the defendant inserted the cut of the Rushmore starter, without giving any credit to Rushmore, are plain violations of the contract.

Nor can I regard the payment of $100,000 as liquidated damages. It seems incredible to me that the parties could have intended that sum to be paid in case of one or of a few violations of the contract or to make no distinction between a violation continued for three years and a violation continued for one week. Cases like Wood v. Niagara Falls Paper Co., 121 Fed. 818, 58 C. C. A. 256, which apportion the damages to the default, as, for instance, $50 a day for each day of delay, are plainly quite different. Furthermore, it is incredible to me that, if Rushmore was entitled to have his starter mentioned in all the defendant's advertisements of every kind and shape, he made no complaint whatever during the three years throughout which it was hardly ever mentioned. This is strong evidence that he understood the contract to mean that he was to have credit for the starter only in advertisements in which it was mentioned.

I think the judgment should be reversed.

ROBERTS v. TENNESSEE COAL, IRON & R. CO.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1918. Rehearing Denied February 27, 1919.)

No. 3099.

1. STATUTES ⊂=191—CONSTRUCTION—STATUTE REGULATING MINING.
Words and terms used in a mining statute are intended to convey the meaning they have in mining parlance.

2. MASTER AND SERVANT ⊂=118(7)—MINING STATUTES—"ESCAPE WAY."
An "escape way," as used in a mining statute, means a passageway leading from the inside to the outside of the mine.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Escape Way.]

3. MASTER AND SERVANT ⊂=118(3)—MINING STATUTES—"SLOPE."
A "slope," within the meaning of a mining statute, is a level or inclined way, passage, or opening used for the same purpose as a shaft—citing Words and Phrases.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Slope.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. NEGLIGENCE ⟸141(8)—TRIAL ⟸296(4, 5)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

The giving of an instruction which defined contributory negligence as negligence that "helps to bring about the injury" *held* not error; but, if so, it was harmless, in view of other instructions based on proximate cause.

5. COURTS ⟸372(3)—FEDERAL COURT—FOLLOWING STATE DECISIONS—INSTRUCTIONS.

An instruction as to what would constitute contributory negligence under the circumstances shown by the evidence *held* proper, where it conformed to the rule established by decisions in the state.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action at law by James B. Roberts, administrator of the estate of Angus McNeil, deceased, against the Tennessee Coal, Iron & Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. A. Denson, of Birmingham, Ala., for plaintiff in error.

Augustus Benners and James Rice, both of Birmingham, Ala., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

WALKER, Circuit Judge. This was an action, under the Alabama Employers' Liability Statute (Code 1907, § 3910), by the plaintiff in error, as the administrator of Angus McNeil, deceased, to recover damages for the latter's death, which was attributed to the alleged negligent failure of his employer, the defendant in error, to provide a reasonably safe place for the performance by the deceased of his duties as an employé engaged in operating a machine for cutting or excavating coal in a mine of the defendant in error, in that the latter negligently suffered its plant to be defective. The machine was operated by electricity transmitted from a trolley wire above it; a pole with a nonconducting handle being used for connecting or disconnecting the machine with the trolley wire. At the time the deceased was killed he was on top of the machine mentioned, which had been moved through a cross-cut leading from a heading in the mine to an air course which ran parallel with that heading. When the machine was near to a switch at the connection of the track through the cross-cut with the track in the air course, the deceased was killed as a result of his head coming in contact with the trolley wire above it, which carried 250 volts, direct current, of electricity. A reversal of the judgment in favor of the defendant in error is sought because of rulings made by the court in admitting and excluding evidence, and because of instructions given by the court to the jury.

No exception was reserved to some of the rulings on evidence which are assigned as errors. We discover no reversible error in any such ruling which is presented for review.

An exception was reserved to the following statement made by the court in its oral charge to the jury:

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"That statutory duty had no application to this case, because the undisputed evidence shows that the voltage was less than 300, and this place where the accident occurred was neither in a slope, nor in a manway, nor in a shaft, so that there was no statutory duty resting on the defendant to shield the wire that plaintiff's intestate came in contact with, and that caused his death."

The statute referred to is one which prescribes the following regulations concerning the insulation, maintenance, and operation of electrical apparatus in coal mines in the state of Alabama:

"Conductors in shafts and slopes used as traveling ways and in escape ways shall be protected. * * *

"All trolley wires carrying a voltage of between 300 volts and 600 volts direct current, or 240 volts and 480 volts alternating current, must be properly shielded, except where the same are at least 6½ feet above top of rail." General Acts of Alabama 1911, pages 534, 535, § 100, rules 11 and 13.

[1, 2] The first-quoted regulation is applicable only to conductors in shafts or slopes used as traveling ways and in escape ways. The last-quoted regulation is not applicable to a trolley wire carrying only a direct current of less than 300 volts. As the evidence showed that the trolley wire in question carried less than 300 volts direct current, the statute was not applicable to the facts of this case, unless there was evidence tending to prove that the place where the deceased was, when he came to his death as a result of a part of his body coming in contact with the trolley wire above, was in an escape way, or in a shaft or slope used as a traveling way. There was no evidence tending to prove that that place was in an "escape way." That expression, as it is used in the statute, describes a passageway leading from the inside to the outside of a mine, through which miners in the mine could escape to the outside. Robinson v. Maryland Coal & Coke Co., 196 Ala. 604, 72 South. 161. We do not understand that it is contended that the place in question was an escape way within the meaning of the statute, and the evidence adduced was not such as to support such a contention.

[3] It is contended that the place was a "slope," within the meaning of that word as used in the statute. It is to be inferred that the use of that word in such a statute was intended to convey the meaning it has in mining parlance. As ordinarily used in such a connection, the term "slope" means an inclined way, passage, or opening used for the same purpose as a shaft. 7 Words and Phrases, 6532; Century Dictionary, "Slope." Though the term be regarded as having a somewhat broader meaning, and as embracing a main haulage passageway, whether inclined or level, there was no evidence tending to prove that the place at which the deceased was killed was a "slope." There was no evidence in conflict with the testimony of one of the witnesses for the plaintiff in error to the effect that the place where the deceased was killed was "no part of either the slope or manway." Another of the plaintiff in error's witnesses referred to the heading which the deceased and the machine he was on had left when they entered the cross-cut as a "slope." When the deceased was killed, he was not in the place so referred to. He was then entirely out of that place, and was approaching the junction of the track through the cut-off and

the track in the air course. There was no evidence tending to prove that either the cut-off or the air course could be regarded as a part of a slope. The first-quoted statutory regulation would be given a meaning which its language does not express, if it was held to require that electric conductors in any opening or compartment of a coal mine used as a traveling way shall be protected. Any opening from which coal is mined, such a machine as the deceased was on being used, may be used as a traveling way by those engaged in such mining, in going to or from their work. Manifestly the statutory regulation in question was not intended to apply to all such places. The statutory requirement is applicable only to such conductors "in shafts and slopes used as traveling ways and in escape ways." The court properly ruled that under no evidence adduced was that regulation applicable.

But under the common law, and regardless of that statute, it was the duty of the defendant in error to exercise reasonable care to see that the place where the deceased was when he was killed, engaged as an employé doing work assigned to him, was reasonably safe. On the question of the employer's discharge of this duty the evidence adduced was conflicting. There was evidence for and against either of the conclusions that it was negligent to leave the trolley wire unshielded at the place in question, or in permitting it to be as low as it was. On the other hand, there was evidence for and against the conclusions that the deceased's death was proximately contributed to by his negligently being on the machine, or by his negligently failing to avoid contact with the wire above him, the presence and location of which were previously known to him. The questions raised by this conflicting evidence were submitted to the jury under instructions which left it to them to determine whether the employer did or did not perform its duty of seeing to the safety of its plant at the place where the deceased was killed, and whether the latter was or was not guilty of contributory negligence. Exceptions were reserved to portions of the charge given by the court in submitting those questions to the jury. Mention will be made of such of those rulings as seem to us to justify any comment.

[4] The following portion of the court's oral charge was excepted to:

"The law of Alabama is that, even though the employer be at fault in a way that helps to cause the injury, yet if the employé who is injured or killed is also at fault—his conduct is negligent in a way that also helps to bring about the injury—then the injured employé, or his representative, if killed, has no right of action against his employer."

This instruction is criticized because the hypothesized negligence of the deceased which would stand in the way of the plaintiff's recovery was described as helping to bring about the injury, instead of being described as proximately contributing to the injury. It cannot be supposed that a different meaning would have been conveyed to the jury, if the orthodox expression commonly used to describe the negligence of an injured person having the effect of preventing a recovery had been employed. If the court had said that what was relied on as contributory negligence must have proximately contributed to the injury,

it hardly is to be doubted that an ordinary jury of laymen would have been aided in understanding what was meant if the court had added that that conduct must have helped to bring about the injury. The language used made it plain enough that the negligence of the deceased employé, which would deprive his personal representative of a right of action, must have been an effective cause of the injury in like manner that the alleged fault of the employer must have been a cause of the injury, for the latter to be liable, in the absence of contributory negligence on the part of the deceased. If the quoted instruction is subject to any criticism, the most that properly can be said against it is that it was not sufficiently definite and specific in describing what was required to constitute contributory negligence. Such a fault justifies an explanatory instruction, which no doubt would have been given, if it had been asked. The giving of the instruction mentioned was not reversible error. From the court's charge as a whole the jury could not well have understood that the plaintiff was deprived of the right to recover by conduct of the deceased relied on as contributory negligence, unless his death was attributable in part to that conduct as a proximate cause of it.

[5] The plaintiff excepted to the giving of the following written charge requested by the defendant:

"If the jury believe from the evidence that the plaintiff's intestate knew of the location of the wire which caused his death, and of the danger therefrom, and if the jury believe from the evidence that the death of the plaintiff's intestate was proximately due to his inattention, indifference, absent-mindedness, or forgetfulness of the presence and danger of said wire, then their verdict must be for defendant."

This charge is criticized on the ground that the deceased's forgetfulness of the presence and danger of the wire was not negligence, unless a reasonably prudent man, under the attending circumstances, would have been likely to be mindful of the peril from the wire. The action of the court in giving the charge in question is supported by often-repeated decisions of the Supreme Court of Alabama dealing with similar instructions given with reference to states of fact not distinguishable in principle from the one disclosed by a phase of the evidence in the instant case. Louisville & Nashville R. Co. v. Hall, 87 Ala. 708, 6 South. 277, 4 L. R. A. 710, 13 Am. St. Rep. 84; Wood v. Richmond & Danville R. Co., 100 Ala. 660, 13 South. 552; Sloss I. & S. Co. v. Knowles, 129 Ala. 410, 30 South. 584; Alteriac v. West Pratt Coal Co., 161 Ala. 435, 49 South. 867; Kilby Co. v. Jackson, 175 Ala. 125, 57 South. 691; Dorough v. Alabama Power Co. (Ala.) 76 South. 963. The decisions referred to are to be regarded as evidencing the existence of an established rule of conduct in that state. It is the law of that state which this court is called on to administer in the instant case. It may be assumed or conceded that the criticism of the correctness of the instruction would merit consideration if the question were presented to us without previously having been passed on by the Supreme Court of Alabama in decisions repeated and reiterated for many years. In view of the settled course of decisions of the highest court of that state, it does not seem to us that the question presented is an open one. One's

conduct in Alabama must be treated in this court as amounting to contributory negligence, if the settled law of that state requires that it be so treated.

The issues of fact in the case were submitted to the jury under appropriate instructions. A careful examination of the record has not led to the discovery of any error calling for a reversal of the judgment.

Affirmed.

GRUHER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 22.

1. CONSPIRACY ⟸43(6)—VIOLATION OF SELECTIVE SERVICE LAW—INDICTMENT.
Indictment charging that defendant conspired with officials of a draft board to violate the provisions of Selective Service Act, § 6 (Comp. St. 1918, § 2044f), charged the commission of an offense against the United States.

2. CONSPIRACY ⟸43(5)—SELECTIVE SERVICE LAW—INDICTMENT—OVERT ACT.
It was not necessary that an indictment for conspiring to violate Selective Service Act, § 6 (Comp. St. 1918, § 2044f), allege in what manner the overt act would tend to effect the object of the conspiracy.

3. CONSPIRACY ⟸43(5)—SELECTIVE SERVICE LAW—INDICTMENT—OVERT ACT.
Indictment for having conspired with draft board officials to violate Selective Service Act, § 6 (Comp. St. 1918, § 2044f), *held* to set forth facts sufficient to constitute an overt act on defendant's part to effect the object of the conspiracy.

4. CRIMINAL LAW ⟸1054(1)—APPEAL—FAILURE TO EXCEPT—EXCUSE.
Where defendant's counsel took no exception to court's failure to instruct witness to answer question, he having given untenable reason for not answering that it might tend to incriminate or degrade him, counsel cannot excuse his omission by saying in Circuit Court of Appeals that exception would only have shown discourtesy.

5. CRIMINAL LAW ⟸1048—APPEAL—ABSENCE OF EXCEPTION.
In a federal court, no error can be corrected as a rule unless an exception has been taken.

6. CRIMINAL LAW ⟸656(2)—DUTY OF COURT—ASSISTANCE OR DIRECTION OF WITNESS.
It is always the duty of a trial court to assist or direct a witness who is stumbling over a technical point, and it cannot be error to ask a witness who declines to answer, without his counsel being present, whether he means to claim his privilege.

7. CRIMINAL LAW ⟸448(12)—EVIDENCE—CONCLUSION OF WITNESS—CONSPIRACY.
In prosecution for having conspired to violate Selective Service Act, § 6 (Comp. St. 1918, § 2044f), objection to question to witness whether a man who at that time had not been a witness had or had not stated a legal result, that is, the conspiracy, in respect of defendant, was properly sustained.

8. CRIMINAL LAW ⟸419, 420(11)—EVIDENCE—HEARSAY.
In prosecution for having conspired to violate Selective Service Act, § 6 (Comp. St. 1918, § 2044f), a question as to what a third person told the witness during a conversation regarding the conspiracy was calculated to elicit hearsay testimony.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

9. CRIMINAL LAW ⟸1048—APPEAL—CORRECTION OF ERROR—ABSENCE OF EXCEPTION.

While Circuit Court of Appeals may notice a plain error, where no exception has been taken, and the error has been specified in the assignment of errors, the right so to do will not be exercised unless it is evident that very serious injustice will result, whether the case is criminal or civil.

In Error to the District Court of the United States for the Southern District of New York.

Kalman Gruher was convicted of having conspired to violate the provisions of the Selective Service Law, and he brings error. Affirmed.

The plaintiff in error, who was the defendant below, and who is hereinafter referred to as the "defendant," has been convicted under an indictment which charged him with having conspired to violate the provisions of section 6 of the Act of Congress of May 18, 1917, c. 15, 40 Stat. 80 (Comp. St. 1918, § 2044f), entitled "An act to authorize the President to increase temporarily the military establishment of the United States," known as the Selective Service Law. The material provision of the section may be found in the margin.[1]

The indictment charged the defendant Louis J. Cherey and Samuel J. R. Bernfeld with having conspired among themselves to violate the provisions of the act. It appears that Cherey was chairman of local board for division 99 of the city of New York, and Bernfeld was a member of the same board and one of the medical examiners of that board. It was the duty of Cherey and Bernfeld to carry into effect the provisions of the act, and in the course of their official duties they were called upon to pass upon the qualifications and fitness of persons who were called by the board for physical examination and to determine the fitness of the persons so called for service in the Army of the United States. The theory of the indictment was that in return for money Cherey and Bernfeld were to aid the defendant by making certain false and incorrect physical examinations and false statements and certificates as to the fitness and liability of persons examined for service under the act.

The indictment concluded as stated in the margin.[2]

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[1] "Any person charged as herein provided with the duty of carrying into effect any of the provisions of this act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct."

[2] "And in pursuance of and to effect the object of the said conspiracy, the said defendant Kalman Gruher, on the 8th day of August, 1917, did call upon the said defendant Samuel J. R. Bernfeld, at 273 Rivington street, the city and county of New York, in the Southern district of New York.

"And further to effect the object of the said conspiracy, the said defendants Louis J. Cherey and Samuel J. R. Bernfeld, on the 8th day of August, 1917, did have a conversation with certain persons at No. 273 Rivington street, borough of Manhattan, city of New York, Southern district of New York.

"And further to effect the object of the said conspiracy, the said defendants

At the trial defendant moved to dismiss the indictment upon the ground that there were no facts constituting an overt act upon the part of the defendant to carry out the conspiracy alleged in the indictment. The motion to dismiss was denied and the trial proceeded. It is claimed that at the trial the court committed certain errors, but especially erred in failing to direct a verdict of acquittal upon the ground that the facts proven did not establish the crime alleged in the indictment.

The jury returned a verdict of guilty, and the defendant was sentenced to the United States penitentiary at Atlanta for two years. The Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]), § 37, provides that if two or more persons conspire to commit any offense against the United States, or to defraud the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Isidor E. Schlesinger, of New York City, for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (Ralph W. Horne, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). There was no error committed in denying the motion to dismiss the indictment.

[1] The indictment specifically charges the defendant with an offense against the United States. It declares that defendant, Cherey, and Bernfeld willfully, knowingly, and feloniously conspired together and agreed among themselves to violate section 6 of the Draft Act. By the express terms of the Draft Act it is made a misdemeanor for any person charged with the duty of carrying into effect any of the provisions of the act, to make any false or incorrect registration, physical examination, exemption, etc., or to fail fully to perform any duty required of him in the execution of the act. Cherey and Bernfeld were members of a board charged with the administration of that act. And an indictment which charges that defendant conspired with these officials to violate the provisions of the act charged him with the commission of an offense against the United States.

[2, 3] The indictment also sets forth facts sufficient to constitute an overt act upon the part of the defendant to effect the object of the conspiracy.

At common law no overt act is necessary to constitute the offense. But under the Criminal Code of the United States some overt act in pursuance of the conspiracy is a necessary element of the offense. United States v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211.

The indictment not only alleges one but three overt acts "in pursuance and to effect the object of the conspiracy." It declares:

Louis J. Cherey and Samuel J. R. Bernfeld did demand from Abraham Leicher, $300 in the city of New York, Southern district of New York; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 37 U. S. C. C.)"

1. That on August 8th defendant called upon Bernfeld, one of his coconspirators, at a certain specified place in the city of New York.

2. That on the date named his coconspirators, naming them, further to effect the object of the conspiracy, had a conversation with certain persons at a certain specified place likewise in the city of New York.

3. That further to effect the object of the conspiracy his coconspirators demanded of Abraham Leicher $300 in the city of New York.

It is true that in itself there was nothing unlawful in the act of the defendant in calling on Bernfeld. But there is no rule of law which requires an overt act to be an unlawful act. It may be in itself a perfectly lawful act which becomes unlawful only when it is committed "in pursuance of and to effect the object" of the conspiracy. It was not necessary to allege in what manner the overt act would tend to effect the object of the conspiracy. Houston v. United States, 217 Fed. 853, 133 C. C. A. 562; United States v. Wupperman (D. C.) 215 Fed. 135; United States v. Shevlin (D. C.) 212 Fed. 343. And if the allegation that Cherey and Bernfeld, further to effect the object of the conspiracy, did demand from Leicher $300 is not a sufficient allegation of an overt act, then we confess our inability to understand in what the insufficiency consists.

The indictment was in all respects sufficient, and it fully informed the defendant of the offense with which he was charged, and no greater definition of the crime was needed.

[4-6] It appears that while Cherey was on the stand he was asked whether he had any talk with the defendant about receiving any bribe or becoming a party to receiving any money to aid others to evade the draft. He declined to answer without his counsel being present. Thereupon the court said: "You mean on the ground it may tend to incriminate or degrade you?" To which he answered, "Yes." It is alleged that, as the witness in refusing to answer had given an untenable reason, it was the duty of the court to have instructed the witness to answer the question; and that the court suggested a substitute reason which was equally untenable as his answer could not incriminate or degrade, he having already pleaded guilty to the charge. If the court committed error, counsel for defendant shared in it, for he took no exception. He seeks to excuse his omission by saying in this court that an exception under the circumstances would only have shown discourtesy. It is never a discourtesy to take an exception to a ruling. And in a federal court no error can be corrected as a rule unless an exception has been taken. We take, however, this occasion to say that in our opinion it is always the duty of a trial court to assist or direct a witness who is stumbling over a technical point. It cannot be error to ask a witness who declines to answer without his counsel being present whether he means to claim his privilege.

[7, 8] It also appears that one of the Assistant United States Attorneys was called as a witness on behalf of the defendant. He was asked: "Did you have a conversation with Mr. Cherey on Saturday last in your office?" He replied: "Yes, sir." Then he was asked:

"And Cherey confessed to having entered into a conspiracy with Dr. Bernfeld?" This was objected to. But the court said: "Let him answer." Thereupon the witness said: "I refuse to answer that question." Then he was asked: "Did he at that time tell you that Mr. Gruher in this case had no connection with the conspiracy between Dr. Bernfeld and Cherey?" This was also objected to and the objection was sustained. Counsel for defendant again took no exception and is therefore not entitled to allege the error if error there be. We may, however, point out that the question asked was whether a man who at that time had not been a witness in the case had or had not stated a legal result in respect of the defendant, for conspiracy is a legal result. And it may be added that the matter was in violation of the hearsay rule.

[9] Whatever the practice in the state courts may be, the rule in the federal courts is established as already intimated that the Circuit Courts of Appeals will not notice errors in the admission or exclusion of testimony unless an exception was taken in the court below. While the court may notice a plain error when no exception has been taken and the error has been specified in the assignment of errors, the right to do so will not be exercised unless it is evident that very serious injustice will result. The right is not lightly to be invoked, in either a criminal or a civil case. In the case now before the court, we do not feel called upon to send this case back for a new trial on any such ground, although counsel ask us to do it to prevent "a shocking injustice," We are unable to see that any shocking injustice is being committed. The testimony affords ample proof of the conspiracy and of defendant's guilt.

Judgment affirmed.

In re HAVENS.

Petition of EXCHANGE NAT. BANK.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

Nos. 75, 95.

1. BANKRUPTCY ⟸84—INVOLUNTARY PROCEEDINGS—AMENDMENT OF PETITION.
That the allegations of an involuntary petition are insufficient, as vague and general, does not deprive the court of jurisdiction, and it may properly permit amendment.

2. BANKRUPTCY ⟸84—AMENDMENT OF PETITION—ALLEGING NEW ACTS OF BANKRUPTCY.
An act of bankruptcy, committed and complete more than four months prior to amendment of an involuntary petition, cannot be charged for the first time in the amendment; but where such act consists of concealment of property, which has continued, the four months period will not begin to run until discovery by petitioning creditors.

3. BANKRUPTCY ⟸234—EXAMINATION OF BANKRUPT—PRIVILEGE.
An alleged bankrupt, although he has removed from the district where involuntary proceedings are pending against him, when in the district in attendance on such proceedings is subject to all lawful orders of the court therein, including an order to appear for examination, under Bankruptcy Act, § 21a (Comp. St. § 9605).

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. COURTS ⊂=1—"JURISDICTION."

"Jurisdiction" is the power to hear and determine a cause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

Petitions to Revise and Appeals from Orders of the District Court of the United States for the Western District of New York.

In the matter of James H. Havens, alleged bankrupt. On petitions by bankrupt and by the Exchange National Bank to revise orders of the District Court. Affirmed on bankrupt's petition, and reversed on bank's petition.

On or about November 6, 1917, the Exchange National Bank filed a petition in involuntary bankruptcy against Havens as a person having less than 12 creditors and having for the greater portion of the six months preceding said filing resided and had his principal place of business at Olean, N. Y., within said Western district. The single act of bankruptcy alleged was that, being insolvent, Havens "on or about October 3, 1917," did "transfer and convey and cause to be placed upon the records of the clerk of Cattaraugus county deeds transferring and conveying a large part of his property with the intent to hinder, delay, and defraud his creditors."

On or about November 23d Havens answered this petition, admitting jurisdiction in respect of residence and place of business, and also the fact of transfer as alleged, but setting forth that said transfers were to his wife, were for a good and valuable consideration, were not made with intent to hinder, etc., and that he was not at the time of said transfer insolvent, and of the issue thus tendered he demanded a jury trial. On or about April 9, 1918, the issue thus framed came on for trial, and thereupon Havens moved to dismiss the petition because it did "not set forth sufficient facts to give the court jurisdiction to enter an adjudication in bankruptcy" against him.

The District Judge held the petition insufficient, but allowed the petitioner to file an amended petition. Such petition was filed on or about April 20—a delay complained of at the time, but not now material. This amended petition set forth in great detail the transfer by deeds recorded October 3, 1917, of what is alleged to be substantially Havens' entire estate. In respect of this transaction the amended petition is but an amplification of the original one.

But in the amended petition for the first time, and therefore on or about April 20, 1918, the Exchange Bank alleged as an act of bankruptcy that Havens, being insolvent, on May 12, 1917, procured a loan of money secured by mortgage on certain real estate which he then owned, and, having by means of such mortgage obtained the sum of $30,000, the proceeds thereof, he did "within four months next preceding the date of the filing of the original petition * * * take, carry away, conceal and secrete" the said $30,000 from his creditors—has "placed the same beyond the jurisdiction of the court, * * * has continued to conceal and secrete [the same] ever since, and presently conceals and secretes" it. Thereupon Havens moved to dismiss the amended petition as not setting forth sufficient facts to give the court jurisdiction, and more particularly because the acts of bankruptcy therein alleged were all committed more than four months prior to the date of filing said amended petition. On the hearing of this motion an order was entered (1) denying the motion to dismiss, but (2) striking out the allegations in respect of the concealment of $30,000 hereinabove set forth.

Thereupon Havens took a petition to revise this order, alleging as error that the amended petition had not been wholly dismissed, and the Exchange National Bank also took similar proceeding, alleging as error that the allegations regarding the $30,000 mortgage transaction had been stricken out. (The record on these two petitions is docket No. 75, October term, 1918.)

When the issue framed on the original petition was set for trial, Havens attended in Buffalo, presumably in order to testify. No trial took place, because his motion to dismiss prevailed, in the sense that an amended petition

was required by the court. Accordingly he repaired to a railway station in Buffalo and was in the act (as his attorney deposes) of procuring "transportation and Pullman accommodation from Buffalo to Joplin, Mo.," when he was served with an order requiring him to submit to an examination pursuant to section 21a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. § 9605]) before a referee in bankruptcy in Buffalo at a date apparently 48 hours or thereabouts subsequent to the time of service.

Apparently Havens never appeared before the referee, nor in any way obeyed the order of the District Judge, but subsequent to the time when he should have appeared moved to vacate the order for examination on the ground that he, being a resident of Missouri, had voluntarily come within the Western district of New York in order to attend the trial of the petition against him, and that before he could return to his Missouri home he had been served with the order aforesaid.

This motion was heard upon affidavits showing that Havens claimed citizenship and residence in Missouri since some date in October, 1917; he did not specify any place within that state of which he became a resident after leaving Olean a few days before petition filed, but did make oath that his "principal places of business" had been for about a year at "Springfield, Mansfield, and Joplin in said state." On behalf of the petitioner it was shown that diligent inquiry at all of these places had failed to discover Havens or his actual whereabouts, except that "his mail should be forwarded to Williamsport, Pa., in care of" the attorney who appears for him on this appeal.

Upon this showing the District Court entered an order whereby the "service of the order [for examination] be and the same is hereby set aside and held for naught, upon the ground that the alleged bankrupt was at the time of said service a resident of the state of Missouri temporarily within the territorial jurisdiction of this court in order to attend the trial of the issues in this proceeding, and for that reason privileged from the service of the order aforementioned." Thereupon the Exchange National Bank took the third petition to revise, which is No. 93 on our docket for the present term.

Gibbons & Pottle, of Buffalo, N. Y. (M. C. Rhone, of Williamsport, Pa., of counsel), for Havens.

Hastings & Jewell, of Olean, N. Y. (Edward W. Hatch and Henry A. Rubino, both of New York City, of counsel), for Exchange Nat. Bank.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] 1. The petition of Havens asserts in substance that the District Court was without jurisdiction to do anything but dismiss the original petition, and therefore erred in allowing any amendment.

[4] Jurisdiction is no more (for present purposes) than the power to hear and determine a cause. Byers v. McAuley, 149 U. S. 628, 13 Sup. Ct. 906, 37 L. Ed. 867. Not only did the District Court possess jurisdiction in this fundamental sense, but it was the only court that could originally hear and adjudicate on the matters presented or sought to be presented by the petition as first framed.

Being thus rightfully possessed of the cause, the court also enjoyed that power of amendment which is incidental to all judicial administration and vital to the ends of justice. Bank v. Sherman, 101 U. S. 406, 25 L. Ed. 866. We are not permitted by this petition to inquire into the sufficiency of the Exchange Bank's first pleading. It was evidently regarded by the District Judge as "too vague and general," and therefore amendment was required. This is common practice.

In re Rosenblatt, 193 Fed. 640, 113 C. C. A. 506; In re Riggs Restaurant Co., 130 Fed. 691, 66 C. C. A. 48—decisions plainly indicating approved practice in this circuit.

The amendments made and permitted to stand were no more than a restatement, descending into unnecessary particulars of the original petition, and we hold that such amendment was properly permitted.

[2] 2. The bank's petition for revision presents a question slightly different from the cases thought to support so much of the order as struck out of the amended petition the allegation of concealment by Havens of the proceeds of the mortgage of May, 1917.

It was assumed below that this was an act of bankruptcy not set forth in the original petition and only charged in and by an amendment made more than four months after its commission. Whether such an act, occurring more than four months before amendment, could be introduced into a pending proceeding, was thought an "interesting question" by Lacombe, J., in the Riggs Case, supra. This court answered it in the negative (In re Haff, 136 Fed. 80, 68 C. C. A. 646), the matter not having been covered by In re Sears, 117 Fed. 294, 54 C. C. A. 532, which was correctly explained and limited in application by Gleason v. Smith, 145 Fed. 897, 76 C. C. A. 427. The general rule as stated in the Haff Case has been approved, especially in the Ninth circuit (Walker v. Woodside, 164 Fed. 685, 90 C. C. A. 644), and in the Seventh (In re Brown Commercial Car Co., 227 Fed. 390, 142 C. C. A. 83). Our own decision (In re Condon, 209 Fed. 801, 126 C. C. A. 524) is (in this respect) but a reassertion of the Haff Case.

This rule rests in theory upon the reasoning of Justice Nelson in Re Craft, 6 Blatchf. 177, Fed. Cas. No. 3,317, where it was pointed out that "to allow a substantial amendment—that is, one going to the whole foundation of the proceeding nunc pro tunc—would be a direct violation" of a limitation "obviously for the benefit of the debtor," namely, the requirement that proceedings must be brought within a limited time after the act of bankruptcy is committed; i. e., under the present statute, four months.

If, therefore, the creditors' allegations in respect of the proceeds of the $30,000 mortgage are to be regarded as stating an act of bankruptcy committed and complete more than four months before amended petition filed, the order complained of was right. But the allegations stricken out are to the effect that the concealment complained of not only occurred within four months of original petition, but had continued down to the date of amendment.

The concealment of property made an act of bankruptcy by section 3 may be a continuing concealment and the four months period may run from the date of discovery. Citizens' Bank v. De Pauw Co., 105 Fed. 926, 45 C. C. A. 130. It was, we think, clearly the intent of the pleader to allege a continuing concealment, not discovered until within four months of amendment. The language is vague, and if the District Judge had required a further amendment, setting forth the circumstances of concealment and discovery with greater particularity, we should have regarded such an order as the exercise of reasonable discretion and therefore not reviewable. In re Rosenblatt, supra. But

to strike out the allegations altogether was, we think, error, because it prevented presentation to the court of what (reading the pleadings benevolently) may be shown to be entirely within the decisions above referred to.

[3] 3. It being admitted that the order requiring Havens to attend and be examined was, under Cameron v. United States, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448, proper, it was error to practically nullify the order by granting the alleged bankrupt immunity from service.

We are of opinion that all the facts shown in evidence inevitably point to the conclusion that Havens had departed from Olean a few days before this petition in bankruptcy was filed, and thereafter practically secreted himself. Against such evidence Havens' statement of a conclusion that he had been "since October, 1917, a citizen and resident of the state of Missouri," is no more than an effort to deny the logical result of the facts shown against him.

As, however, he may hereafter find it advisable to show himself within the Western district of New York, as he did in April last, we shall consider whether an alleged bankrupt, while attending the trial of an involuntary petition against him, is privileged from examination under section 21a; for, if this be true, he must also be privileged from performing any other duty laid upon him by the act and usually enforced by a court order.

It is argued under section 7 of the act (Comp. St. § 9591) that Havens could not be required to attend for examination at Buffalo, because it was more than 150 miles distant from his home or principal place of business. Assuming that both his personal and business homes were most remote from Buffalo, we think the section referred to has no application, because he had already come there. Inasmuch as he refused to obey the order at all, the question whether (assuming a remote residence) he could have been compelled to continue in attendance without having his expenses paid is a question not before us.

It is true that one going to a town or place in order to attend a trial is secure from service of process eundo morando redeundo, even though he be a party. Hale v. Wharton (C. C.) 73 Fed. 739. But a party who is attending the trial of his cause is assuredly subject to the orders of the trial court in respect of the matter under adjudication. What the District Court had jurisdiction over was the question whether Havens was a bankrupt, and the examination directed, since it must relate to the "acts, conduct or property" of the alleged bankrupt himself, was a most important part of that investigation. The argument for immunity really assumes that any bankrupt who chooses to remove himself from the territorial jurisdiction of adjudication is by the fact of removal entitled to all the privileges of a stranger; indeed, rather more, in that he can attend the bankruptcy court for such purposes as he pleases, and decline to attend when he does not please.

But the duties of a bankrupt are laid down by the statute, and so are his privileges. Section 9 (Comp. St. § 9593). The order complained of exceeded the statute. If the bankrupt removes into another district, ancillary proceedings are open to his creditors. Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas.

969; In re Madson Steele Co., 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407. But when the bankrupt is in attendance upon the court lawfully engaged about the business of his adjudication, he must submit to all the lawful orders of that court, including examination under section 21a. This we regard as inherent in the nature of the jurisdiction created by the Constitution and defined by the Bankruptcy Act. It is therefore ordered, in No. 75, that the petition of the Exchange National Bank be sustained, with costs, and that of Havens be dismissed, with costs, and in No. 95 that the petition of the Exchange National Bank be sustained, with costs.

ÆTNA LIFE INS. CO. OF HARTFORD, CONN., v. RYAN.

(Circuit Court of Appeals, Second Circuit. December 16, 1918.)

No. 106.

1. EVIDENCE ⟸126(3)—RES GESTÆ—DECLARATION.
Declaration of deceased, when stricken at dinner, that he had been hit by door of subway car, is inadmissible as part of res gestæ, in action on his accident policy; it not appearing how long after accident, the res gestæ, the declaration was made.

2. INSURANCE ⟸466—ACCIDENT INSURANCE—SOLE CAUSE OF DEATH.
To recover on policy insuring against death resulting, directly and independently of all other causes, from bodily injuries effected solely through external, violent, and accidental means, plaintiff must show an accident which was the sole cause of the death; it not being enough that an accident was the proximate cause, if death would not have resulted but for a pre-existing disease.

In Error to the District Court of the United States for the Eastern District of New York.

Action by Catherine Ryan against the Ætna Life Insurance Company of Hartford, Conn. Judgment for plaintiff, and defendant brings error, plaintiff in error hereinafter being called "defendant," and defendant in error hereinafter being called "plaintiff." Reversed.

See, also, 253 Fed. 457.

James B. Henney and Bouvier, Beale & Geer, all of New York City (Phelan Beale, of New York City, of counsel), for plaintiff in error.

Edward H. Daly, of New York City (Edward H. Daly, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff has obtained a judgment for $12,045.84 damages and costs entered against the defendant, after a trial before a judge and jury.

The action was brought by plaintiff as the beneficiary under an accident insurance policy upon the life of her husband.

The complaint alleges that the insured lost his life because of an injury he sustained while a passenger on a train of the Interborough

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Rapid Transit Company in one of its subway stations in the city of New York. It is alleged that while he was entering the train he "sustained bodily injuries effected solely through external, violent, and accidental means, to wit, by being struck by a closing car door of said train, which blow by said door precipitated, hastened, and developed a cerebral hemorrhage in the said Michael J. Ryan, who had arteriosclerosis, which hemorrhage caused the death," etc. The injury was received on August 25, 1917, and death resulted on September 9, 1917.

The policy provided that no indemnity was payable unless the insured was injured or came to his death, "directly and independently of all other causes, from bodily injuries effected solely through external, violent or accidental means, suicide (sane or insane) not included."

The defendant sets up the defense that the beneficiary died as a result of disease.

The insured at the time of his death was 53 years old. He was bandmaster in the Catholic Protectory in the borough of the Bronx in the city of New York. On the morning of August 25th he left his home in Brooklyn and went by subway to the Protectory, which he reached about noon. He sat down in the dining room to eat his dinner, and about 12:15 p. m., while at the table and when he was speaking, he suddenly became dumb and could not hear when spoken to and fell to the floor and could not move his left arm. He was picked up and placed on a chair. An ambulance was called, and he was taken to the hospital, where he died on September 9th.

[1] It appears that a witness who assisted in picking him up when he fell in the dining room of the Protectory was asked whether he had any conversation with Ryan after he fell. He replied:

"I was near him all the time. He was mumbling to me and the brothers that he was hit by the subway door, the center door."

It was moved to strike out the answer on the ground that it was too remote and not part of the res gestæ. The objection was overruled, and the court allowed the answer to stand, stating that the issue to which the statement had reference was "as to whether there was an occurrence or blow at all; and, as to that, I think this statement is a part of the res gestæ." The witness did not testify as to any statement made by Ryan as to when he was hit, or where upon his body or other part of him he was hit.

The evidence was certainly inadmissible as a part of the res gestæ. It does not appear when Ryan was hit by the subway door. It may have occurred at one time as well as another. No one knows how long after the event the narration was made. The res gestæ was the accident. The declaration made by Ryan was no part of it. It was not made at the time of the accident, and it does not appear that it was so nearly contemporaneous with it as to throw light upon it. Res gestæ is admissible because and only because it is so connected with the event which it describes that it is a contemporaneous part of and happens with the event. Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; Boston & Albany Railroad Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L.

Ed. 1006; Keefer v. Pacific Mutual Ins. Co., 201 Pa. 448, 51 Atl. 366, 88 Am. St. Rep. 822. In Insurance Co. v. Moseley, 8 Wall. 397, 19 L. Ed. 437, which was an action on an accident policy, a declaration made by a deceased person was held admissible as a part of the res gestæ. The case is distinguishable from the case at bar. The question there was whether the assured died from the effects of a fall downstairs in the night. The testimony of his wife showed that he left his bed between 12 and 1 o'clock and when he came back said he had fallen down the back stairs and almost killed himself. And the son, who slept in the lower part of the building occupied by his father, testified that about 12 o'clock on that same night he found his father lying with his head on the counter and asked him what was the matter and that he replied he had fallen down the back stairs and hurt himself very badly. The court in sustaining the admission of the evidence did so upon the ground that the declarations were made immediately or very soon after the fall. Justices Clifford and Nelson dissented. In that case it was known when the accident happened and the declarations were practically contemporaneous with it. In the case at bar it did not appear when the accident occurred. It might have been in the morning when the decedent started to come to New York, or it might have been when he got off to call at a store at Cooper Square as the testimony shows he did, or when he again took the subway train to go to the Proctectory, or when he once more alighted from the train on arriving at his destination. And, indeed, the accident might have happened on a prior day. In any event, the declaration was not contemporaneous with the accident.

An examination of the record in this case, however, discloses a fatal defect. It appears established beyond controversy that the deceased at the time he fell to the floor in the Protectory was suffering from arteriosclerosis, and that the disease was in a well-advanced state and affected his entire vascular system. It extended throughout all parts of his body, including his brain. The disease results in a hardening and narrowing of the entire arterial system. The arteries become filled with lime salts and fibrous tissues so that the opening through which the blood passes becomes smaller and as the same amount of blood has to pass through the blood pressure is increased. As one of the witnesses testified "it is just as if you had been running water through a half inch pipe, and then finally the diameter of the pipe has been reduced, and you are pumping it through a quarter inch pipe," or an eighth of an inch pipe. And when the pressure becomes at length too high the blood vessel breaks at the weakest point. The arteries of the brain seem to be the ones which usually rupture under those conditions. The evidence showed that the deceased also was suffering from Bright's disease of a chronic nature, and that he had myocarditis, which is an inflammation of the heart muscle.

The autopsy disclosed that the deceased died from a hemorrhage in the brain, there being a rupture of a cerebral blood vessel which might have resulted from any exertion. The physician who made the autopsy testified that, while the immediate cause of death was the cerebral hemorrhage, arteriosclerosis, chronic diffuse nephritis, and myocarditis were contributory causes. He also testified that in case

of a hemorrhage of the brain death might result in ten minutes or within several days or weeks, according to the extent of the hemorrhage.

The plaintiff claimed that the cerebral hemorrhage was the direct and independent cause of the death of the insured, and that it was effected solely by his being hit by the subway door. But there is no evidence in the record that deceased was hit by the door, except his statement already referred to as erroneously admitted. The counsel for the plaintiff laid stress upon the condition of the hat of the deceased which was produced as an exhibit as were his broken spectacles, which fell out of his pocket after he had been picked up from the floor. Non constat but that the spectacles were broken when he fell to the floor, as they fell out of his left hip pocket and he fell on the left side. We inspected the hat exhibited to us upon the argument and discovered nothing which indicated that it had received a blow. The forehead rim of the right underside appeared either to have become unglued or the sewing separated the upper surface from the lower surface for perhaps an inch. The autopsy disclosed no external marks of any violence on the body or the head.

[2] The burden of proof rested on the plaintiff to establish the fact that the insured sustained an accident and that there could be no recovery upon the policy of insurance unless that accident was the sole cause of his death, as the policy insured him against a death "resulting, directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means." The cases establish the principle that, if death results from disease or a bodily infirmity, there can be no recovery under such a policy whether the insured suffered an accident or not. And they also show that there can be no recovery if the insured sustained an accident but at the time it happened was afflicted with a pre-existing disease and if death would not have resulted if he had not had the disease, but his death was caused because the accident aggravated the effects of the disease or the disease aggravated the effects of the accident. National Masonic Accident Association v. Shyrock, 73 Fed. 774, 20 C. C. A. 3; Maryland Casualty Co. v. Morrow, 213 Fed. 599, 130 C. C. A. 179, 52 L. R. A. (N. S.) 1213; Preferred Accident Ins. Co. v. Patterson, 213 Fed. 595, 130 C. C. A. 175; Illinois Commercial Men's Ass'n v. Parks, 179 Fed. 794, 103 C. C. A. 286; Stanton v. Travelers' Ins. Co., 83 Conn. 708, 78 Atl. 317, 34 L. R. A. (N. S.) 445; Stokely v. F. & C., 193 Ala. 90, 69 South. 64, L. R. A. 1915E, 955; Pacific Mutual Life Ins. Co. v. Despain, 77 Kan. 654, 95 Pac. 580; Ætna Life Ins. Co. v. Bethel, 140 Ky. 609, 131 S. W. 523; White v. Standard Life & Accident Ins. Co., 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; Thomas v. Fidelity & Casualty Co., 106 Md. 229, 67 Atl. 259; Robinson v. U. S. H. & A., 192 Ill. App. 475; Continental Casualty Co. v. Peltier, 104 Va. 222, 51 S. E. 209; Jiroch v. Travelers' Ins. Co., 145 Mich. 375, 108 N. W. 728; Ward v. Ætna Life Ins. Co., 85 Neb. 471, 123 N. W. 456; Penn v. Standard Life & Accident Ins. Co., 158 N. C. 29, 73 S. E. 99, 42 L. R. A. (N. S.) 593.

The only testimony in the record that the deceased received any injury whatever is as we have already stated the erroneously admitted testimony that he mumbled that he had been hit by a subway door. And there is no testimony from which the kind and character of the injury, if any, could be inferred.

There is undisputed testimony that the conditions found at the autopsy to exist were in themselves a competent producing cause for the cerebral hemorrhage which resulted in the decedent's death.

The court charged as follows:

"If you find that the plaintiff satisfies you by a preponderance of testimony which you believe that the man, walking around and carrying with him all the time the possibility of having a cerebal hemorrhage from some slight accident, did meet with an accident, and that was the proximate cause of his death, then it would come within the policy. That is, if the accident was the proximate cause of his death.

"On the other hand, if a man was walking around, who was likely to die at any time from disease or who was likely to die at any time from slight accident, and if he suffered a slight accident and then walked any distance, but then died from something apart from the accident, it would not be within the policy."

The court refused to charge as follows:

"The plaintiff in this case cannot recover under the terms of the policy herein for any loss resulting in connection or in conjunction with any other causes not of external violence, and if the jury should find that the decedent received an alleged blow by coming in contact with the center door of a subway train that the said decedent at the time was suffering from arteriosclerosis, chronic diffuse nephritis, and myocarditis, and that by reason of the existence of the said physical conditions the said blow, in connection therewith, caused the cerebral hemorrhage resulting in death, this plaintiff cannot recover."

The court also refused to charge as follows:

"The policy in suit only insured the decedent 'against loss resulting directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means,' and if the jury should find that the defendant's death was not a loss resulting directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means, their verdict must be for the defendant."

The requests to charge were proper. The charge as given was improper as appears from the cases already referred to.

The trial court submitted the case to the jury upon the theory that, if the alleged accident was the proximate cause of the death, the plaintiff would be entitled to recover. If there had been legitimate evidence showing that an accident had happened, the rule of proximate cause as applied ordinarily in negligence cases would have been inapplicable, as the policy upon which this suit was brought provided that there was to be no liability unless the injury was the sole cause of death.

The jury rendered their verdict on the theory that the accident in the subway occurred. When the jury returned their verdict the court addressing the jury said: "You have found by your verdict that the accident occurred on the subway?" And the foreman answered: "Yes, sir."

Not only was erroneous testimony admitted, but the instructions to the jury were based upon an erroneous theory. A verdict and judgment so obtained cannot be permitted to stand.

Judgment reversed.

HUME v. CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 105.

1. COURTS ⟸405(5)—CIRCUIT COURT OF APPEALS—JURISDICTION.
An appeal which presents questions other than that of the jurisdiction of the District Court is properly taken to the Circuit Court of Appeals.

2. COURTS ⟸264(3)—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUIT.
An action by a general receiver appointed by a federal court for the property of an insolvent corporation, and to collect and preserve its assets, on a chose in action in favor of the corporation, is ancillary to the original suit and within the jurisdiction of the court, regardless of citizenship of parties, although the action is one in tort for damages against a municipal corporation.

3. EQUITY ⟸35—"ANCILLARY SUIT."
An "ancillary suit" in equity is one growing out of a prior suit in the same court, dependent upon and instituted for the purpose either of impeaching or enforcing the judgment or decree in a prior suit, and the jurisdiction of such suit is dependent upon the jurisdiction of the court of the prior suit.

[Ed. Note.—For other definitions, see Words and Phrases, Ancillary Suit.]

In Error to the District Court of the United States for the Eastern District of New York.

Action at law by Arthur Carter Hume, as receiver, against the City of New York. Judgment for defendant, and plaintiff brings error. Reversed.

The defendant interposed a demurrer to the plaintiff's complaint, the demurrer was sustained, and the plaintiff appeals.

On the 30th day of December, 1910, a bill in equity was filed against the South Shore Traction Company, alleging insolvency. Thereafter Paul T. Brady and Willard V. King were appointed receivers by the District Court for the Eastern District of New York. The order recites:

"(1) That until further order Paul T. Brady and Willard V. King be and they hereby are appointed receivers for this court of the defendant corporation, and of all its real and personal property, all its assets and choses or things in action, including all moneys and book accounts, contracts of all kinds, debts due or to become due, bills receivable, bonds, stocks, mortgages, securities, deeds, leases, all interest in lands, both legal and equitable, muniments of title, rents, profits, incomes, of every kind and description, plants, works, machinery, and all other beneficial interests and valuable things held, owned, or possessed by the defendant, or to which it had the rights of possession, of every kind, description, and nature, wherever the same may now be, with all the rights and powers of receivers in such or like cases."

The order contained further provisions, among which were that the receivers carry on the business of the corporation, preserve and advantageously convert into money the property assets and effects of the corporation, collect any debt or demand, appear in and defend any and all suits at law or in equity then pending against the corporation, or do any and all lawful acts and

things usual in the premises "which in their judgment shall be best calculated to enable them to collect and preserve the property and assets of the corporation."

The receivers thus named continued in possession, sold the railroad, and transferred the property and good will, including the franchise rights, with the consent of the city of New York, to another traction company. After accounting, they were discharged, and the present receiver was appointed by an order of the District Court on the 21st of December, 1914. This latter order provided, among other things, as follows:

"Ordered, that Arthur C. Hume * * * be and he hereby is appointed receiver of the South Shore Traction Company in the place and stead of said Paul T. Brady and Willard V. King, and is hereby given all the powers and rights heretofore vested in said Paul T. Brady and Willard V. King as such receivers, and all the conditions and provisions of the original order appointing said Paul T. Brady and Willard V. King as such receivers are hereby made applicable in connection with the appointment of the receiver now substituted in place of said former receivers," etc.

With the power thus conferred, the plaintiff has instituted this action against the city of New York seeking to recover $1,750,000, in a complaint which alleges three separate causes of action which, in substance, allege that the traction company sustained damage because of delays and interferences on the part of the city, which were caused by reason of actions and conduct on the part of the city in carrying out its contract obligations arising through the franchises obtained by the traction company. The defendant appeared generally and signed various stipulations by which it obtained extensions of time to plead to the complaint. Later a demurrer was interposed, which the court sustained.

Arthur Carter Hume, of New York City, in pro. per.

William P. Burr, Corp. Counsel, of New York City (John P. O'Brien and Vincent Victory, both of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge (after stating the facts as above). [1] The District Judge sustained the demurrer upon the theory that the court was without jurisdiction to pass upon the claims of the receivers against the city (a citizen of the state of New York) for a cause of action based upon a claim of damages for tort, holding also that the filing of a general appearance in the action was not such a waiver as precluded the right to object to such want of jurisdiction. The defendant challenges the right of the plaintiff to be heard in this court, contending that the sole question presented is one of jurisdiction, and that the plaintiff's relief should be sought directly from the Supreme Court. American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859. But here the plaintiff does not present solely the question of jurisdiction, and in view of the questions presented by the assignment of errors 1 and 2 this court can and will entertain jurisdiction upon this appeal.

For instance, the plaintiff presents as a first question the right of the court below to resettle the decree over his objection and makes that the subject of his first assignment of error. In Coler v. Grainger Co. et al., 74 Fed. 16, 20 C. C. A. 267, on the motion to dismiss an appeal in the Sixth Circuit, Taft, J., said:

"The motion to dismiss the appeal, however, cannot be sustained in the case at bar, because the record does present questions other than that of the jurisdiction of the Circuit Court."

And in Cobb v. Sertic, 218 Fed. 320, 134 C. C. A. 116, a similar question was presented, and the court there said:

"The only question argued in this case, either orally or in the briefs, is one of jurisdiction of the court below; but the proceeding in this court is prosecuted upon assignments of error which embrace a number of questions concerning the merits of the cause. It follows that the case is rightly here, and that this court may pass upon the question argued."

[2] By the order of appointment the present receiver is the successor of Messrs. Brady and King, who had very general powers conferred upon them, with the view of obtaining, by taking possession, collecting, compromising, or suing for, all of the assets of the traction company. When this plaintiff was appointed receiver, he was not restricted, and, indeed, had conferred upon him the same powers as did Brady and King. The right to institute and maintain ancillary suits in the District Court in which the action was originally instituted, in aid of the objects of the receivership, is well settled. The original equity action resulting in the appointment of the receivers was between a citizen of New Jersey and a citizen of New York, and if the present action is ancillary to that suit, it is controlled by the rule announced in the Supreme Court in White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67. There it was said:

"As was observed by this court in Porter v. Sabin, 149 U. S. 473, 479 [13 Sup. Ct. 1008, 1010 (37 L. Ed. 815)]: 'When a court exercising a jurisdiction in equity appoints a receiver to hold the property of a corporation that court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it.' The Circuit Court obtained jurisdiction over the Cardiff Coal & Iron Company by the filing of the original creditors' bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver, and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties, or of the amount in controversy."

In a later case, Pope v. Louisville, etc., Ry. Co., 173 U. S. 573, at page 577, 19 Sup. Ct. 500, at page 501 (43 L. Ed. 814), the Supreme Court again took occasion to say:

"When an action or suit is commenced by a receiver appointed by a Circuit Court (now the District Court),[1] to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the Circuit Court as a court of the United States is concerned; and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested."

In Hollander v. Heaslip, 222 Fed. 808, 137 C. C. A. 1, it was held that an ancillary bill would be sustained where the receiver in equity, ad-

[1] Parentheses ours.

ministering the estate of an insolvent corporation, sought to recover against stockholders for liability against them for agreements to subscribe. Walker, J., said:

"We are not of opinion that the court was in error in overruling the abovementioned demurrer. The bill to which it was interposed was auxiliary to the original suit in which, by means of a receivership, the court had acquired possession of the assets of the World Publishing Company, Limited, for the purpose of applying them to the payment of its debts. This enabled it to cause a debtor to that corporation who was within reach of its process to be brought into the original cause, to the end that his debt might be ascertained and payment coerced. It was for the court, in its discretion, to decide whether it would determine for itself all claims of the corporation whose estate it was administering, or would allow them to be litigated elsewhere. It was within its power to hear and determine all controversies regarding such claims, at least in so far as it could acquire jurisdiction of the persons of those who were parties to such controversies, though the questions thus collaterally involved were of a purely legal nature."

In Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801, receivers were permitted to maintain a bill ancillary to a suit in which they were appointed against a municipal corporation, a city of the same state as themselves.

[3] An ancillary suit in equity is one growing out of a prior suit in the same court, dependent upon and instituted for the purpose either of impeaching or enforcing the judgment or decree in the prior suit, and the jurisdiction of such suit is dependent upon the jurisdiction of the court of the prior suit. Minn. Co. v. St. Paul Co., 2 Wall. 609, 17 L. Ed. 886; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

The rights of this plaintiff to invoke in his aid the jurisdiction of the District Court, since the question of diversity of citizenship does not aid him, are dependent upon the former action in equity of which the court had jurisdiction and in which an order was entered appointing him receiver, and if the present bill can be said to restrain, avoid, explain, or enforce the judgment or decree therein, or to enforce and obtain the jurisdiction of liens upon or claims to the property in the custody of the court in the original suit, such a dependent suit is but a continuation in a court of equity of the original suit to the end that more complete justice may be done. Brun v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154. The question is therefore presented whether this plaintiff, as an officer of the court, can be said to have this claim or this chose in action, as the custodian of this estate, as a possession coming to him in the original suit.

In White v. Ewing, supra, Judge Brown said:

"Any suit by or against such receiver in the course of winding up such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties or of the amount in controversy."

In Armstrong v. Trautman (C. C.) 36 Fed. 275, the receiver of a national bank was permitted to maintain an action, irrespective of citizenship, to recover an amount due the bank of which he was appointed re-

ceiver in an equity action. Indeed, the order appointing the original receivers, and the plaintiff as their successor, commanded this receiver to maintain or to collect, by suit or otherwise, all the assets of the insolvent corporation for the benefit of its creditors, and this required him to maintain the present suit, even though his right of recovery may be said to be based in an action in tort for damages. If a meritorious cause of action existed against the defendant at the time that the plaintiff became the receiver, he was entitled to the possession of that chose in action, as he would be if it consisted of some tangible property which he might physically take into his possession. The District Judge said:

"In so far as a chose in action or an intangible asset is in the possession of the receiver in the same sense in which a tangible asset would be in his possession, this court will hold that a claimant thereto might proceed to litigate with the receiver the right to possession or to the proceeds when obtained and that this litigation would be within the jurisdiction of this court as ancillary and incident to the jurisdiction under the original decree."

The converse of this is also true, so that with a chose in action outstanding it will be deemed in the possession of the receiver in the same sense as a tangible asset would be.

We see no reason why the District Court should lack jurisdiction to maintain an action of this character as ancillary to the original suit, if the court had the jurisdiction (as it is conceded to have) to maintain an action if it were founded in breach of contract. We therefore conclude that the suit is ancillary to the original suit and that the court had jurisdiction of the subject-matter of this action.

Concluding thus, it will be needless to examine into the plaintiff's claim that the court, in sustaining the defendant's demurrer, erroneously took into consideration matters other than the contents of the file papers, and which is made the subject of the first assignment of error. The suggestion in the plaintiff's brief that the demurrer interposed is frivolous, and that the defendant should be denied the right to plead in the event that this court should hold that the demurrer was not well founded, of course, must not prevail. The city should have the usual opportunity to file its answer to the complaint, and a trial be had upon the merits of the issues thus raised by such pleadings.

Judgment will therefore be reversed.

HOYER v. CENTRAL R. CO. OF NEW JERSEY.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 103.

1. RAILROADS ⟸355(1)—TRESPASSERS ON TRACK—LIABILITY FOR INJURY.
Railroad tracks, except at public crossings or on highways, are the exclusive property of the railroad company, and persons who go upon such tracks without permission are trespassers.

2. RAILROADS ⟸355(5)—PERSONS ON TRACK—EMPLOYÉS IN COURSE OF DUTY.
Persons in contractual relations with a railroad company whose work requires them to go on the tracks while so employed are not bare licensees.

3. RAILROADS ⟸358(1)—PERSONS ON TRACK—"LICENSEE."
A "licensee" on a railroad's premises is a person who, being neither a passenger, servant, nor trespasser, nor standing in any contractual relation to the company, is expressly or impliedly permitted by the railroad company to come on its premises for his own convenience or gratification.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Licensee.]

4. MASTER AND SERVANT ⟸88(7)—INJURY TO EMPLOYÉ ON TRACK—NEGLIGENCE.
A railroad company *held* not chargeable with negligence for killing of a brakeman employed in its switchyards who, after quitting work at night after dark, instead of leaving the yard at a nearby street, walked down a dead track terminating at a bumper, and when a mile distant was struck by a switch engine on its customary trip to the bumper to change crews; it being shown that the engineer stopped his engine as quickly as possible after decedent was seen, that there was a safe walk beside the track, and it not appearing that the company had knowledge that the track was used as a walk.

5. RAILROADS ⟸359(1)—DUTY TOWARD PERSONS ON TRACK—TRESPASSERS.
The general rule is that a railroad company is under no duty to exercise active vigilance to provide against injury to a trespasser on its tracks until his presence is known, when it is bound to exercise reasonable care to avoid injuring him.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Julius H. Hoyer, administrator of Henry Hoyer, deceased, against the Central Railroad Company of New Jersey. Judgment for defendant, and plaintiff brings error. Affirmed.

The action is brought under the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657–8665), which act gives a cause of action for damages to the personal representative of a person employed by a common carrier in interstate commerce whose death is due to an accident while he is so employed.

The decedent was killed on defendant's tracks on October 19, 1916.

The action is for the benefit of the surviving widow, children, or next of kin or dependents of such employé.

The statute authorizes the action to be brought in a court of the United States in the district in which the defendant shall be doing business at the time of the commencement of the action.

The plaintiff asks for judgment in the sum of $50,000.

The court at the close of the case directed the jury to return a verdict for defendant.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

John C. Oldmixen, of New York City, for plaintiff in error.

De Forest Bros., of New York City (Robert Thorne, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The negligence alleged in the complaint is that the defendant at the time this accident occurred was moving this train on the track without any signal or warning to persons that might be on the track and without adequate lights.

The decedent was a brakeman employed by defendant in its switching yards in Newark, N. J., and had been so employed for three years. It is conceded that the last work he was engaged in was the handling of cars containing freight going out of the state of New Jersey. He had been working with a drill crew in the freightyards that had handled interstate freight. He had completed his work for the day at 6 o'clock in the afternoon, and was on his way out of the freightyard, and supposedly on his way home, walking on the dead track when he was run over and killed by one of defendant's engines at about 6:30 p. m. He was walking with his back to the engine, and the engine was not sounding a whistle or ringing its bell and was running about eight miles an hour.

It appears that, in order to get out of the yard in which he had been at work, the deceased had only to walk about a block, when he would have reached a public street, where he might have taken a trolley car or proceeded on foot to his home. But he chose to pursue a different course and walked on the dead track, the point of the accident being about a mile from where he had been working. There were two live or high speed tracks adjoining the track upon which the deceased met his death, and these two tracks ran parallel to the dead track. While this was called a "dead" track, this did not mean a track not in use, but merely a track having a switch to other tracks at one end only, and a bumper at the other end. The track was in more or less use for switching purposes, and every night shortly after 6 o'clock it was the custom for the drill crew to run down on the drill engine to the bumper end of this track where the day crew was relieved and the night crew went on duty and took the engine back over the same track and into the yards to carry on the drilling and switching of cars through the night. The defendant was run down by an engine on one of its regular trips.

There was a path at one side, and entirely away from the track, which was a level concrete surface about two feet wide and along the top of a retaining wall which made a space of some five feet in width. And there is some testimony showing that there was a cinder path about two feet wide which ran by the side of the track and which was sometimes used to some extent in the mornings by employés engaged in the factories in that neighborhood.

The night of the accident was dark and is described as "a black, drizzly, rainy night," and "you couldn't see your hand before you hardly." Three of the switching crew were standing on the running

board in front of the engine. They had their lanterns which were lighted. The engineer was in his cab running his engine and looking ahead. The fireman was in the cab on his own side and looking out on the track. The light on the engine was lit but was the standard light with which a drill engine is regularly equipped. It was not intended to and did not reflect the light along the track ahead of the engine so as to disclose objects on the track. The tracks at the place of the accident were straight.

Two of the men on the running board discovered the deceased at the same time, and both shouted a warning, and one of the men swung his lantern as a signal. The deceased when first seen was about 15 feet ahead of the engine. Although the engineer was in the cab looking ahead, he had not seen him until he struck him. Neither had he seen his companion, who was walking beside him, but on the cinder track, and who was also killed. The engineer as soon as he heard the shouts and got the signal immediately applied the brakes and did everything he could to stop the engine and did in fact stop it within its own length. It was too late, as the deceased had been struck down, and his body was found cut in two, one half being inside and the other outside the track. And just as the engine struck him a passenger train passed on the adjacent track.

We have searched the record to see whether the defendant had reason to anticipate that at the time this accident occurred there might be persons walking on this so-called "dead" track. We find no evidence to support any such theory. There is no testimony showing that employés or the general public were in the habit of walking along this track in the evening, or that the railroad permitted or licensed people so to use it. The freight conductor who testified to this said that every morning he would see from two to six persons walking up and down that path, but that he had only seen them in the mornings and that he had never seen them doing it in the evenings.

[1-3] It is the law that railroad tracks, except at public crossings or on highways and streets, are the exclusive property of the railroad company. Persons who go upon such tracks, except at such places without the permission of the company expressed or implied, are trespassers, and, subject to certain qualifications, are there at their own risk. Persons who go upon the tracks by reason of contractual relations with the company are not trespassers. Persons in such contractual relations whose work requires them to go on the tracks are while so employed not bare licensees. Holmes v. North Eastern R. Co., L. R. 6 Exch. 123; Froehlich v. Interborough Rapid Transit Co., 120 App. Div. 474, 104 N. Y. Supp. 910; Conlan v. New York Central, etc., R. R. Co., 74 Hun, 115, 26 N. Y. Supp. 659, affirmed, 148 N. Y. 748, 43 N. E. 986; Watts v. Richmond, etc., R. Co., 89 Ga. 277, 15 S. E. 365; Turner v. Boston, etc., R. Co., 158 Mass. 261, 33 N. E. 520. A "licensee" on a railroad's premises is said to be a person who being neither a passenger, servant, nor trespasser, nor standing in any contractual relation to the company, is expressly or impliedly permitted by the railroad company to come on its premises for his own convenience or gratification. See 33 Cyc. 756.

[4] In this case the decedent, it is true, was a servant of the company. His labors for the day, however, were concluded, and his duties did not require him to be on the track at the time of the accident. He might have walked a block from where his work stopped and made his exit from the yards, instead of walking a mile in the direction he chose to pursue. He might have walked between the dead track and the live track at the right, there being a distance of ten feet between the two tracks. He might have walked on the cinder path to the left and would have been safe if he kept far enough away from the rails. And he might have walked on the path along the retaining wall. But he chose to walk on the track itself. He was not there by the express or the implied invitation of the company. The evidence does not show that he was even a licensee. He was a trespasser upon the tracks and was not taking ordinary care for his own protection. It was a dangerous place, and the danger was enhanced by the character of the night and of the storm.

[5] The general rule is that a railroad company is under no duty to exercise active vigilance to provide against injury to a trespasser on its tracks until his presence is known. Sheehan v. St. Paul, etc., R. Co., 76 Fed. 201, 22 C. C. A. 121; Cleveland, etc., R. Co. v. Tartt, 99 Fed. 369, 39 C. C. A. 568, 49 L. R. A. 98; McCreary & Boston, etc., R. Co., 156 Mass. 316, 31 N. E. 126; Nolan v. New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106; James v. Illinois Central R. Co., 195 Ill. 327, 63 N. E. 153. It is bound only to abstain from wanton, reckless, or willful injury. Grand Trunk R. Co. v. Flagg, 156 Fed. 359, 84 C. C. A. 263. Its duty is to exercise reasonable care to avoid injuring him after discovering his peril. Texas, etc., R. Co. v. Modawell, 151 Fed. 421, 80 C. C. A. 651, 9 L. R. A. (N. S.) 646; Tutt v. Illinois Central R. Co., 104 Fed. 741, 44 C. C. A. 320.

The injury which resulted in the decedent's death was not inflicted wantonly, recklessly, or willfully. After discovering his presence on the track, the defendant did everything in its power to avoid his death. There is no evidence in the record that the defendant knew that any class of persons were accustomed to walk on the track at the hour when this accident happened or at any other hour, although there is some evidence that in the mornings there were some trespassers on the cinder path along the tracks. But walking on the cinder path in the morning and walking on the track at night after dark are widely different transactions. And if persons were in fact licensed to walk upon the path that gave them no right to walk on the track. So far as walking upon the cinder path is concerned, it would seem that those who do so are trespassers. In Shearman & Redfield on Negligence (6th Ed.) vol. 2, p. 1227, it is said that—

"Mere failure to prevent trespasses continually occurring at a particular place has sometimes been construed into acquiescence in such use by the company and as converting a trespasser into a licensee. Such, however, is not the rule sanctioned by reason or weight of authority."

It is said that the deceased was at the time of his death engaged in interstate commerce although he had stopped work and was on his way home. The Supreme Court has held that leaving the carrier's

yard after his day's work in interstate commerce is a necessary incident of the work and partakes of its character; that a workman in so doing is but discharging a duty of his employment and is still engaged in interstate commerce. Erie R. R. Co. v. Winfield, 244 U. S. 170, 173, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662 (1917). See, too, North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 260, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. We need not inquire whether a person who does not take a short and safe and direct route out of the yards, but elects to pursue instead a course which leads him a mile further away from the point where he might have left the yards and reached his home, can be said still to be engaged in interstate commerce; for upon the facts in this record it is not material whether the defendant was engaged in interstate commerce or not. The Employers' Liability Act does not make a common carrier by railroad engaged in interstate commerce an insurer of its employés. The liability it imposes is for injury or death resulting in whole or in part from its negligence. And in this case the evidence shows, as we have seen, no negligence on the part of the defendant.

Judgment affirmed.

MOORE v. MOORE.

(Circuit Court of Appeals, Third Circuit. January 30, 1919.)

No. 2375.

1. CONTRACTS ⟸93(4)—MISTAKE.
   A promise, where there is no legal obligation, and made, whether through ignorance of rights or misconception of the law, to avoid something that cannot happen, is without consideration and invalid.
2. HUSBAND AND WIFE ⟸278(2)—CONTRACT CONDITIONED ON DIVORCE.
   While a contract by a husband, separated from his wife, for her support during such separation, is lawful, one made during separation, and pending suit by the wife for divorce, by which the husband binds himself and estate to pay her a stipulated sum per week during life, conditioned upon the granting of the divorce, is contrary to public policy and void.

In Error to the District Court for the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Lucile W. Moore against Alexander P. Moore. Judgment for defendant, and plaintiff brings error. Affirmed.

Arthur O. Fording and Richard Townsend, both of Pittsburgh, Pa., for plaintiff in error.

John O. Wicks and John S. Weller, both of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This action is in assumpsit. The contract declared on was made by the parties in their relation of husband and wife. It was entered into when they were living separate and apart and bears date the day following the institution of proceed-

ings by the wife for divorce from her husband. The contract is under seal, recites the marriage and pendency of divorce proceedings, and contains two undertakings on the part of the husband. The first is, that the husband shall pay his wife "for counsel fees, expenses and alimony, pendente lite, the sum of seventy-five ($75) dollars a week" from the date of the contract "until the date of the final determination of said divorce proceedings." The second is, "That should the said divorce proceedings be decided in favor of the said wife, and a decree of divorce a vinculo matrimonii be granted by the said court in said case, the said Alexander P. Moore, his heirs, executors and administrators" shall pay to his said wife "from the date of the said decree, for and during the term of her natural life, the sum of seventy-five ($75) dollars a week," and "that said court shall fix and determine the support or alimony to be seventy-five ($75) dollars a week, payable weekly as aforesaid, and make the same a part of its decree."

A divorce a vinculo matrimonii was granted. In formulating the decree, the contract for support of the wife after divorce was not submitted to the court, but the court, nevertheless, incorporated its substance in a decree for alimony. After obeying the decree for five years, the husband ceased making payments, contending that the decree, in so far as it imposed alimony, was beyond the court's jurisdiction.

In a proceeding of attachment, instituted by the wife to enforce the decree for alimony, the Court of Common Pleas No. 4 of Allegheny County—the court that entered the decree—dismissed the proceeding with a frank admission that the decree for alimony was inadvertently entered and was in excess of its jurisdiction. Appeal was taken to the Superior Court of the State of Pennsylvania—the appropriate appellate tribunal of last resort—where the order of the Court of Common Pleas discharging the rule for attachment was affirmed on an opinion holding that under the Constitution and statutes of that state, which had not changed the common law rule except where the husband is libelant, alimony cannot be awarded upon a divorce a vinculo matrimonii. Moore v. Moore, 64 Pa. Super. Ct. 192.

The divorced wife then abandoned her claim for alimony under the decree and brought in the court below this action for support under the contract between her husband and herself.

The defendant, by affidavit of defence—a proceeding in Pennsylvania under the Practice Act of 1915, P. L. 483, similar to the common law proceeding by demurrer—raised the question of law, whether the contract is on its face and on the plaintiff's showing of facts invalid because contra bonos mores.

On this question, the District Court sustained the defendant and entered judgment accordingly. The plaintiff sued out this writ-of-error, asserting here, as below, the validity of the contract.

The plaintiff has relieved us of the necessity of discussing at length the general principles of law that bear on the question before us by conceding, "that an agreement which looks to a possible or intended future separation, or which might encourage such, is void; and that

a contract whose consideration is the obtaining of a divorce is contra bonos mores, and void;" and that "a contract though expressing another consideration, should be void if its true purpose is to procure a divorce, or if its tendency is to cause a divorce to be obtained."

To escape the application of these universally admitted principles to the contract sued on, the plaintiff takes two positions. Of these the first, in the language of her counsel, is, that "no one has brought upon the record the fact that the Common Pleas granted the divorce." If this fact be excluded from the case, the suit ends here. But there are phases of the case of such serious import that we are not inclined to dispose of it summarily on this position.

In passing on the plaintiff's contention that the fact of divorce is not in the record and therefore is not to be regarded as in the case, it may be sufficient to emphasize by repetition that the contract contains two undertakings by the defendant; first, to pay his wife a given sum for expenses and alimony pendente lite, and second, to pay her a like sum for "support or alimony" *after a decree of divorce has been granted.* The plaintiff's statement of claim does not show on which undertaking this action was brought. Manifestly it cannot at this date be brought on both. If brought on the first, that is, on the undertaking for alimony pendente lite, she cannot recover for her husband's default in paying for her support at a time five years after the litigation had ended; if on the second, that is, on the undertaking for "support or alimony" after divorce has been granted, she cannot recover unless the fact that a decree for divorce has been granted—the condition precedent on which her right of action is predicated—is averred in her statement of claim and proved or is otherwise established.

Although the plaintiff has failed to plead this essential fact, we are not inclined to dispose of her case on this ground, for we prefer—as her counsel probably expected—to take judicial notice of the fact of divorce as established by public records and shown by published reports. In the discussion that is to follow, we shall consider that the divorce contemplated in the contract has been granted and that the event on which the husband's undertaking was based, has occurred.

The second position which the plaintiff assumes in order to take the case from under the law applicable to a contract between husband and wife having a tendency to aid or facilitate the granting of divorce is, that husband and wife may contract while married with reference to and in recognition of a present separation, and that such a contract is valid and effectual, both in law and equity, provided its object be actual and immediate, and not contingent or prospective. In urging this as the applicable law of the case, the plaintiff maintains, that the contract in suit, when entered into, had to do with an actual separation between the wife and husband then existing, and extended to the support of the wife during that separation as it continued in the future, as distinguished from a contract for support conditioned upon and following a decree for divorce.

We do not question this statement of the law; we question, rather, its application to the contract in this case and to the circumstances under which the contract was made. It is well settled both in Eng-

land and in the United States—and particularly in Pennsylvania—that an agreement of separation between husband and wife, made after separation has taken place, whereby the husband provides for the wife's separate maintenance during the continuance of such separation is lawful, and is not in contravention of public policy. Wilson v. Wilson, 1 H. L. Cas. 538; Hunt v. Hunt, 5 Law T. Rep. 778; Daniels v. Benedict, 97 Fed. 367, 372, 38 C. C. A. 592 (C. C. A. 8th); 6 R. C. L. 771, and cases; Hutton v. Hutton's Adm'r, 3 Pa. 100; Speidel's Appeal, 107 Pa. 18; Frank's Estate, 195 Pa. 26, 33, 45 Atl. 489; Singer's Estate, 233 Pa. 55, 81 Atl. 898; Murh's Estate, 59 Pa. Super. Ct. 398. But the contract here under discussion, while entered into at a time when there was a separation between husband and wife presently existing, was made not with reference to that separation as it then existed, but with reference to a contemplated future separation yet to arise out of and to follow an anticipated future event, which was the entry of a decree for divorce. This was another separation, and a separation of another kind. This fact, we think, carries the case away from the principles of law applicable to a contract for a wife's maintenance during a present separation, and takes it back to the very principles of law applicable to a contract for future separation which the plaintiff conceded but endeavored to avoid at the threshold of the argument. Thus, there is raised a question with two aspects, first whether the contract in suit was based on an immoral consideration, and if not, whether its true purpose or its tendency was to induce the future separation to which it relates by stimulating the wife in the prosecution of her suit for divorce in a manner and measure opposed to sound principles and public policy.

[1] Does the contract contain a valid consideration? The contract is unilateral. It contains two promises by the husband and none by the wife. Admittedly, no express consideration moved from the wife to the husband. The only consideration for the husband's promise named in the contract is the husband's relief from annoyance in having "his financial condition, and the value of his business, and his business interest, * * * made the subject of judicial investigation" and disclosed to the public by the court in determining alimony, which both parties, we must assume, mistakenly thought would be imposed by the decree of divorce. As there rested on the husband no legal obligation for his wife's support after divorce of the character contemplated in the agreement, and, as, accordingly, no decree for alimony could validly be entered against him, Moore v. Moore, 64 Pa. Super. Ct. 192, it follows that no inquiry by the court into the husband's affairs to determine the amount of alimony could validly be made. A promise made where there is no legal obligation, and made, whether through ignorance of rights or misconception of the law, to avoid something that cannot happen, lacks valid consideration, and is not binding. Logan v. Mathews, 6 Pa. 417; Offutt v. Parrott, 1 Cranch, C. C. 154, 18 Fed. Cas. 606, No. 10,453; Maull v. Vaughn, 45 Ala. 134; Grimes v. Grimes, 89 S. W. 548, 28 Ky. Law Rep. 549.

It would appear, therefore, that the contract is void for want of consideration. But opposed to this view, the plaintiff cites and con-

fidently relies upon the case of Blaker v. Cooper, 7 Serg. & R. (Pa.) 500, where the court sustained a contract made between husband and wife while separated, providing for the wife's support for her natural life. Subsequently the parties were divorced—at whose instance it does not appear—and the wife remarried. The husband stopped payments and the wife sued on the bond accompanying the contract. The report of the case shows very clearly that the husband, who was a man of landed property, made his promise of support on a valid consideration—the wife's release of dower—and not on a misconception of the law as to his obligation to support his wife after divorce. The point was made that the contract provided for alimony, and, that, as under the Pennsylvania law the husband was not liable for alimony after divorce a vinculo matrimonii, the contract expired with the granting of divorce. The court decided otherwise. The case cited does not rule this case, because there a valid consideration for the husband's promise was found, while here no such valid consideration appears, and also in that case the promise, not being made in contemplation of divorce and for the wife's support during the separation that would follow, was not contra bonos mores, while here the promise, if not literally given in consideration of divorce, its performance was conditioned on divorce, and raises the question of public policy.

[2] If nothing more were in the case than the question of the validity of the consideration just discussed, we would hold that the judgment of the court below should be affirmed. But we prefer, rather, to decide the case on another ground, which extends beyond the immediate interests of the parties and relates to considerations of good morals and public policy.

The question whether the contract is against public policy must be determined by its purpose and tendency. 6 R. C. L. 707. Admitting this, the plaintiff maintains, that the purpose and tendency of the contract are questions for the jury, and, that, accordingly, the trial judge erred in deciding them himself. But, where the facts are conceded, or are not in dispute, as on demurrer or on affidavit of defense under the Pennsylvania practice, or where the question does not depend upon the circumstances under which the contract was entered into, the question whether a particular contract contravenes public policy is to be determined by the court, not by the jury. 6 R. C. L. 710. The contract being before the court on pleadings that show all the facts, the question whether a contract which contemplates a future separation has a tendency to induce such separation in a manner that contravenes public policy is one of interpretation by the court. 6 R. C. L. 771, and cases.

It cannot be denied that the contract in this case contemplates separation in the future, that is, a separation that will follow future divorce. It looks to, not merely a possible, but an intended separation. The husband's promise is enforceable, if at all, only after a divorce a vinculo matrimonii has been granted; therefore, his promise is conditioned on that event. Has the promise a tendency to induce that event? The promise was not made to cover merely a real or fancied obligation. A promise to discharge such an obligation,

even if otherwise valid would be void if its tendency was to induce an unlawful thing. But the promise was for something more than for support of the divorced wife during the period of the husband's life—an obligation which the laws of some states would impose upon him. He undertook to support her for her life, and to do this, he bound "his heirs, executors, and administrators" to continue payments for her support after his death. By this promise, the wife was shown, that if she succeeded in getting a divorce, she would receive more than the law would award her, even if the law were as she thought it. This was a substantial inducement to her to prosecute her divorce proceeding to the decree on which alone she could reap the promised reward. Manifestly, the tendency of the husband's promise as it affected the wife was to encourage her to prosecute the suit to a successful termination, or, at the very least, to deter her from abandoning it. Such an undertaking savors of collusion, a thing the divorce laws of Pennsylvania very vigorously denounce. The husband had some reason for making the promise other than a sense of legal obligation to support his wife after divorce. He doubtless expected some benefit in return for the detriment he would suffer and his estate would sustain by payments to be made by him and his executor through an unknown period of years. It must be believed that there is hidden in the contract some consideration, other than the one we have already disposed of, which inspired him voluntarily to enter into an obligation of such substantial character. The promise of the husband to do what the law did not require of him and to do it in a measure even beyond his own misconception of the law's requirements, suggests the real consideration that moved him to his promise. If, because of the silence of the contract and the absence of evidence aliunde, we cannot hold that the consideration of the husband's promise was the obtaining of the divorce which his wife was seeking, we find that the promise shows a willingness on his part, if nothing more, to promote and pay for the event which the wife alone could bring about. A contract to do such a thing tends inevitably to encourage the beneficiary to perform the condition on which alone she can receive its benefits.

The marital relation is regarded by the law as the basis of the social organization. The preservation of that relation is deemed essential to public welfare. Agreements between parties that are conditioned on divorce, Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, or that tend to destroy that relation by encouraging or facilitating the procuring of divorce, are against good morals and will not be enforced. The maxim, "Ex turpi contractu non oritur actio," founded as it is on sound morals, has been long recognized by the courts in the administration of justice. The contract in suit, as we interpret it, is very different from contracts sustained by courts in some states where the husband's obligation to support his wife continues after divorce and is provided for by alimony, and where such agreements are regarded by the courts as a satisfactory short cut to aid them in framing decrees. Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 N. Y. Supp. 1065, 1070; Werner v. Wer-

ner, 153 App. Div. 719, 138 N. Y. Supp. 633; Doeme v. Doeme, 96 App. Div. 284, 89 N. Y. Supp. 215, 218; Nelson v. Vassenden, 115 Minn. 1, 4, 131 N. W. 794, 35 L. R. A. (N. S.) 1167; Ham v. Twombly, 181 Mass. 170, 173, 174, 63 N. E. 336. Even in cases in these states, contracts for support in the nature of agreed alimony are not sustained if they disclose a tendency to encourage divorce. Werner v. Werner, 153 App. Div. 719, 138 N. Y. Supp. 633; Maisch v. Maisch, 87 Conn. 377, 383, 87 Atl. 729; Gibbons v. Gibbons (Ky.) 54 S. W. 710, 711.

We regard the contract in suit void as tending to aid and facilitate the obtaining of a divorce by encouraging the wife vigorously to prosecute her action, and that, being void, because opposed to public policy, the contract cannot be rendered valid either by the presence of an otherwise lawful consideration or by the mere ceremony of attaching a seal to it. Gaslight & Coke Co. v. Turner, 5 B. N. C. 675; Standard Lumber Co. v. Butler Ice Co. (C. C. A. 3d) 146 Fed. 359, 76 C. C. A. 639, 7 L. R. A. (N. S.) 467.

The judgment below is affirmed.

WOLFE et al. v. BARATARIA LAND CO.

(Circuit Court of Appeals, Eighth Circuit. January 8, 1919.)

No. 4966.

COVENANTS ⊂=121(3)—JUDGMENT AGAINST COVENANTEE—EFFECT.

To hold a warrantor in a deed bound by the result of a suit involving the matter upon which his obligation rests, it is not necessary that he be a formal party to the record, but it is sufficient if he has information of the suit and an invitation and opportunity to participate in it.

Wade, District Judge, dissenting in part.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action at law by the Barataria Land Company against John D. Wolfe and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

F. F. Dawley, of Cedar Rapids, Iowa (Dawley & Jordan, of Cedar Rapids, Iowa, and C. W. Kepler & Son, of Mt. Vernon, Iowa, on the brief), for plaintiffs in error.

J. H. Trewin, of Cedar Rapids, Iowa (John M. Redmond and John D. Stewart, both of Cedar Rapids, Iowa, on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. The Barataria Land Company sued the Wolfes in the United States District Court for the Northern District of Iowa to recover a part of the purchase price paid them for a tract of land in Louisiana, which they sold and conveyed to it with cove-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

nants of seizin and warranty. The price paid was an agreed sum per acre, and the action was brought because of a shortage in the area, afterwards ascertained.

To show the extent of the shortage the plaintiff introduced in evidence the record of a decree of a court of Louisiana in a suit between it and an adjoining landowner to settle a controversy over their boundary line. The line established by the decree lessened the area conveyed and warranted to the plaintiff. Upon proof that the defendants Wolfe were informed of the pendency of the Louisiana suit, and were invited to aid plaintiff in the trial of it, the court instructed the jury that the decree was conclusive of the true boundary line, leaving them only to compute their award upon the shortage disclosed and the price paid per acre. Accordingly there was a verdict and judgment for the plaintiff, and defendants prosecuted this writ of error. The question is of the correctness of the court's instruction.

A statute of Louisiana provides for suits to settle controversies over boundary lines. Such a suit does not depend upon adverse possession by a defendant as in actions in ejectment, but upon the existence of a controversy over the true boundary between adjoining owners, and it is not material which of the disputants commences it. The remedy provided by the statute makes for good order, and in effect, if not in form, may in a sense result in the judicial establishment of title. The plaintiff here was also the plaintiff in Louisiana, but there is no sound reason in that circumstance why those beholden to it may not be concluded by the decree as much as if it had been a defendant in ejectment and had suffered eviction. The controversy was a justiciable one, affecting plaintiff's right to land embraced in the description in defendants' deed. It is not denied that there was a real controversy between the plaintiff and the adjoining owner over the boundary line, and no fraud or collusion appears. The judicial determination of it must necessarily have been in Louisiana.

To hold a warrantor, indemnitor, or person in a similar relation, bound by the result of a suit involving the matter upon which his obligation to another rests, it is not necessary that he be a formal party to the record. The strict principles of res adjudicata do not apply. His privity or relation to the record party precedes the judgment, and it is sufficient if he has information of the suit and an invitation and seasonable opportunity to aid or participate in the conduct of it. Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298; Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427. In that case the city sued Robbins to recover the amount of a judgment it was compelled to pay to one Woodbury for injuries caused by his falling into an excavation in a public street which Robbins made and negligently left unguarded. Robbins had been informed of the Woodbury suit against the city and of the approaching trial, and was requested by the city to aid it in procuring testimony. He was not formally notified to defend, nor that he would be held responsible for the result. The Supreme Court held that such a notice was not necessary. That case was founded on a tort, but the principle applies as strongly where the duty to indemnify or hold harmless arises from contract. There is a diversity of views in the state courts as to the

notice that should be given the indemnitor or warrantor. Some require an express notice or request to participate as a party to the cause, and a declaration of the consequences if it is ignored; but the modern trend is towards a relaxation of that strictness. The better rule is that of Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360, as follows:

"No particular form of words is necessary in order to constitute notice in such cases, nor is it even necessary to give a written notice. It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim, and that the action is pending with full opportunity to defend or to participate in the defense. If he then neglects or refuses to make any defense he may have, the judgment will bind him in the same way and to the same extent as if he had been made a party to the record."

But, however this may be, the rule of Robbins v. Chicago prevails in federal jurisdictions. There is nothing inconsistent with it in Kapiolani Estate v. Atcherly, 238 U. S. 119, 35 Sup. Ct. 832, 59 L. Ed. 1229, Ann. Cas. 1916E, 142.

The defendants knew of the controversy over the boundary line several years before the Louisiana decree was rendered. They afterwards learned of the pendency of the suit there; they had a copy of the petition in the case, and made surveys on their own account, all in ample time for their affirmative aid and participation in the litigation. About four months before the decree was rendered they were requested by plaintiff to furnish any evidence they had for use at the trial, and to make suggestions about the establishment of the true boundary line. They replied in substance that if plaintiff would dismiss the present action, which had been brought and was then pending in Iowa, "and waive its claims for damages by reason of alleged shortage," one of the defendants would go to Louisiana and testify and furnish what information he could; otherwise not. This correspondence was conducted between counsel of the parties to this suit, but one of the defendants saw the plaintiff's letter. They made no claim of any lack of complete information, or of insufficiency in time or character of the notice and request. Their position, quite untenable, was that, if plaintiff did not dismiss the present action and waive its claim for damages, they would not disclose the evidence they had prepared for their own defense. Manifestly the defendants had information of the suit in Louisiana, and an invitation and an opportunity to aid or participate in its conduct sufficient to bind them to the result.

We have so far considered the case upon the assumption that the Louisiana decree was final. Defendants urge that it was not. It is doubtful that this point was made at the trial definitely enough to attract the attention of the court, but in an amendment to its petition in this cause, setting up the decree, the plaintiff averred that the defendant in that suit had the right of appeal, and that an appeal and reversal might occur. True, this was done in an attempt by plaintiff to reserve the right to increase its claim for damages; but the averment cannot be ignored, and it must be considered in connection with an entire absence in the record before us of anything indicating a finality of the Louisiana decree. We cannot say that an appeal was not

taken, or that, if taken, it would not materially and substantially change the rights of the parties to that suit, as well as the rights of defendants here. For this reason the judgment must be reversed and a new trial awarded, but nothing we have said shall be taken to affect the discretion of the trial court to hold the case until the appeal, if one was taken, results in a final decree.

The judgment is reversed, and the cause is remanded for a new trial.

WADE, District Judge (concurring in part and dissenting in part). I concur in the reversal of this case upon the ground that the Louisiana decree was not at the time of the trial final; but I cannot agree with the majority of the court in holding that the decree in the Louisiana case (if final) concludes the defendants (herein referred to as the Wolfes). The right of every man to his "day in court" is so important that it should be carefully guarded.

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination." Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Old Wayne Mutual Association v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345.

Cases cited in majority opinion have gone far toward depriving parties of this right, and this case in my judgment goes a step further than any of the courts have yet ventured. The plaintiff (herein referred to as the Land Company) had already instituted this suit in the Northern district of Iowa before it commenced the proceedings in Louisiana. It was not evicted, and no suit was instituted against it in Louisiana. It elected to commence the boundary line case hundreds of miles away from the residence of the defendants, and in a jurisdiction where they should not be called upon to litigate—especially when there was a suit pending against them in the proper jurisdiction involving the same issues.

The Land Company certainly had a right to elect whether the suit in Louisiana should be such as to become binding upon its grantors. The majority opinion states that it is sufficient if the party sought to be held "has information of the suit, and an invitation and seasonable opportunity to aid or participate in the conduct" of the case. With this I agree, provided it means that the party has full opportunity to appear and try the case in his own way, make his own issues, introduce testimony, and cross-examine witnesses. Less than this does not give him his "day in court."

In this case I cannot agree that the Wolfes had any "invitation" to take part in the trial. I think, under all the facts, such invitation is distinctly negatived. I am satisfied that the Land Company had no purpose or intention of binding the Wolfes by the decree in the Louisiana case. I am convinced that the claim of an adjudication was an afterthought.

This case was commenced in June, 1915, the suit in Louisiana was instituted in October, 1915, and not until January 25, 1916, six days

before the case was assigned for trial, did the Land Company advise the Wolfes of the pendency of the suit, and this was by a letter which could not reach counsel for Wolfes before January 26th. That it was not an invitation to have their "day in court" in the Louisiana case is indicated by the following language in the letter:

"Kindly give this matter your prompt attention, as the boundary line suit is set for trial, as we understand it, on January 31, 1916."

"Kindly use the telegraph, if necessary, at our client's expense, citing records and giving names of witnesses, with their addresses," etc.

It was easy for the Land Company to have plainly demanded, or at least invited, the Wolfes to appear in the case; instead it is said:

"We respectfully request that they [the Wolfes] furnish to the Barataria Land Company any and all information they have which will aid the Barataria Land Company in determining and settling the boundary of the lands purchased by the Barataria Land Company from your clients in a proper way. If your clients have any information which will tend to establish the boundary in accordance with the description in the deeds, our clients, the Barataria Land Company, will be more than pleased to have you furnish it, and will be glad to consider any suggestions you may have in reference to establishing the true boundary lines of the land purchased by the Barataria Land Company from Messrs. Wolfe and others."

The whole letter is plainly a request that the Wolfes furnish to the Barataria Land Company information which they may have acquired in preparing their defense in the Iowa case, and it is to me just as plainly a notice to the Wolfes that the Land Company is going to conduct the case itself.

That it was so understood by counsel for the Wolfes is shown by their answer to the letter, and that the Land Company so understood it is plain from the fact that, while the decree was rendered in the boundary line case in May, 1916, and there was an amendment filed to the petition in this case on June 20th—practically a month after the decree was rendered, in which the Louisiana suit is referred to, no suggestion was made that the Wolfes were bound by the adjudication. It was not until October 3, 1916—the day before the trial of this case was commenced—that any pleading was filed setting forth the claim that the letter was sent, and that the adjudication was binding.

I do not believe that a person can be bound in such a case, except where he, as a reasonably prudent man, is justified in believing that the other party expects him to make defense, and contemplates that the adjudication shall be binding upon him. I assume that, if the Land Company had distinctly stated, "We will be glad to have any evidence you can furnish, but we do not expect you to take any part in the trial," no one would contend that the Wolfes would be bound by the decree. To my mind, this was in effect, under all the circumstances, just what was conveyed to the Wolfes.

I think there is a marked distinction between a case where the vendee of land is made a defendant in a suit which seeks to evict him from some of the land purchased, and one in which the vendee commences the suit. In the suit by the vendee, he has control of the litigation; he can elect whether to make his vendor a party or not; he can make his own issues, and in such case I do not believe that his

vendor is bound by the decree, unless the vendee, in clear and unmistakable language, notifies or invites the vendor to join with him in the trial. If his conduct is such (as in this case) as to make the vendor, as a reasonably prudent man, believe that he is not expected to join in the case, he should be estopped from relying upon the decree rendered.

INTERSTATE COMPRESS CO. v. AGNEW.*

(Circuit Court of Appeals, Eighth Circuit. January 15, 1919.)

No. 5012.

1. BAILMENT ⊂=14(1)—BAILEE FOR HIRE—MEASURE OF LIABILITY.
A bailee for hire is only bound to use ordinary diligence in the care of the property bailed, and in the absence of a statute prohibiting it, may limit his liability by contract, except for gross negligence, willful act, or fraud.

2. COURTS ⊂=372(4)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.
A decision by the highest court of a state, not based on any statute, that a contract is void as against the public policy of the state, is not binding on a federal court in a case involving a similar contract, made before such decision was rendered, and where the contract is valid under the settled law of the national courts.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by J. W. Agnew against the Interstate Compress Company. Judgment for plaintiff, and defendant brings error. Reversed.

James R. Keaton, of Oklahoma City, Okl. (Frank Wells and David I. Johnston, both of Oklahoma City, Okl., on the brief), for plaintiff in error.

Everett Petry, of Tulsa, Okl., for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. The defendant in error, hereinafter referred to as the plaintiff, instituted this action against the plaintiff in error, hereinafter referred to as the Compress Company, to recover the value of 294 bales of cotton stored with the Compress Company, alleged to have been destroyed by fire by reason of the gross negligence of the Compress Company.

The answer admits the destruction of the cotton while stored in its compress, but denies all allegations of negligence. As a further defense it pleads that, when the cotton was delivered to it, it executed and delivered to the party delivering it a receipt which provided:

"Not responsible for loss by damage, fire, flood, or other agencies, unless caused by the willful act or gross negligence of this company"

—which receipt was accepted by the bailor, and that no part of the cotton was destroyed by its willful act or gross negligence. These receipts were issued and delivered in January, 1915. There was a trial

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied 256 Fed. 655, — C. C. A. —.

to a jury, and a verdict for the plaintiff. The Compress Company requested the court, among other special requests, to charge the jury:

"The court instructs the jury that the following provisions contained in each of the receipts issued by the defendant to the plaintiff, or his grantors, for each of the bales of cotton delivered by plaintiff to defendant, and in the latter's possession at the time of the fire, to wit: 'Not responsible for loss by damage, fire, flood, or other agencies, unless caused by the willful act or gross negligence of this company'—constitutes a part of the contract of bailment, and is a valid and binding provision thereof, and before plaintiff will be entitled to recover in this case he must show to your satisfaction by a preponderance of the evidence that defendant's agents or employés were guilty of some act or omission contributing to the destruction of plaintiff's cotton by the fire in question, which was willfully performed or omitted, or which amounts to gross negligence or fraud."

"You are instructed that the defendant in this case, in any event, was only bound to use ordinary care in providing a reasonably safe place for the storage of the cotton, and was bound only to take such precautions and adopt such safeguards as an ordinarily prudent person would adopt to protect his own property."

"The court instructs the jury that one who undertakes to care for or to provide custody for goods for hire has a legal right to limit his liability by special contract, so as to cover only such damage as may be caused by the willful or gross negligence of the party in caring for said property or providing storage therefor."

"The court instructs the jury that a custodian for hire, who has limited the liability thereunder to only such damages as may be caused by the willful or gross negligence of such person, can only be held liable for such damage as naturally resulted from the willful act of such person in caring for said property or for such damage as has resulted from the gross negligence of such person in taking care of said property while in his possession"

—all of which requests were by the court refused and proper exceptions saved.

The court in its charge instructed the jury on this issue:

"A proposition which may well be disposed of at the outset is that the provision in the tickets for this cotton against responsibility, unless caused by the willful act or gross negligence of the company is not valid, because contrary to the public policy of this state. The principle which applies in a case of this kind and which governs in this case is that the defendant, being a bailee for hire of plaintiff's cotton, would become answerable in damages to the plaintiff in case of the loss of the cotton, through its negligence proximately causing such loss, but not otherwise."

To this part of the charge a proper exception was saved by the Compress Company.

[1] The issues are therefore narrowed to the single proposition of law, whether the provision contained in the receipts and accepted by the plaintiff, that the Compress Company is not responsible for loss or damage by fire, flood, or other agencies, unless caused by the willful act or gross negligence of the defendant, is valid. In Clark v. United States, 95 U. S. 539, 542 (24 L. Ed. 518), it was held:

"A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law, on the subject."

It is equally well settled that a bailee, in the absence of a statute prohibiting it, may limit his liability by contract, except for gross negligence, willful act, or fraud. World's Columbian Exposition v. Re-

public of France, 96 Fed. 687, 694, 38 C. C. A. 483; Gashweiler v. Wabash, etc., R. R., 83 Mo. 112, 53 Am. Rep. 558; Butler v. Greene, 49 Neb. 280, 68 N. W. 496; Sanchez v. Blumberg (Tex. Civ. App.) 176 S. W. 904; Evans v. Nail, 1 Ga. App. 42, 57 S. E. 1020; Direct Nav. Co. v. Davidson, 32 Tex. Civ. App. 492, 74 S. W. 790; Memphis & Charleston R. R. Co. v. Jones, 39 Tenn. (2 Head) 517; 4 Elliott on Contracts, § 3002; 6 Corp. Juris, p. 1112. In the World's Columbian Exposition Case it was held:

"Is there good reason why the notice given by the Exposition Company to exhibitors, that it would 'in no way be responsible for damages or loss of any kind, * * * however originating,' should not be given full effect according to its terms? We perceive none."

[2] The learned trial judge considered himself concluded by the decision of the Supreme Court of Oklahoma in Inland Compress Co. v. Simmons, 159 Pac. 262, where the court said:

"The writers on bailments seem to agree that the parties to a bailment contract may regulate the responsibilities of the bailee by special contract."

But he further held that a contract by a compress company, identical with that in the instant case, "is against the public policy of the state and therefore void." This opinion was filed July 11, 1916. It will be noticed that the decision in that case is not based on any statute of the state, but on a general proposition of law, declaring for the first time in the judicial history of the state that such a contract is against the public policy of the state. The only statute of the state cited in the opinion is section 1109 of the Revised Statutes of 1910, which provides:

"A bailee for hire must use at least ordinary care for the preservation of the thing bailed"

—which is merely declaratory of the common law and the general law on the subject, as was held in Clark v. United States, supra. Is that decision, rendered long after the contract involved was made, conclusive on the national courts? When a ruling of the highest court of a state is controlling, when the same question arises in an action pending in a national court of that state, has been determined by the national Supreme Court so frequently, that it has ceased to be an open question. Like most important legal principles, it has been of gradual growth, until it has finally become a well-established rule of law. In Kuhn v. Fairmont Coal Co., 215 U. S. 349, 360, 30 Sup. Ct. 140, 143 (54 L. Ed. 228), the court, after a full review of the former rulings of that court on the subject, epitomizes the law as follows:

"We take it, then, that it is no longer to be questioned that the federal courts in determining cases before them are to be guided by the following rules: (1) When administering state laws and determining rights accruing under these laws, the jurisdiction of the federal court is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts. (2) Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state. (3) But where the law of the state has not been thus settled, it is not only the

right, but the duty, of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. (4) So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt."

Applying these rules, giving full weight to that part of the decision in the Kuhn Case that, "for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court, if the question is balanced with doubt," we are of the opinion that the law is well settled that the contract of bailment in the case at bar is valid, and not against public policy, so far as it affects contracts entered into prior to the decision in the Inland Compress Co. Case, and that the court erred in refusing to give the instructions hereinbefore set out, asked by the defendant, and charging the jury "that the limitation of liability in the warehouse receipts was invalid, because contrary to the public policy of the state."

The cause is reversed, with directions to grant a new trial and proceed in conformity with this opinion.

HAMILTON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 15, 1919.)

No. 5058.

1. PROSTITUTION ⊂⊃4—WHITE SLAVE TRAFFIC—EVIDENCE TO SUPPORT CONVICTION.
   Evidence *held* sufficient to sustain a conviction of defendant for violation of the White Slave Act (Comp. St. §§ 8812–8819).
2. CRIMINAL LAW ⊂⊃829(1)—TRIAL—REFUSAL OF INSTRUCTIONS.
   Refusal of requested instructions in a prosecution for violation of the White Slave Act (Comp. St. §§ 8812–8819) *held* not error, in view of the charge given.
3. CRIMINAL LAW ⊂⊃1032(5)—REVIEW—HARMLESS ERROR—DEFECTIVE INDICTMENT.
   Where no demurrer or motion to quash was interposed, nor the attention of the trial court otherwise called specifically to an alleged defect in the indictment, and it clearly was not prejudicial to defendant, the objection is not entitled to so favorable consideration by the appellate court as if it had been raised by demurrer.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Criminal prosecution by the United States against William A. Hamilton. Judgment of conviction, and defendant brings error. Affirmed.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Ralph F. Potter, of Chicago, Ill. (George I. Haight, James H. Wilkerson, and Edwin H. Cassels, all of Chicago, Ill., on the brief), for plaintiff in error.

Francis M. Wilson, U. S. Atty., of Kansas City, Mo. (William G. Lynch, Asst. U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

BOOTH, District Judge. Writ of error, to review judgment after verdict convicting Hamilton of violation of White Slave Traffic Act of June 25, 1910 (36 Stat. 825, c. 395 [Comp. St. §§ 8812–8819]).

There were two counts to the indictment. From the record it appeared without dispute that Hamilton and the girl with whom it was alleged the offense was committed had formed a casual acquaintance in the state of Kansas, August 21, 1916, and came from that state to Kansas City, Mo., over the Atchison, Topeka & Santa Fé Railway, on the evening of that day. Thereafter and on the same evening the girl returned alone to Kansas City, Kan., by street railway, and immediately came back to Kansas City, Mo., also by street railway. The first count was based upon the transportation from Kansas to Missouri on the Atchison Railway; the second count, upon the subsequent transportation from Kansas to Missouri on the street railway. The defendant was acquitted on the first count, but convicted on the second count.

Errors relied upon may be grouped as follows: First, as to the sufficiency of the evidence to justify the verdict; second, as to admission of certain testimony; third, as to refusals by the court to instruct the jury as requested by the defendant; fourth, as to sufficiency of the indictment.

[1] First. The evidence discloses the following facts: August 21, 1916, a girl, not quite 18 years of age, living with her parents in Kansas City, Kan., walked to the neighboring town of Turner, in Kansas, to canvass for the sale of brushes, samples of which she had with her in a suit case. After canvassing a part of the town she went to a small restaurant for dinner. Defendant, a man of 45 years of age, resident of Kansas City, Mo., was in the restaurant at the time. After dinner the girl left the restaurant and had gone a short distance, when defendant drove up in his automobile and asked her if she wished to ride. She declined at first, but upon second invitation accepted, thinking, according to her testimony, that she would thus get to a part of the town which she had not canvassed. Defendant was on his way to Lawrence, and persuaded the girl to go with him to that city. On their return they stopped at De Soto and had supper. Defendant put his automobile in a garage, and said they would go the rest of the way by train. Defendant bought the railway tickets. They got off at the Union Station, Kansas City, Mo., took a street car, the defendant paying the fares, and took transfers. At a certain point they got off and defendant told her that she had better go back to Argentine, that

he did not have any place fixed for them to stay that night, that he would have to get rid of his bucket of samples, and by that time she would be over and back again and he would have a place fixed, and that if she would do that it would save trouble, if anything came up afterwards. Defendant gave her some change and a transfer, and she took the street car for Argentine, in Kansas. Defendant also gave her his telephone number, and told her, when she got over there, to call him.

The girl went to Argentine, called the defendant by telephone, and arranged to meet him at a certain point in Kansas City, Mo. She took the street car back to Kansas City, Mo.; the defendant met her as had been arranged by telephone, took her in an automobile, and after driving around some little time they stopped at a hotel. Defendant went in, left her at the foot of the stairs, went upstairs himself, and shortly came down and said it was all right; they went upstairs, and occupied a room together that night. The defendant had intercourse with her. The hotel clerk testified that the defendant and the girl came to the hotel on the night in question, and that the defendant registered them as man and wife, but under an assumed name.

Many of the foregoing facts are disputed by defendant, but are amply sustained. The evidence in the case was voluminous, and it would serve no useful purpose to discuss it at length. It is sufficient to say that it has been carefully considered, and our conclusion is that the verdict was fully justified.

Second. Mrs. Winterbower, an osteopathic doctor, witness for the defendant, testified that she made physical examination of the girl two or three days after the occurrences set forth above, that she found no evidence that intercourse had been had. Later the mother of the girl was called as a witness, and was asked whether, in the district attorney's office, the time being specified, she did not hear the doctor say that the hymen had been broken, and so far as she could tell the girl had had sexual intercourse. Objection was made that no foundation for impeachment of the doctor had been laid when she was upon the witness stand. Objection was overruled. While the precise words used in the question put to the mother were not specifically called to the attention of the witness doctor, yet the exact substance of the words was particularly called to her attention, and the time and place of the alleged statement. Under the circumstances there could have been no unfair surprise of the witness; we think the foundation laid was sufficient.

[2] Third. The requests made by the defendant to instruct the jury, which were refused by the court, may be divided into two groups. The first group relates to the proof of intent by circumstantial evidence. In the refused instruction set out in the fourth specification of error occurs the following:

"You cannot find that such intent existed at the time alleged, unless all the circumstances shown in the evidence which are necessary to establish such intent beyond a reasonable doubt are consistent with each other and inconsistent with any reasonable theory of the defendant's innocence of such intent."

This requested instruction was rightly refused. In the first place, it was confusing, inasmuch as it furnished no criterion to determine what circumstances were necessary to establish the intent. In the second place, if its meaning was that all circumstances bearing upon the question of intent must be consistent with each other, it is not a correct statement of the law.

The eighth specification of error, bearing upon the same subject, is open to similar criticism.

In the refused instruction set out in the seventh specification of error occurs the following:

"To warrant a conviction of the defendant, he must be proven guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent, when all the evidence in the case is considered."

To tell the jury that, to warrant conviction, defendant must be proven guilty beyond a reasonable doubt, and then to follow it with an instruction as to reasonable theory, would tend to confuse, rather than to aid, the jury. The instruction requested was properly refused.

The second group of instructions requested and refused relates to the point of time at which the intent specified must have existed in the defendant's mind. The trial court at three separate times in its charge mentioned this matter and covered it accurately and fully. There was no occasion, therefore, to give the instructions requested.

[3] The remaining specification of error challenges the sufficiency of the second count of the indictment. The count read, so far as here material, as follows:

"That on or about the 21st day of August, A. D. 1916, at Kansas City, Jackson county, Missouri, * * * William A. Hamilton * * * did then and there unlawfully * * * persuade * * * Luzon Koppenhaver * * * from the state of Kansas * * * to the state of Missouri, * * * with the unlawful * * * purpose and intent * * * to induce * * * said Luzon Koppenhaver to engage in * * * sexual intercourse with him, * * * and the said William A. Hamilton * * * did then and there unlawfully * * * induce and cause her, the said Luzon Koppenhaver, to go and be carried and transported as a passenger in interstate commerce upon the line and route of the Kansas City Railways Company, from said city of Kansas City, in the state of Kansas, to the said city of Kansas City, in the state of Missouri. * * *"

The objection was first raised after verdict, by motion in arrest of judgment, on the broad ground that:

"The said second count of said indictment does not charge a public crime under the laws of the United States."

The record fails to show that the real point now made in this court was at any time called to the attention of the trial court. The claim is this:

That "the second count of the indictment does not charge a public crime under the laws of the United States, in that it does not allege that the defendant induced or caused the girl in question to go and be carried or transported as a passenger in interstate commerce in furtherance of the purpose denounced by the statute."

The words "in furtherance of such purpose" are found in the statute, and might properly have been included in the indictment, and we

do not undertake to say that a demurrer to said count, or a motion to quash, on account of the omission of said words might not have been sustained.

But no demurrer or motion to quash was interposed, no motion made for a directed verdict on that ground, and no attention called specifically to the alleged defect at any time in the lower court.

It is clear from the record that there was no misunderstanding on the part of the defendant or his counsel as to the nature of the offense charged; that the evidence was ample as to every element of the offense to sustain conviction, and that there is no possibility that the judgment of conviction could not be successfully pleaded to any other prosecution under an indictment containing the omitted words, but covering the same transactions. Under these circumstances the defendant's contention as to the insufficiency of the second count of the indictment is not entitled to receive so favorable consideration as if it had been raised by demurrer. Connors v. U. S., 158 U. S. 408, 411, 15 Sup. Ct. 951, 39 L. Ed. 1033; Ledbetter v. U. S., 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; Clement v. U. S., 149 Fed. 305, 313, 79 C. C. A. 243; Ulmer v. U. S., 219 Fed. 641, 643, 134 C. C. A. 127.

Judgment of the court below is affirmed.

THE COLUMBIA.

THE NO. 28.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 82.

NAVIGABLE WATERS ⇐14(3)—OBSTRUCTION BY DUMPING—STATUTORY PENALTY.

The owner of a towing tug and scow is not relieved from the penalty for dumping before reaching the prescribed dumping ground, in violation of Act June 29, 1888, § 3, as amended by Act Aug. 18, 1894, § 3 (Comp. St. 1916, § 9935), on the ground of avoidable accident or unfavorable weather, where the cause was the blowing out of a gasket on the tug, causing it to stop, and the scowman dumped his load to avoid swamping in a heavy sea, where the gasket was an appliance requiring frequent examination, but was not shown to have been recently inspected.

Appeal from the District Court of the United States for the Southern District of New York.

Libel in admiralty by the United States against the steamtug Columbia and dumper scow No. 28; the Coastwise Dredging Company, claimant. Decree for claimant, and the United States appeals. Reversed.

Action was brought to recover (as liens upon the boats proceeded against) the penalties provided by the Act of June 29, 1888, c. 496, § 3, 25 Stat. 209, as amended August 18, 1894 (28 Stat. 360, c. 299, § 3 [U. S. Comp. Stat. § 9935]),

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

for illegally dumping material laden on scow No. 28, which was towed out of New York Harbor and toward the dumping ground by tug Columbia.

Tug and scow belonged to the same owner, and it was admittedly the duty of the tug to take the scow "to a point not less than three nautical miles southeast of Scotland Lightship, with Ambrose Channel Light vessel bearing N. E. by N. (magnetic)," and there cause the scow to dump "in not less than fifteen fathoms of water."

The following questions arose upon the trial: (1) Was the scow as a matter of fact dumped before it got to the dumping grounds? (2) Was the dumping, if unlawful, caused by unavoidable accident? or (3) unfavorable weather?

It was testified by the master and mate of the United States patrol boat that they saw the scow dumped not over three-quarters of a mile from Scotland Light. These witnesses were wholly unimpeached. The master and mate of the tug gave evidence to the effect that, with the wind forward of the beam and the sea rough, the Columbia had been under way long enough (judging by her past performances) to arrive at the dumping ground. These men made a written report of the dumping to their owners, but did not therein advance this statement.

Having reached the approximate region (wherever that was) of the dumping, the tug became disabled—it "blowed a gasket out" of the air pump used to "maintain a vacuum in the condenser." This vacuum is created "so the engine can have a clear exhaust and develop her horse power," and if the air pump is not in operation and the vacuum is not maintained "the exhaust steam from the engine is not being subtracted from the condenser and the steam is thrown right down in the pipes more and more—the pressure gets greater and greater in the condenser, and it is liable to bursting."

As soon as this accident happened the engines were stopped, the tug and tow rolled in the trough of the sea, the waves broke over the heavily laden scow, the sea was increasing, and the scowmaster dumped his boat, because, in the opinion even of the master of the United States patrol boat, who witnessed the operation, "it would have been unwise for him to hold the load much longer," because his life was in danger. The scowmaster himself disappeared before trial and did not testify. The licensed officer in charge of the Columbia at the time gave it as his opinion that if the tug had not broken down the tow could have proceeded, and the scow's difficulties were occasioned by getting "in the trough of the sea and [rolling] to one side and the other," so that when "the sea goes over him it is liable to open the seams."

The trial court held (1) that dumping was not proven to have taken place on forbidden ground; (2) the accident to the tug was unavoidable; (3) that sufficiently unfavorable weather was shown to excuse the act of the scowmaster, and therefore (apparently on all three of these grounds) dismissed the libel, whereupon this appeal was taken.

Francis G. Caffey, U. S. Atty., of New York City (John Hunter, Asst. U. S. Atty., of New York City, of counsel), for appellant.

Hunt, Hill & Betts, of New York City (George Whitefield Betts, Jr., of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). It is no longer open to doubt that by the legislation above referred to the refuse of New York City, when dumped in the ocean, is unlawfully disposed of, unless deposited within the limits defined and prescribed by the supervisor of the harbor. Randall v. United States, 107 Fed. 935, 47 C. C. A. 80; Jaycox v. United States, 107 Fed. 938, 47 C. C. A. 83. It does not follow that every deposit beyond the lawful limits entails punishment or penalty. The excuses advanced may be sufficient to avoid even pecuniary loss by the owners of tug or scow

or both; but the illegality of the dumping is unaffected by the validity of the excuse. The questions at bar flow from the language of section 3 as amended, declaring that:

"Neither defect in machinery nor avoidable accidents to scows or towboats, nor unfavorable weather, nor improper handling or moving of scows or boats of any kind whatsoever, shall operate to release the owners and masters and employés of scows and towboats from the penalties hereinbefore mentioned."

1. Where scow 28 dumped is a question of fact, as to which we should not disturb the finding below, if in our opinion it rested upon really conflicting evidence; i. e., balanced contradictory and irreconcilable statements, each separate statement being possible. The F. B. Squire, 248 Fed. at page 470, 160 C. C. A. 479.

In this case, however, we are unable to find that the definite, careful and credible statements of the government inspectors are contradicted at all. Claimant's case is an argument that, because the tug had been out so long, she must have gotten further away from Scotland Light at the time of dumping than the distance observed by the men whose business it was to impartially note just such occurrences. We therefore hold that the scow was relieved of her load before she got to the dumping ground.

2. In The J. Rich Steers, 228 Fed. 319, 142 C. C. A. 611, we considered the meaning of the statutory phrase "avoidable accidents," and held that to establish the defense of unavoidable accident it was necessary to show the precise defect causing damage, and that the party proceeded against "was not wanting in any lack of ordinary care in relation to it, or else to show all possible causes and that the defendant was not wanting in ordinary care as to any one of them." This, as the citations made sufficiently showed, was an identification of the defense of unavoidable accident under this statute with that of inevitable accident so often raised in admiralty proceedings, and as to which our most recent holding is In re Reichert Towing Line, 251 Fed. 214, — C. C. A. —.

The evidence here does not even attempt to comply with the standard there laid down. There is no evidence of recent inspection of the gasket, and abundant evidence that it is an appliance which needs frequent examination in order to avoid exactly what happened to the Columbia. We therefore infer negligence on the part of the tug from the nature of her breakdown.

3. While this dumping did not take place in a storm, we have no doubt that the scowmaster, lying in the trough of the sea and exposed to the wash of every wave, dumped his boat to save his life, or at least under a reasonable apprehension that he was in imminent and deadly peril.

In the sense above stated, the weather was unfavorable; but it cannot follow that the statutory penalty is avoided if such unfavorable weather, or the danger produced thereby, was not in a legal sense the proximate cause of the offensive dumping. (The foregoing assumes, but does not hold, that weather per se can be a good excuse.)

The evidence is uncontradicted that, had the tug continued to pull

and kept the scow out of the trough, there would have been no trouble. There was no increase of danger, no exposure to any new peril, that did not proximately result from the stoppage of the tug's engine. There was, therefore, no intervening act efficient to break the causal connection between the stoppage of the tug and the danger to the tow which produced an unlawful deposit of refuse at the bottom of the sea. Long Island, etc., Co. v. Killien, 67 Fed. at page 368, 14 C. C. A. 418; Muller v. Globe, etc., Co., 246 Fed. at page 762, 159 C. C. A. 61.

We find, therefore, an unlawful and unexcused dumping. If tug and scow were in different ownerships, questions might arise which have not been argued, and as to which we express no opinion; it is enough for present purposes that the claimant of both vessels proceeded against was, through some one or more of its servants and one or both of its vessels, guilty of an offense against the statutes.

Therefore without appraising blame or distributing liability as between tug and tow, it is ordered that the decree appealed from be reversed, without costs, and the cause remanded, with directions to enter a decree for the libelant in the sum of $250, with costs of the District Court.

THE HATTERAS. THE TAMPA. THE NEUSE.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

Nos. 97–99.

1. MARITIME LIENS ⟸25—FEDERAL STATUTE—TOWAGE—"NECESSARIES."
Under Act June 23, 1910, § 1 (U. S. Comp. St. § 7783), giving a lien on vessels "to any person furnishing repairs, supplies or other necessaries," towage is not a "necessary," and that service gives no lien on the tow.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessaries.]

2. TOWAGE ⟸9—PRESUMPTION OF LIEN.
While a lien for towage may be created under general maritime law, and there is a presumption of pledge in support of lien, such presumption is rebuttable, and in each case the facts must be examined before a lien can be established.

3. TOWAGE ⟸9—CONTRACT WITH CHARTERER.
Towage services rendered on request of a transportation company, apparently in its home port, to tow "our barges," without further inquiry, *held* not to create a lien, where the company was in fact a charterer, bound by the charter to protect the barges from liens.

Appeal from the District Court of the United States for the Southern District of New York.

Three admiralty suits by the New York, Ontario & Western Railway Company against the barges Hatteras, Tampa, and Neuse; the Southern Transportation Company, claimant. Decrees for claimant, and libelant appeals. Affirmed.

The Southern Transportation Company of Philadelphia owned all three of the barges above named, and chartered them all to the New York & Boston Transportation Company of New York by a charter party which was not a demise. This contract contained an agreement that the charterers would keep

the barges "free from all liens of any kind whatsoever during the term of" the charter party, and that the charterers should have no "authority to bind the barge for (inter alia) towage."

During the time of charter, and when the barges were at anchor on Red Hook flats, in New York Harbor, an officer of the charterers called on the telephone the office of libelant, a railway company owning certain seagoing tugs. A clerk in the maritime department of the railroad company answered the telephone, and the charterers' officer inquired, "Will you tow three of our barges, two of them to Providence and one to Fall River?" The answer was in the affirmative, a rate was agreed upon, and agreement made that libelant's tugs were to go to Red Hook and take charge of the barges forthwith. No investigation concerning the relation of the New York, etc., Company to the barges was made, and libelant's agent deposed that he inferred, from the use of the phrase "our barges," that the New York, etc., Company owned the barges to be towed.

Libelant's tugs took the barges to Hammond's Flats, near Throgg's Neck, and it there became necessary to use longer hawsers for towing through the Sound and at sea. It then appeared that the barges had no hawsers proper for this purpose, and of this fact the tugmaster apprised libelant's marine superintendent, who thereupon communicated telephonically with the charterers, and was requested and agreed to use the tug's hawsers.

The vice president of the charterers testified that he conducted this last telephone conversation, and in the course thereof apprised libelant's marine superintendent that the barges were under charter to the New York, etc., Transportation Company, and that the charterers had supposed that proper hawsers came with the boats. This libelant's marine superintendent denied, but admitted that a few days after the towage was completed he was informed by the Southern Transportation Company that they owned the barges, and that bills for the towage had been made out against the several "barges and owners in care of New York & Boston Transportation Company."

The charterers failed to pay the towage bills, as they were admittedly bound to do under the charter party, whereupon libelant filed a libel against each barge, claiming liens for the towage aforesaid because (as alleged in the libels) the "services were necessary for said barge, were rendered upon her credit, and by the general admiralty law, as well as by the Act of Congress of June 23, 1910" (Act June 23, 1910, c. 373, 36 Stat. 604 [Comp. St. §§ 7783–7787]), became "valid and subsisting maritime liens." The District Court held that no liens had been created, and dismissed all the libels, whereupon libelant took these appeals.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for appellant.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] 1. The contention for a lien under the act of 1910 necessarily rests on the assertion that towage—at least for barges without motive power of their own—must be considered one of the "other necessaries" for which liens are recognized or conferred by the first section of the act (U. S. Comp. St. § 7783).

As to the effect of this statute on existing law, our views are sufficiently expressed in The Oceana, 244 Fed. at page 82, 156 C. C. A. 508; and as to the specific question whether towage is included in the phrase "other necessaries," we think the opinion of Veeder, J., in The J. Doherty (D. C.) 207 Fed. at pages 999, 1000, entirely satisfactory, and adopt the same.

Consequently none of these libels can be sustained under the statute; towage not being a "necessary" within the act.

[2] 2. It is not doubted that under general maritime law a lien for towage may be created, or that there is a presumption of pledge supporting lien, in respect of at least many of the essential assistances to navigation, of which towage is one. The Alligator, 161 Fed. 40.

But such a presumption is rebuttable, and means little more than that the burden of producing evidence to show the facts lies upon him that denies a pledge so natural and frequent as one for (inter alia) towage. Therefore, in respect of towage, the facts must always be examined before any lien can be asserted, as was done in this court in The Sarah Cullen (D. C.) 45 Fed. 511, affirmed 49 Fed. 166, 1 C. C. A. 218, and The Stroma, 53 Fed. 281, 3 C. C. A. 530. For the same principle, see The Wandrahm, 67 Fed. 358, 14 C. C. A. 414.

[3] Upon such inquiries the real question often is that presented by this litigation, viz.: How far may one furnishing services to a vessel, without any actual knowledge of her ownership, agents or charterings, and dealing with some person other than the master, shut his eyes, avoid or neglect all inquiry, and rest upon an authority to contract, which is in essence nothing more than an inference from an apparent act of authority?

We lay aside all decisions concerning liens asserted to rest on dealings with a shipmaster. The authority of a master by virtue of his office is so ancient, extensive, and universally accepted as to give to the "captain's orders" a standing quite different from the agreements of all other agents.

In this instance libelant was plainly employed to perform a service maritime in its nature, the subject of a maritime contract and capable of supporting a maritime lien. But such lien could arise only by the hypothecation express or implied of the credit of the vessel, and that pledge, like any other, must rest on the act of the owner, even though such owner's efficient act consisted only in permitting another to be his agent. While any one who appoints an agent takes the risk of liability growing out of, not only the agent's power, but its abuse, the mere fact of acting like an agent does not make an agent out of the actor.

There are only two states of fact possible in this case. Either libelant was told before any substantial part of the towage service was rendered that the person procuring the towage was a charterer, or else nothing more was known until after services rendered than that the New York & Boston Transportation Company in and of New York, had asked to have "our barges" towed.

The District Court found the first state of facts to be the truth. It came to that conclusion, after seeing and hearing the witnesses, and we perceive no reason to disapprove that finding. If so, there was no lien by general law irrespective of statute, under The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710.

If, however, we adopt (for argument's sake) the second state of facts, then the libelant was requested by a corporation apparently of New York, and in New York, to tow "our barges." Libelant's infer-

ence from such a request must have been that a New York owner was in his home port seeking to make a contract for towage. But we hold as matter of fact that libelant had no right to infer an ownership from the use of the word "our." It is surely common knowledge that a master, a seaman, a ship's husband, and indeed almost any one connected with the management or upkeep of a vessel, commonly and naturally refers to that vessel in a possessive sense as well as in the feminine gender. In short, this tug owner made no inquiry, literally knew nothing, and sought to know nothing, about the relation of the hirer to the barges. Such circumstances amount to shutting one's eyes to keep out the light, and successfully rebut any presumption of lien.

Decree affirmed, with costs.

In re SIMMONS & GRIFFIN.

Petition of SIMMONS.

(Circuit Court of Appeals, First Circuit. February 11, 1919.)

No. 1381.

1. INSURANCE ⟸239—LIFE INSURANCE—RIGHT TO SURRENDER POLICY.
A policy of life insurance for the benefit of a third person named therein cannot be surrendered without the consent of the beneficiary.

2. BANKRUPTCY ⟸143(12)—LIFE INSURANCE AS ASSET—RIGHTS OF TRUSTEE.
The right of a trustee in a life insurance policy on the life of the bankrupt is limited to the amount which the bankrupt could have realized on the policy at the time of bankruptcy as a cash asset.

3. BANKRUPTCY ⟸143(12)—LIFE INSURANCE AS ASSET—BANKRUPT'S RIGHT TO SURRENDER POLICY.
Where a third person was named as beneficiary in a policy of insurance on the life of a bankrupt, and he was without power to change the beneficiary or to surrender the policy, he had no property interest therein which passed to his trustee.

In Bankruptcy. In the matter of Simmons & Griffin, bankrupts. Petition of Arthur E. Simmons to revise order of District Court. Reversed.

For opinion below, see 253 Fed. 466.

Milton B. Warner, of Pittsfield, Mass. (Warner & Barker, of Pittsfield, Mass., on the brief), for petitioner.

Walter J. Donovan, of Adams, Mass., for respondent.

Before BINGHAM and ANDERSON, Circuit Judges, and ALDRICH, District Judge.

ANDERSON, Circuit Judge. In 1903, the Metropolitan Life Insurance Company issued a $1,000 20-year endowment policy on the life of Arthur E. Simmons, payable in case of his death during the 20-year period to his mother, Martha A. Simmons.

In 1912, the mother released all her right in the policy, and the insured thereupon designated his wife as contingent beneficiary in

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

place of his mother. This designation was duly recorded in the office of the issuing company.

We agree with the District Court and with the referee that, as the result of this transaction, the wife became entitled to the same rights that she would have had if originally named as the contingent beneficiary in lieu of the mother; that is, that in case of Simmons' death within the 20-year period, the premium not being in default, the wife would have been entitled to recover the full face of the policy.

On February 19, 1917, the insured was duly adjudicated a bankrupt. At that time "this policy had a cash surrender value of $415.-26, according to the computation of the company." This means nothing more than that the company, on receiving proper acquittances and releases from all necessary parties, would pay that amount of $415.-26 in order to end its future possible liability for a larger sum.

On petition of the trustee, the referee ordered the bankrupt either to pay this sum to the trustee or to "execute an assignment of such documents and papers as may be necessary to enable the trustee to collect the amount of the cash surrender value from the company." The District Court affirmed this order. Just what documents the District Court and the referee contemplated as sufficient "to enable the trustee to collect the amount of the cash surrender value" does not appear. 253 Fed. 466.

[1] We think this decision cannot be sustained. It overlooks the rights of the bankrupt's wife and their effect upon the surrender value of the policy. "A policy of life insurance for the benefit of a third person named therein cannot be surrendered without the consent of the beneficiary." By Knowlton, J., in Haskell v. Equitable Life Insurance Co., 181 Mass. 341, 343, 63 N. E. 899, 900. The same principle is stated by Chief Justice Fuller in Hume v. Bank of Washington, 128 U. S. 195, 206, 9 Sup. Ct. 41, 44 (32 L. Ed. 370), as follows:

"It is, indeed, a general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named. Bliss on Life Insurance (2d Ed.) p. 517; Glanz v. Gloeckler, 10 Ill. App. 484, per McAllister, J.; s. c. 104 Ill. 573 [44 Am. Rep. 94]; Wilburn v. Wilburn, 83 Ind. 55; Ricker v. Charter Oak Ins. Co., 27 Minn. 193 [6 N. W. 771, 38 Am. Rep. 289]; Charter Oak Ins. Co. v. Brant, 47 Mo. 419 [4 Am. Rep. 328]; Gould v. Emerson, 99 Mass. 154 [96 Am. Dec. 720]; Knickerbocker Life Ins. Co. v. Weitz, 99 Mass. 157."

[2] Whatever may have been the view in some of the earlier decisions, it is now settled law that the right of the trustee in bankruptcy is limited to the amount which the bankrupt might have received on the policy at the time of the bankruptcy as a cash asset. Burlingham v. Crouse, 228 U. S. 459, 473, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148; Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143. See, also, In re Hammel, 221 Fed. 56, 137 C. C. A. 80; In re Samuels, 237 Fed. 796, 151 C. C. A. 38. There would be no profit in discussing the cases before Burlingham v. Crouse, supra. See the learned and interesting review of them by Professor D. Fred-

erick Burnett in 3 Cornell L. Q. 253, May, 1918, "Life Insurance as an Asset in Bankruptcy."

[3] We think that the surrender value of this policy was not "property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon * * * under judicial process against him," and, therefore, passing to the trustee, under Bankruptcy Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565 (Comp. St. § 9654); nor did the surrender value fall within "the powers which he might have exercised for his own benefit," thus passing to the trustee under section 70a (3).

The case is plainly distinguishable from Blinn v. Dame, 207 Mass. 159, 93 N. E. 601, 20 Ann. Cas. 1184, for in that case the insured had reserved "power to surrender the policy at any time and receive for his own benefit the amount of the then existing surrender value." See 207 Mass. 164, 93 N. E. 602, 20 Ann. Cas. 1184. The decision of the Supreme Court in Cohen v. Samuels, supra, reversing the majority decision below, rests upon the same ground, for the policies involved in that case had each "a cash surrender value at the time Samuels was adjudicated a bankrupt, which the companies were willing to pay him, and in all of them he had the absolute right to change the beneficiaries."

In the case at bar Simmons had no such right. His mother was originally the contingent beneficiary, and had rights in the policy beyond his control. She gave up those rights in due form. The company thereupon, upon the request of the insured, substituted his wife as contingent beneficiary, vesting in her rights equivalent to those originally accruing to his mother. Under these conditions the bankrupt had no pecuniary interest, which could pass to the trustee, without the consent of the wife. See Wilde v. Wilde, 209 Mass. 205, 95 N. E. 295. We must hold that this policy had no such surrender value as passed to the trustee, under section 70a (3) or 70a (5).

As what we have said is enough to dispose of the case adversely to the claim of the trustee, it is not necessary to consider whether the same result might not be reached under the exemption provided by Rev. Laws Mass. c. 118, § 73, and section 6 of the Bankruptcy Act (Comp. St. § 9590). Perhaps, to avoid misconception, we ought to add that we do not think that statute can be construed as applicable only to paid-up endowment life insurance policies, as is apparently intimated in the opinion of the court below. The history and policy of the statute are fully discussed by the Supreme Judicial Court of Massachusetts in Bailey v. Woods, 202 Mass. 549, 89 N. E. 147, 25 L. R. A. (N. S.) 722, and Bailey v. Woods, 202 Mass. 562, 89 N. E. 149. In the first case (202 Mass. 549, 551, 89 N. E. 147, 148 [25 L. R. A. (N. S.) 722]), that court said:

"Since 1844, with the exception of the seven years from 1887 to 1894, if they can be called an exception, it has been the policy of the commonwealth to enable the husband and father to provide by insurance on his life for his wife and children, subject only to have premiums paid in fraud of creditors within the statutory period of limitation inure to their benefit out of the proceeds of the insurance, and since 1894 the law has included assignments from the husband to the wife of policies issued to the husband. This has

been regarded as a wise and humane policy and the constitutionality of the legislation has never been questioned, and we do not see how it can be successfully. 'It proceeds,' as has been said, 'upon the theory that the interest of a man's wife and children in his life, and his duty to make reasonable provision for their support, are not wholly subordinate to the claims of his creditors, and that he may make an irrevocable settlement of a policy of insurance on his life for the benefit of his family.'"

We have no disposition to undertake to narrow the broad and liberal interpretation put upon that legislation by the Massachusetts court.

Let there be a decree reversing the decree of the District Court, with costs to the petitioner in this court.

McKIE LIGHTER CO. v. COLLINS.

(Circuit Court of Appeals, First Circuit. February 11, 1919.)

No. 1385.

SHIPPING ⊂=209(3)—RIGHT TO LIMITATION OF LIABILITY—PRIVITY OR KNOWLEDGE OF PETITIONER.

Action of a District Court in dismissing a petition for limitation of liability for a personal injury, on the ground that petitioner was not without privity or knowledge of the acts causing the injury, *held* sustained by the evidence.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Petition in admiralty by the McKie Lighter Company for limitation of liability; Charles Collins, claimant. From a decree dismissing the petition, petitioner appeals. Affirmed.

G. Philip Wardner, of Boston, Mass., for appellant.

Wilfred B. Keenan and Damon E. Hall, both of Boston, Mass., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an appeal from a decree of the District Court for Massachusetts dismissing the petition of the McKie Lighter Company, the owner of a lighter, to have its liability for an injury suffered by Charles Collins, the claimant, determined, and, if liable, the damages limited.

In its assignments of error the Lighter Company complains that the District Court erred: (1) In dismissing its petition; (2) in not limiting its liability to the value of the lighter and pending freight; (3) in holding that the injury was not inflicted without its privity or knowledge; (4) in holding that the ultimate question was whether, upon the facts stated, Capt. Gurney, by his acts or failure to act so ratified and adopted the work in progress as to make it responsible therefor; (5) in finding and ruling that Capt. Gurney, by his acts

or failure to act, so ratified and adopted the work in progress as to make it responsible therefor; and (6) in finding that the tug Ida M. Chase came to the wharf and her master told Capt. Gurney that he desired to remove a rope from the tug's propeller.

The evidence discloses that, prior to the filing of the petition, Collins had brought a suit in the superior court of Massachusetts against the Lighter Company to recover damages for an injury sustained while at work under the stern of the tug, Ida M. Chase, endeavoring to remove a rope from her propeller (her stern at the time being raised in the air by the company's lighter to permit the work to be done) and had recovered a verdict for $10,000; that the case was transferred to the Supreme Judicial Court, on exceptions to the refusal of the court below to direct a verdict for the defendant; and that the exceptions were overruled and the case certified back to the superior court for judgment. 230 Mass. 281, 120 N. E. 66. In the Supreme Judicial Court it was held that the evidence warranted the jury in finding: (1) That Collins was not a volunteer or a trespasser, and was of right in the place where he was at the time he suffered the injury of which he complained; (2) that the defendant had undertaken the work of raising the tug, and the acts of its servants and agents were authorized; and (3) that the defendant was negligent, in that it could be found that the hook on the fall of the derrick holding the sling passed around the stern of the tug was "so worn, chafed, and frayed" that when subjected to the necessary strain it gave way, and that this condition could have been ascertained and remedied by the exercise of reasonable diligence on the part of the defendant's agents and servants.

It is conceded that the liability of the appellant for the injury suffered by the claimant is concluded by the judgment of the state court. This concession disposes of the questions raised by the first two assignments of error so far as they relate to the question of liability. It is also conceded that the lighter is a vessel, within the meaning of sections 4283–4288 (Comp. St. §§ 8021–8026), and section 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 (Comp. St. § 8027); that its value is less than the damages suffered by the claimant; and that the privity or knowledge of Capt. Gurney, who was the vice president, director, and general manager of the Lighter Company, was the privity or knowledge of the company.

The finding complained of in the sixth assignment of error is immaterial, as the judgment of the state court determined that the Lighter Company had undertaken the work of raising the tug and that its servants and agents were acting within their authority in undertaking to raise her as they did. The fourth and fifth assignments, if they pertain to any question apart from those concluded by the judgment in the state court, relate merely to subsidiary matters stated by the District Judge in a course of reasoning by which he reached the conclusion that the injury inflicted upon Collins was not without the privity or knowledge of Capt. Gurney, who in this case is the Lighter Company, and in this respect they do not differ from the third assignment of error. Such being the case, the question is whether the evidence

produced at the trial is such that it should be found that the injury inflicted upon Collins by the Lighter Company was without the privity or knowledge of Gurney.

As to this matter Capt. Gurney testified that shortly before the accident occurred he looked out of a window in the entry leading from the office of the Lighter Company and saw the tug stern up in the air from Lighter No. 2; that he went directly out and found that the engineer of the tug was on the hub of its propeller, and that the claimant, Collins, was in a boat underneath the arch of the tug; that he (Gurney) was there about 15 minutes before the accident happened; that the lighter was not suitable to hoist the tug; that her tackle, engine, and boom were all too light to do the work; that the ends of the straps secured about the stern of the tug were improperly fastened to the hook on the derrick, and brought an unusual strain on the point of the hook; that he saw this the instant he got down there; that as general manager of the company he had control and direction of the lighter, with authority to order the work to stop, and that he stood there and watched the work go on for 15 minutes, and saw the accident happen which he anticipated would occur at the time he looked out of the window; that the two men were then underneath the tug and about 35 feet from him; that, although he knew they were in a dangerous position, he did not tell them to get out, or tell the engineer of the lighter not to do any more hoisting; that while he was there, and some 5 minutes or more before the accident occurred, the tug sank somewhat into the water, and he saw the engineer of the lighter put on steam and raise the tug higher; that he did not tell the engineer to stop until he thought the tug was high enough out of the water to permit the men to continue their work under the tug; that he then told the engineer to stop, and stood there and watched the work go on. He also testified that, upon reaching the lighter, he told the captain of the tug to order the men out, that it was dangerous, and that the captain of the tug replied that he thought it was all right. But inasmuch as he remained there without taking steps to stop the work, and in fact participated in raising the tug, knowing that the lighter and its equipment were insufficient for the work, and that there was an excessive strain on the point of the hook, we think that he was derelict in his duty, and cannot be said to be without the privity or knowledge essential to entitle the appellant to limit its liability.

The contention of the Lighter Company that it performed its full duty to Collins as an invitee upon its premises cannot be sustained. This matter was concluded by the judgment in the state court, where the question of the company's negligence was in issue, was actually litigated, and was determined against it. But, if this were not so, we think the reasonable conclusion to be drawn from the evidence is that the company did not perform its duty in this respect.

The decree of the District Court is affirmed, with costs to the appellee in this court.

ENSLEN v. MECHANICS & METALS NAT. BANK OF CITY OF NEW YORK.*

(Circuit Court of Appeals, Fifth Circuit. January 31, 1919.)

No. 3174.

1. BILLS AND NOTES ⟸360—BONA FIDE PURCHASER—RENEWALS.
A bank, which in the usual course of business discounted a note made payable to the maker and indorsed by him, has the rights of an innocent purchaser for value with respect to a note taken in renewal and payable to itself.

2. BILLS AND NOTES ⟸354—BONA FIDE PURCHASERS—PURCHASE FOR LESS THAN FACE VALUE.
The rule which protects a bona fide holder for value of commercial paper from defenses or equities that might be good as between the original parties does not require that he shall have paid face value for it.

3. BILLS AND NOTES ⟸113—DEFENSES—ESTOPPEL
A maker of a negotiable note payable to his order, who indorses and gives it to another to be discounted at a bank, which is done, and afterwards renews it by giving a new note to the bank and taking up the old, is estopped to set up, as against the renewal note, the defense of fraudulent representations by the person to whom the original note was intrusted for discount.

In Error to the District Court of the United States for the Southern Division of the Northern District of Alabama; William I. Grubb, Judge.

Action at law by the Mechanics & Metals National Bank of the City of New York against D. W. Enslen. Judgment for plaintiff, and defendant brings error. Affirmed.

Forney Johnston and W. R. C. Cocke, both of Birmingham, Ala., for plaintiff in error.

Edward H. Cabaniss, of Birmingham, Ala., for defendant in error.

Before WALKER, Circuit Judge, and BEVERLY D. EVANS, District Judge.

BEVERLY D. EVANS, District Judge. In an action on a note against the maker, by the payee, the court gave a peremptory instruction to the jury to return a verdict for the plaintiff for its face value. The defendant took a writ of error.

The complaint on the note was in the short statutory form authorized by the Code of the state of Alabama. The defendant pleaded the general issue, with leave by agreement of counsel to introduce evidence as to all matters of special defense as fully and completely as if all legal defenses to the action were well and specially pleaded.

On the trial the plaintiff introduced in evidence the note, which was for $34,500 principal sum, payable to plaintiff, dated February 2, 1916, due six months after date, with 6 per cent. interest from date. On the back of the note was an indorsement and guaranty of payment by A. E. Jackson. Thereupon the defendant offered evidence tending to show that the note was executed and delivered under substantially

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 249 U. S. —, 39 Sup. Ct. 391, 63 L. Ed. —.

these circumstances: The Jefferson County Savings Bank had failed, with large liabilities. Certain persons, including A. E. Jackson, undertook to form a new bank, which was to assume the liabilities of the defunct bank by taking over its assets and by providing additional funds. This new bank was called the Jefferson County Bank. Among the subscribers to the new bank was E. F. Enslen, who had been identified for many years with the defunct bank, and his wife. The plan of reorganization contemplated that the promoters of the new bank were to take a certain amount of stock, payable partly in cash and partly by note. For convenience the stock in the new bank was issued originally in the name of A. E. Jackson, but very soon thereafter the certificates of stock were issued to the individual subscribers, who had given their notes. One of these subscribers was Mrs. Enslen. She paid for the stock a certain amount of money, and executed and delivered her note for the balance to A. E. Jackson. This note included interest from date at 6 per cent., and was made payable to her own order and indorsed by her. Jackson discounted the note with the Mechanics & Metals National Bank of the City of New York at 5 per cent., and the net proceeds was credited to the Jefferson County Bank, and afterwards checked out by that bank. The rate of discount was 5 per cent., and the discounting bank accounted to the Jefferson County Bank (or possibly its organization committee) for the difference between the discount and interest rate. Just before its maturity the note was sent to the Jefferson County Bank, and was renewed by Mrs. Enslen's executing the note in suit and delivering it to A. E. Jackson, who entered thereon his indorsement and guaranty of payment and sent same to the plaintiff.

[1] Under the evidence it is clear that the note in suit is a renewal of the note of Mrs. Enslen, payable to her order and indorsed by her, and discounted to the plaintiff. The right of the plaintiff to recover is that of an indorsee.

The trial court entertained the opinion that under the evidence the plaintiff sustained the relation of a bona fide holder for value, and the defendant was cut off from showing any defense she might have to the note. The plaintiff in error insists that the evidence affords an inference that the plaintiff bank was the original holder of the original note, and that Jackson was its agent or joint adventurer in the organization of the new bank, the stock subscription to which furnished the consideration of the note. We do not think such inferences are deducible from the evidence. The evidence presented a transaction not infrequent in commercial annals. Certain persons were desirous of reorganizing a bank from the assets of one which had just failed. Additional capital was necessary, and the subscribers to stock in the new bank made and delivered their notes for their stock subscriptions. These notes were indorsed by the subscribers and discounted with a bank, and the net proceeds credited to the newly organized bank and used by it.

[2] The fact that the rate of discount was less than the interest rate, and this difference was credited to the newly organized bank or its promoters, does not deprive the discounting bank of its char-

acter as an innocent purchaser for value. If this difference was paid to the newly organized bank, the stockholder got the benefit of his share of it. If paid to the organizers, who had indorsed the note, it is no hurt to the maker that the organizer who had indorsed the note may have received something for his indorsement. The rule which protects a bona fide holder for value of commercial paper against defenses or equities, that might be good as between the original parties, does not require that the holder shall have paid the face value of the paper, and where the evidence affirmatively shows that an indorsee in fact purchased it for value, in an action by him against the maker he is entitled to stand on the footing of a holder in good faith. King v. Doane, 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84.

The rulings on evidence to which exception is taken are without merit. The court confined the evidence to the transaction in issue. The excluded testimony relating to the payment of the difference between the interest rate of the note and the rate of discount would not have changed the character of the transaction.

[3] But, aside from this the defendant is estopped from attacking the consideration of the note. With knowledge of the facts relied on as a defense, she executed the renewal note in suit, and thereby waived such defenses. A maker of a negotiable note, payable to his order, who indorses it and gives it to another, to be discounted at a bank, which is done, and afterwards obtains a renewal of it, with extension of time of payment, by giving a new note and taking up the old, is estopped as against the bank to set up as against the renewed note the defense of failure of consideration on account of alleged fraudulent representations made to the maker by the person with whom she intrusted her note to be discounted, and especially so when the maker had knowledge of the facts when the renewal note was given. Hunter v. Lanius, 82 Tex. 677, 18 S. W. 201; Padgett v. Lewis, 54 Fla. 177, 45 South. 29; Riggins v. Boyd Manufacturing Co., 123 Ga. 232, 51 S. E. 434.

Judgment affirmed.

In re DAILEY.

Petition of CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 41.

BANKRUPTCY ⊂=288(1)—SUMMARY ORDERS—ADVERSE CLAIMS.

A city, which under the terms of a contract for the removal of refuse, on its abandonment by the contractor, took possession of his plant to continue the work pending a new contract, is an adverse claimant, and a court of bankruptcy is without jurisdiction by a summary order to require it to surrender the property to the contractor's trustee in bankruptcy.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In the matter of John D. Dailey and De Witt C. Ivins, individually and as copartners as Dailey & Ivins, bankrupts. On petition by the City of New York to revise order of District Court. Reversed.

This cause comes here from the United States District Court for the Southern District of New York, on petition to revise an order requiring the city of New York to deliver certain property of the bankrupts to their trustee.

On August 12, 1913, a contract was entered into between the city of New York and John D. Dailey and De Witt C. Ivins, doing business under the firm name of Dailey & Ivins. The contract provided for the removal and final disposition by Dailey & Ivins of ashes, street sweepings, and rubbish collected in the boroughs of Manhattan and the Bronx, as well as from Blackwell's and Randall's Islands and from steam tugs and other vessels in the harbor. The contract was commenced on January 2, 1914, and was to run for a period of three years, with a right to renew for another period of two years. In January, 1916, the contract was renewed for a period of two years, which was to begin on January 2, 1917, and end January 1, 1919. In carrying on the work under their contract Dailey & Ivins furnished a certain plant, scows, and other means of transportation and final disposition of the ashes, etc.

On March 2, 1918, Dailey & Ivins abandoned the contract and refused to proceed thereunder, and on the same day between 11 a. m. and 11:30 a. m. there was served on John D. Dailey, one of the members of the firm of Dailey & Ivins, a notice by the commissioner of street cleaning of the city of New York which read as follows: "Under and by virtue of the powers and provisions contained in your contract, dated August 13, 1913, the street cleaning commissioner hereby 'takes possession of the plant, scows, and other means of transportation and final disposition of the ashes, the street sweepings and rubbish, etc.,' belonging to or heretofore used by you."

On the same day that this notice was given the commissioner of street cleaning took physical possession through the employés of his department of the plant before mentioned belonging to Dailey & Ivins and used by them in carrying out work under the contract, all of said plant being located within the city of New York. On the same day, March 2, 1918, at 2:30 p. m., an involuntary petition in bankruptcy was filed against Dailey & Ivins, alleged bankrupts, in the United States District Court for the District of New Jersey, and simultaneously an order was made appointing temporary receivers of the property. And on that day at 10:05 p. m. the commissioner of street cleaning was served with a copy of an order made by Judge Mayer, of the Southern District of New York, appointing George G. Tennant and Charles H. Smith ancillary receivers of Dailey & Ivins. This order contained a provision restraining, among others, the city of New York, its agents, servants, and employés, from removing, transferring, or otherwise interfering with the property, assets, and effects of Dailey & Ivins. The receivers, shortly after their appointment, informed the commissioner that they could not and would not carry out the provisions of the contract which Dailey & Ivins had made with the city of New York.

On May 4, 1918, District Judge Augustus N. Hand, of the Southern district of New York, entered an order requiring the city of New York and its street cleaning commissioner, and their respective agents, employés, and representatives to deliver to George G. Tennant, as trustee, possession of all the property of the bankrupts in its and their possession within ten days after service of a copy of the order. It is this order which the city of New York seeks to have revised. At the hearing prior to the making of the order the city of New York and the commissioner filed with the District Court a written objection to the court's entertaining jurisdiction of the matter, on the ground that the court was without jurisdiction.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for trustee in bankruptcy.

William P. Burr, Corp. Counsel, of New York City (Terence Far-

ley, William E. C. Mayer, and Joseph L. Pascal, all of New York City, of counsel), for the city of New York.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The fact cannot be disputed that at the time this order was made the property here in controversy was in the actual possession of the city of New York, and that it claimed then, as it claims now, the right to retain it in its possession, basing its right on the provisions of the contract which it made with the bankrupts. This claim is an adverse one, and it is advanced against the trustees of the bankrupts. It does not rest upon pretense and sham, but is real and not colorable. It raises a serious question of law. The question, therefore, is whether the District Court had jurisdiction to dispose of it in a summary proceeding, or whether the petitioner as a matter of right is entitled to have the matter disposed of in a plenary action.

The Supreme Court in Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, declared that a bankruptcy court has jurisdiction in a summary proceeding to compel a surrender to a trustee in bankruptcy of property in the hands of a third party which the latter holds as the agent of the bankrupt and to which he asserts no adverse claim. It went on, however, to say that the court must decline to finally adjudicate on the merits if the respondent asserted that he had the right to possession by reason of a claim adverse to the bankrupt, which claim is not merely colorable, but real, even though fraudulent and voidable.

And we held in Re Midtown Contracting Co., 243 Fed. 56, 155 C. C. A. 586, that whether a claim is real or colorable does not depend upon whether it turns upon a question of fact or upon a question of law. If the claim rests upon mere pretense of fact or of law, it is colorable. But it is not colorable if it is put forth in good faith and is real. In the latter event we said the trustee must institute an independent action in a court having jurisdiction of the subject-matter and have the claim regularly adjudicated, as the bankrupt himself would have done if bankruptcy proceedings had not been pending and he desired to obtain possession of the property. The Supreme Court in Wilds v. Department of Education, 245 U. S. 654, 38 Sup. Ct. 12, 62 L. Ed. 532, declined to grant a writ of certiorari to review the decision in the Midtown Case, and it remains the law in this circuit and is decisive of the question herein presented.

The claim arises under a contract entered into under section 544 of the Greater New York Charter (Laws 1901, c. 466). It is a public contract authorized by law, and relates to the performance of an important and well-established public duty. It involves a public work of great magnitude and necessity, which the public interests demand should be performed speedily and without interruption. Dailey v. City of New York, 170 App. Div. 267, 279, 156 N. Y. Supp. 124.

Prior to the abandonment of the contract by the bankrupts they had been paid by the city of New York under the contract over the sum of $2,775,000; and upon the abandonment of the contract the commissioner of street cleaning advertised for bids to complete the work,

but the bids were rejected, as the prices demanded were deemed excessive. The city claims that paragraphs O and Q of the contract authorized and empowered it to take possession of the property "pending proceedings to cancel and annul" the contract, and that it is entitled to retain the possession until either the contract is relet or the contract is completely performed by the city itself. Whether it is right or wrong in this contention is not the question before us. It is sufficient for the present purpose to say that the claim is not colorable, and therefore must be determined in a plenary action.

The order under review is reversed.

SLIGO FURNACE CO. v. DALTON.

(Circuit Court of Appeals, Eighth Circuit. January 15, 1919.)

No. 4756.

1. TENANCY IN COMMON ⟸55(3)—TITLE TO SUPPORT ACTION.
An action at law may not be maintained by one tenant in common for trespass on realty.

2. PLEADING ⟸418(2)—DEMURRER—WAIVER BY PLEADING TO MERITS.
Under the law of Missouri, pleading over after overruling of a demurrer to the petition is not a waiver of the point made by the demurrer that the petition does not state a cause of action.

3. COURTS ⟸339—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.
Federal courts are not required by the conformity statute (Rev. St. § 914 [Comp. St. 1916, § 1537]) to follow the rules of practice of the state courts, if in conflict with the well-settled rules of the national courts.

4. PLEADING ⟸433(5)—DEFECTIVE PLEADING—AIDER BY VERDICT.
A petition which states no cause of action is not cured by ver[illegible]t.

5. PLEADING ⟸418(1)—DEMURRER—WAIVER BY PLEADING OVER.
Where exception is reserved to the overruling of a demurrer, although the party answers over, the question whether the demurrer was properly overruled is open on writ of error to the final judgment.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Richard P. Dalton against the Sligo Furnace Company. Judgment for plaintiff, and defendant brings error. Reversed.

This was an action of trespass for willfully cutting timber on the lands of the defendant in error, asking treble damages under the statutes of the state of Missouri. For convenience the parties will be referred to as they were in the court below—the defendant in error as the plaintiff, and the plaintiff in error as the defendant. It appears from the petition that the plaintiff was a tenant in common, owning an undivided half interest in the lands on which the trespass is alleged to have been committed.

The defendant filed a demurrer to the petition, upon the grounds that there was a misjoinder of parties and that the petition failed to state a cause of action in the plaintiff. The demurrer was by the court overruled, and thereupon an answer was filed, in which the fact that the plaintiff was only a tenant in common, owning an undivided interest, was pleaded as a defense. At the close of the evidence the defendant asked for a peremptory instruction upon several grounds, among them that the plaintiff cannot maintain the action, as he was only a tenant in common with others, not parties to the action. The motion was by the court denied. Proper exceptions were saved to the over-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ruling of the demurrer to the petition, as well as the refusal to direct a verdict in favor of the defendant. A verdict was returned in favor of the plaintiff, and this writ of error is prosecuted by the defendant.

William R. Gentry, of St. Louis, Mo. (M. F. Watts and Edwin W. Lee, both of St. Louis, Mo., and William R. Edgar, Sr., and William R. Edgar, Jr., both of Irontown, Mo., on the brief), for plaintiff in error.

Vance J. Higgs, of St. Louis, Mo., for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). [1, 2] That an action at law may not be maintained by one tenant in common for a trespass on realty is well settled. 15 Enc. Pl. & Pr. 544; 21 Enc. Pl. & Pr. 805, 1 Corp. Juris, 1120; 1 Rul. Case Law, 342; Cochran v. Brannan (D. C.) 196 Fed. 219, 222. And this rule prevails in the state of Missouri. Muldrow v. Railway Co., 62 Mo. App. 431; Lumerate v. Railroad Co., 149 Mo. App. 47, 130 S. W. 448. In fact this rule of law is not seriously questioned by the learned counsel for defendant in error. But it is claimed that it is the settled rule of law of the state of Missouri, as determined by the highest court of that state, that when a defendant answers, after a demurrer to the petition has been overruled, the demurrer is waived. And it is claimed that under the Conformity Act (section 914, Rev. St. [Comp. St. § 1537]), the national courts are bound to follow the decisions of the highest court of the state. A careful examination of the decisions of the courts of Missouri does not sustain the contention of counsel, when the demurrer to the petition is upon the ground that no cause of action is stated. Paddock v. Somes, 102 Mo. 230, 235, 14 S. W. 746, 748 (10 L. R. A. 254). In that case the court held:

"If a defendant pleads to the merits, he waives everything in the petition but two points: First, that the petition does not state facts sufficient to state a cause of action; second, that the court has no jurisdiction over the subject-matter of the action."

This has been reaffirmed in many cases. White v. St. Louis & M. R. R. R. Co., 202 Mo. 554, 561, 101 S. W. 14, and authorities there cited. A petition or complaint, showing that the plaintiff has no right to maintain the suit, clearly fails to state a cause of action.

[3] But aside from this, even if the highest court of the state of Missouri should have held that pleading over after the demurrer is overruled, is a waiver thereof, the national courts would not be bound by it, under section 914, Rev. St. That statute only requires the national courts to conform "as near as may be to the practice, pleadings and forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which such courts are held." In City of St. Charles v. Stookey, 154 Fed. 772, 778, 85 C. C. A. 494, this question was fully discussed by this court, and it was held that rules of practice of the state courts are not to be followed by the national courts, if in conflict with the well-settled rules prevailing in the national courts. Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291, 300, 23 L. Ed. 898; Mexican Central Ry. v. Pinkney, 149 U. S. 194,

200, 13 Sup. Ct. 859, 37 L. Ed. 699; Boatmen's Bank v. Trower Bros. Co., 181 Fed. 804, 104 C. C. A. 314.

[4] It is the well-settled rule of the national courts, as established by the Supreme Court, that only such pleas are cured by verdict, which although they would be bad on demurrer, because wrong in form, yet still contain enough of substance to put in issue all the material parts of the declaration. Garland v. Davis, 45 U. S. (4 How.) 131, 11 L. Ed. 907. But a verdict will not cure a petition which states no cause of action, and which, therefore, could be taken advantage of by motion in arrest of judgment. McDonald v. Hobson, 48 U. S. (7 How.) 745, 12 L. Ed. 897.

[5] By reserving an exception to the overruling of a demurrer, although answering over, the question, whether the demurrer was rightly overruled, is open on writ of error on the final judgment. Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.

The facts in this case show how great an injustice would be inflicted upon a party, if the rule of practice contended for on behalf of the plaintiff would be the law. The plaintiff in his declaration claimed the value of the timber cut to be $5,000, and that his undivided half interest is worth $2,500, and he asked judgment for $7,500, treble the amount of the alleged value of his interest in the timber cut. The verdict of the jury found the value of his interest to be $300, and final judgment was rendered for $900. Had the defendant rested on its demurrer to the petition, judgment by default would have been rendered against it for $7,500. The law does not thus intend to punish a litigant, even if he erroneously invokes the judgment of the court on the legal sufficiency of a petition.

The court below erred in overruling the demurrer to the petition, and also in refusing to direct a verdict in favor of the defendant, upon the ground that the plaintiff, being the owner of an undivided interest in the land only, could not maintain this action.

The cause is reversed, with directions to set aside the verdict and proceed in conformity with this opinion.

D. B. GORE CO. v. PERRIN.

(Circuit Court of Appeals, Fifth Circuit. January 27, 1919.)

No. 3286.

MASTER AND SERVANT ⟸153(3), 245(7)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An employer was not under duty to warn an employé 18 years old of the danger in using a riveting hammer having oval faces in driving a steel wedge into wood, which was obvious, and, although required to use it, the employé is also chargeable with negligence in so using it as to cause the wedge to fly out and injure him.

In Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action at law by B. D. Perrin, by his next friend and father, W. R. Perrin, against the D. B. Gore Company. Judgment for plaintiff, and defendant brings error. Reversed.

Augustus Benners and James Rice, both of Birmingham, Ala., for plaintiff in error.

B. M. Allen and Robert N. Bell, both of Birmingham, Ala., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and EVANS, District Judge.

WALKER, Circuit Judge. The writ of error in this case presents for review a judgment in favor of the defendant in error for damages for a personal injury sustained by him while he was in the employment of the plaintiff in error as a blacksmith's helper. The parties will be referred to as they were designated in the trial court, the plaintiff and the defendant, respectively. The count of the complaint which was recovered on attributed the injury complained of to the alleged negligence of one James Bradley, a person in the service or employment of the defendant, who had superintendence intrusted to him, and, while in the exercise of such superintendence, in ordering or requiring the plaintiff to use a certain hammer which was unfit or unsuited for the purpose for which plaintiff was required by Bradley to use it.

The phase of the evidence adduced which was most favorable to the plaintiff was to the following effect: The defendant was engaged in surface work preparatory to mining coal. For the purpose of repair work required it employed one Bradley, a blacksmith, and had at the scene of its operations a forge and some blacksmith tools. The place where the blacksmith equipment was kept and where the blacksmith work was done was called the blacksmith shop, though there was no building there. At the time he was hurt the plaintiff had been working for the defendant about 2½ months. For about 2 weeks before he was hurt he was acting as the blacksmith's helper. Before that he was employed in other work on the job. At the time he was hurt he was 18 years old. The handle of a sledge hammer he was using came off, and Bradley told him to hurry up and wedge the sledge hammer back on the handle; that the men had some work pushing in the shop. In Bradley's presence the plaintiff made a wedge by sharpening one end of a piece of steel with a smoothing hammer, placed the wedge in an opening cut in the end of the handle before it had been put back in the hammer, and, while with his left hand he was holding the handle of the sledge hammer to keep it in the position in which it was leaning against a wooden block, hit the wedge with a riveting hammer, which was "round-shaped, oval-faced on both ends, and worked slick." The blow caused the wedge to fly out, and it struck the plaintiff in one of his eyes, causing an injury which resulted in the loss of sight in that eye. Plaintiff had not previously used the riveting hammer. He had seen Bradley using it. There were other hammers on the job; but the only one that could be used, which was at the blacksmith shop

when plaintiff received the order mentioned, was the one which the plaintiff used.

From the circumstances attending the giving of the order it might be inferred that it meant that the plaintiff was to use the riveting hammer in doing the work he was told to do. If the order was a negligent one, it was such because of Bradley's failure to warn the plaintiff of the danger involved and how to avoid it. An employer is not required to warn an employé of a danger which is obvious to a person of ordinary intelligence, unless, through youth, inexperience, or other cause, the employé is incompetent fully to understand and appreciate the danger and how to avoid it. Louisville & Nashville R. Co. v. Boland, 96 Ala. 626, 11 South. 667, 18 L. R. A. 260; Boland v. Louisville & Nashville R. Co., 106 Ala. 641, 18 South. 99; 26 Cyc. 1176. The danger in using the riveting hammer in driving a steel wedge into the end of the sledge hammer handle was that, by reason of the first-mentioned hammer being round or oval-faced on both ends, and worked slick, a heavy blow with it was liable to be a glancing one, that might cause the wedge to fly out, if it had not been made sufficiently fast in the opening prepared for it before the blow was given. We do not think that the danger properly can be regarded as a latent one, or one which a youth 18 years old and of ordinary intelligence would reasonably be expected not fully to appreciate and know how to guard against. A mere child, known to be about to attempt to drive in a steel wedge with such an instrument, might need to be warned of the danger of the attempt without first making the wedge fast enough for it not to be likely to be knocked out by a glancing blow. A normal person, of more maturity and experience, would not reasonably be expected to need such warning. There was no evidence indicating that the plaintiff was physically or mentally immature for one of his age. The presumption is that he was possessed of that degree of intelligence which is common to young men 18 years old, and, in the absence of evidence to the contrary, it is to be presumed that a young man of that age is capable of recognizing and appreciating such an obvious danger as the one above mentioned. The hazard of the attempt as it was made was such an obvious one that the plaintiff's employer was not under a duty to warn him in reference to it. Worthington & Co. v. Goforth, 124 Ala. 656, 26 South. 531; Brammer v. Pettyjohn, 154 Ala. 616, 45 South. 646. The evidence most favorable to the plaintiff showed that the injury complained of was attributable to his negligently exposing himself to an obvious danger. The plaintiff's contributory negligence being available as a defense under the pleadings in the case, it was error to refuse the requested charge against a verdict in his favor.

Reversed.

UNITED STATES S. S. CO. v. ALLIED S. S. CORPORATION.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 108.

EVIDENCE ⇐411—PAROL EVIDENCE—WRITING INCOMPLETE ON ITS FACE.

A written memorandum, indorsed on a charter party and signed by the parties, that "this charter is hereby canceled by mutual consent," does not exclude parol evidence of the agreement upon which the cancellation was made.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Allied Steamship Corporation against the United States Steamship Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and Geo. M. Burditt, both of New York City, of counsel), for plaintiff in error.

Frederic H. Cowden, of New York City, for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The written pleadings contained in the record cast little light on the issues actually tried. By them little more is shown than that from numerous defendants, all in some way connected, or said to have been connected with the steamship Ocama, plaintiff desired to recover $5,000, while defendant United States Steamship Company denied on oath substantially every allegation of the complaint.

The plaintiff's evidence showed that the Allied Company had chartered the Ocama from the Continental Trading Company, and on signing the charter had paid on account of hire $5,000. In this transaction the Continental Company was acting as agent for Ocama's owners. The United States Company did not own the steamer, but seems to have owned the stock of the concern that was the owner; yet it received the $5,000 aforesaid. Thereafter, and before delivery of vessel under said charter party, disputes and differences arose between the parties concerned, whereupon by mutual agreement the charter party was canceled. About the foregoing facts there was substantially no dispute, but a copy of the charter party was put in evidence, bearing the following indorsement: "This charter is hereby canceled by mutual consent"—signed by the Allied and Continental Companies, through admittedly authorized agents. The only fact difference between the parties was that Allied Company gave testimony tending to show that one Morse, the president of United Company, had agreed when the charter party was canceled, to return the aforesaid $5,000 to Allied Company, and this proposition was wholly denied by the defendant. Upon this showing, and at the close of all the evidence, plaintiff's counsel made the following application:

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"I move to amend my complaint to conform with the proof to show that this charter party was rescinded, and that as a part of the said agreement of cancellation by rescission the United States Steamship Company agreed by its president, Charles W. Morse, to return this payment of $5,000."

To this motion no objection was made by defendant, though it dropped out of the case all the other parties and wholly changed the issue.

The motion was granted without exception, and thereupon the United States Company moved "to strike out all the testimony as to the conversation relating to" the agreement of cancellation, because "the writing of the cancellation is complete in itself and parol testimony cannot be given to vary the terms of any agreement."

An exception was taken to the refusal of this motion, and also to the refusal of the court to charge in substance as matter of law that the record owners of the Ocama were (by reason of certain delays of the Allied Company) "entitled to cancel the said charter party and retain the deposit of $5,000."

The Allied Company had a verdict after the court had very plainly put to the jury the issues raised by the motion to amend and to such charge no exception was taken.

On this writ plaintiff in error points out that some of the Allied Company's evidence declared that Morse had said, when the charter party was canceled:

"I give you my word of honor that out of the first cargo, or out of all cargoes I have, this money [i. e., the $5,000] comes back."

Thereupon defendant offered to prove how much freight money the Ocama received on her first trip after the cancellation. This was objected to, and excluded over exception, and is now assigned for error. We find no merit in any of these propositions.

1. The memorandum indorsed upon the charter party merely stated a result; it did not give, nor purport to state, the terms of cancellation. "The mere circumstance that some writing had been made by parties for the better recollection of the terms of their transaction does not of itself make that writing the sole memorial of the transaction, even to the extent covered by the writing." 4 Wigmore, Ev. § 2429. This transaction is very far within the rule thus well stated.

2. The request denied by the court had become wholly immaterial by the radical amendment made after the close of the evidence. It then stood admitted that there had been a cancellation "by mutual consent." That consent plainly included the record owners of the Ocama; but, even if it did not, their possible rights did not in the least affect the question whether the United States Company, by its president, had agreed to return to the Allied Company money which it had actually received.

3. In like manner, if there ever was any merit in the offer to prove how much the United States Company, or its president, got out of the subsequent freights of the Ocama, the point became immaterial, when the issues were changed by amendment unobjected to.

The case then stood as upon an oral pleading, the answer of the defendant below being a general denial. If that defendant then held

that it was only liable to pay out of a special fund, there was ample opportunity to present that issue. It never was presented, either in the original written answer or by motion to amend. Therefore the exception became worthless, whatever may have been its original merit.

Let the judgment be affirmed, with costs.

DEPEW et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 20, 1918.)

No. 2386.

POST OFFICE ⊂=50—USE OF MAILS TO DEFRAUD—ELEMENTS OF OFFENSE.

On trial of defendants, charged under Criminal Code, § 215 (Comp. St. 1916, § 10385), with using the mails to defraud, an instruction approved that an intention to use the mails when the scheme was formed was not essential, if they were in fact used in its execution.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Criminal prosecution by the United States against Thomas H. Depew and others. Judgment of conviction, and defendants bring error. Affirmed.

R. W. Archbald, of Scranton, Pa., and A. E. Anderson, of Pittsburgh, Pa., for plaintiffs in error.

B. B. McGinnis, of Pittsburgh, Pa., for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. In the court below the defendants were found not guilty on counts 1, 2, and 5, and guilty on counts 3 and 4, of an indictment. The first four counts charged a scheme to defraud and the use of the mails in execution thereof, and the fifth count charged a conspiracy to commit the offenses charged in the four counts. Judgment having been entered and sentence imposed, the defendants sued out this writ.

The evidence, which covered several days in its production, is not before us, but from the charge of the judge, which is before us, and to the accuracy of whose statement of facts no question is raised, it is clear there was evidence of the existence of a scheme or artifice to defraud sufficient to carry the case to the jury. No charge is made that any testimony on behalf of the government was wrongfully admitted, and the charge itself, the opinion of the court, and the absence of anything indicating injustice, satisfy us that the defendants had a full and fair opportunity of presenting their side of the case to the jury.

The error urged on the present writ relates to the defendants' points, viz. the refusal of the fifth point, and the answer to the seventh. We find no error in that regard. The court in its charge, as to the proof of facts, instructed the jury that the government must establish:

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"First, that the person charged devised a scheme or artifice to defraud; and, second, that in carrying out such scheme such person either deposited a letter or package in the post office, or took one therefrom."

As to the law applicable the court said:

"Under section 5480 of the Revised Statutes of the United States, it was then necessary to charge, not only that a scheme to defraud was devised, but that it was intended to be effected by the use of the mails. That was the former statute. But under section 215 of the Criminal Code [Act March 4, 1909, c. 321, 35 Stat. 1130 (Comp. St. 1916, § 10385)], it is only necessary to charge and prove that the scheme or artifice to defraud was devised or intended to be devised, and that the mails were actually used in executing or attempting to execute the scheme."

In our judgment, what the court thus said in reference to the facts shows that the court did hold that the use of the mails must be proved as laid, and therefore its refusal of defendants' fifth point cannot be regarded as any denial of the contention made in the point, viz. that "the use of the mails is thus made an essential part of the scheme and must be proved as laid," for that is what the court had already charged; but the denial of the point went to the refusal to give binding instructions to acquit on the ground the proof "has not been done, and there can therefore be no conviction in the case." Taking the charge, the point, and its answer as a connected whole, it is clear to us that the court's refusal of this point was in reality but the refusal to give binding instructions for the defendants, and as such involved no error.

It is further contended the court erred in its answer to defendants' seventh point, which point and answer were:

"Seventh. The various means which it is charged in the indictment were to be employed by the defendants in carrying out the scheme to defraud are essential parts of the scheme, and must be proved as laid in the indictment."

Answer of Court: "The scheme to defraud and the means used to carry it into execution are distinct, although the latter may be evidence of the existence of the former. The indictment alleges that the scheme was to be effected by means of the Post Office establishment of the United States, but it is not necessary, under section 215 of the Penal Code, that when the scheme was formed the parties intended to execute it by the use of the mails."

We are unable to see any harmful effect the point and answer had in the case. The court, in the extracts of the charge already made, had already charged that the government must show that the persons charged devised the scheme or artifice described, and the answer to the point in no way lessened this requirement of proof in the charge. The substance of the answer was that:

"It is not necessary, under section 215 of the Penal Code, that when the scheme was formed the parties intended to execute it by the use of the mails."

This, as we have seen, was what the court had already instructed the jury was the law. Therein we find no error, as we read the two acts of Congress and the decision of the Supreme Court in U. S. v. Young, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. 548.

We are of opinion the court below was right in the construction given by it in the charge and in the answer to this point. The remaining

assignments of error, bearing on the refusal of the court to arrest judgment, disclose no error. The reasons warranting a denial of those several requests were, in our judgment, rightly set forth in the opinion of the trial judge.

Finding no error in the record, and satisfied the defendants had a fair trial, we affirm the judgment of sentence entered in the court below.

RAHM v. MAYOR, ETC., OF CITY OF VICKSBURG.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1919.)

No. 3297.

MUNICIPAL CORPORATIONS ⟸768(3)—SUFFICIENCY AND SAFETY OF WAY—SIDEWALK ABOVE GRADE OF STREET.

A city *held* not chargeable with negligence, which rendered it liable for injury to a person who fell when starting to cross a street in the evening in the middle of a block, because the sidewalk was some 4 or 5 feet higher than the grade of the street.

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action at law by F. H. Rahm against the Mayor and Aldermen of the City of Vicksburg. Judgment for defendant, and plaintiff brings error. Affirmed.

R. L. McLaurin, of Vicksburg, Miss. (McLaurin & Armistead, of Vicksburg, Miss., on the brief), for plaintiff in error.

George Anderson, of Vicksburg, Miss. (Anderson, Vollor & Kelly, of Vicksburg, Miss., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

BATTS, Circuit Judge. Veto street, between Washington and Walnut, in the city of Vicksburg, was improved by reducing the grade. No corresponding change was made in the sidewalk on the north side. This sidewalk, from Washington street east towards Walnut, was of concrete; and, starting with the same grade as Veto street at Washington, it was, at the middle of the block, from 3½ to 5 feet higher than the street. From this point the sidewalk was of brick, and, gradually descending, again reached the level of Veto street at Walnut. Plaintiff in error, a gentleman of more than 70, a traveling salesman, not residing in the city, was walking from Washington east towards Walnut on the north sidewalk of Veto. Reaching the highest point on the sidewalk, he states that he saw what appeared to him a hole in the sidewalk, and, in order to avoid any danger, he left the sidewalk and stepped into the street at the point at which the sidewalk was highest from the street. He sustained injury from the resulting fall, and instituted suit against the city for damages.

The declaration charged that plaintiff proceeded on a concrete side-

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walk until "when the sidewalk ceased to be of concrete and continued in brick pavement, which under the dim reflection from the street light appeared very much darker to the plaintiff than the concrete sidewalk"; that "in an effort to avoid possible danger ahead of him, where he could not see so plainly, he turned to the right, intending to cross Veto street and to take the sidewalk on the south side, where he could see much better from the light available"; that at this place "Veto street is some 4 or 5 feet lower than the sidewalk," the step-off being practically perpendicular; that the accident to plaintiff was caused by negligently leaving the sidewalk at the old grade and not providing sufficient light or a railing. In a second count it was alleged that the north sidewalk was not lowered to avoid complications or litigation with adjacent owners of property. The trial court overruled a demurrer to the declaration.

After the introduction of evidence he instructed the jury, but concluded his charge by directing a verdict for the defendant. The action of the court may have been unusual; but, if the evidence required a directed verdict, instruction could be given at any time before submission to the jury. The question for determination is whether there was evidence requiring the submission of the case to the jury.

The city is not an insurer of the safety of persons who use its streets and sidewalks. Its obligations are met when reasonable care is exercised to keep them in reasonably safe condition. The city provided a safe street between Washington and Walnut, and safe sidewalks between the two streets. At Washington and Walnut there were safe places to cross from the sidewalk on one side to that on the other. There is no law and no customary practice requiring that safe crossings be provided at all points between streets on a block. Mr. Rahm chose to utilize, after night, a sidewalk of the city. The sidewalk was an entirely safe one, and if he had kept on it no accident would have occurred. He chose rather, without any investigation of what appeared to him to be a hole, but which in fact was not, to leave the sidewalk in the middle of the block, and take the chance which might be involved in crossing from one sidewalk to the other at an unusual place. This he did without making any effort to ascertain the relation between the sidewalk and the street—without knowing or undertaking to find out the distance from the one to the other. A difference between the grade of a street and of a sidewalk is common. It is apparent that plaintiff's accident resulted from his mistake in the first instance, his failure to easily correct his impression, and his failure to ascertain whether he could, with safety, step from the sidewalk to the street.

The plaintiff testified on cross-examination that the lights were dim on that night. At Washington, at the intersection of Veto, there was a 1,500 candle power arc light, and on Walnut street, at the intersection of Veto, there was an 80 candle power incandescent light. There is no evidence that lights of these powers were not entirely sufficient to light up Veto street and its sidewalks. There was nothing to obstruct the light. The circumstance that the witness testified that, on the particular night, the lights were dim, would not carry the in-

ference that the city had not exercised ordinary and proper care in the matter of lighting.

The circumstance that the city would have lowered the sidewalk, except for the attitude of the property owners, does not import negligence.

It is suggested that contributory negligence does not, under the laws of Mississippi, preclude recovery. The facts developed do not make a case of contributory negligence. Contributory negligence involves the idea of negligence by both parties. The evidence does not disclose any particular in which the city failed to perform its duty. The instructions of the court were justified by the evidence, and the case is

Affirmed.

DENVER OMNIBUS & CAB CO. v. KREBS.*

(Circuit Court of Appeals, Eighth Circuit. January 15, 1919.)

No. 5033.

1. EVIDENCE ⟹123(11)—RES GESTÆ—STATEMENTS OF AGENT.
Statements made by the driver of a taxicab to a passenger, immediately after an accident in which a pedestrian was injured, are admissible against his employer as part of the res gestæ.

2. EVIDENCE ⟹492, 568(6)—OPINION EVIDENCE—QUALIFICATION OF WITNESS.
Upon the question of the speed of a taxicab no technical knowledge is required to qualify a witness to state his opinion; its weight being for the jury.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action at law by May M. Krebs against the Denver Omnibus & Cab Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John A. Deweese and Charles A. Prentice, both of Denver, Colo., for plaintiff in error.

J. W. Kelley and Eselyn B. Kelley, both of Denver, Colo., for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. For convenience the parties will be referred to as they appeared in the court below, the defendant in error as plaintiff, and the plaintiff in error as defendant.

This is an action for damages for personal injuries, alleged to have been sustained by the plaintiff by the negligence of the defendant. The complaint charged that, while the plaintiff was walking across a public crossing on a public street in the city of Denver, an employé of the defendant, driving at a reckless speed one of the taxicabs of the defendant, negligently, recklessly, and carelessly struck the plaintiff, seriously injuring her. The answer, in addition to general denials, pleaded contributory negligence of the plaintiff.

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied April 12, 1919.

Upon a trial to a jury a verdict in favor of the plaintiff was returned, upon which judgment was entered, which it is sought to reverse by this writ of error. There are several errors assigned to the admission of evidence and also the refusal of the court to direct a verdict for the defendant.

[1] One of the objections to the evidence is the admission of that part of the testimony of a witness, who was a passenger in the taxicab which struck the plaintiff and inflicted the alleged injury. He testified that:

"When passing the place where the injury occurred the car suddenly swerved. When he asked the chauffeur what was the trouble, he kept on going and replied: 'I nearly hit a woman.' I said: 'Hadn't we better go look and see if she is hurt?' He replied: 'No; I didn't hit her; I just missed her.' As the machine continued, I noticed that the uptown bound street car had stopped, and I called the attention to the chauffeur to that fact, whereupon he said: 'I am pretty sure I didn't hit her.'"

As the chauffeur was the agent of the defendant, his statements, made at the time of the accident, and while in the discharge of his duties as a chauffeur of a taxicab carrying a passenger, were clearly admissible as a part of the res gestæ. 2 Chamberlayne on the Modern Law of Evidence, § 1344; 16 Cyc. p. 1242.

[2] Did the court err in admitting the testimony of the plaintiff and the witness Lucas as to the speed the taxicab was running, as they had not qualified as experts, it is claimed? The plaintiff testified that she had frequently ridden in automobiles, and knew about their speed. The witness Lucas testified:

"I have ridden many times in automobiles over a period of years, and have observed their speed, both with and without looking at the speedometer. I have also observed the speed of railroad trains, by watching the speedometers in private and business cars."

This is sufficient to qualify these witnesses to testify to the speed of the taxicab. In a matter of this nature no technical knowledge is required to admit such opinions; the jury to determine the weight to be given to the testimony. Robinson v. Louisville Ry. Co., 112 Fed. 484, 50 C. C. A. 257; Porter v. Buckley, 147 Fed. 140, 78 C. C. A. 138; Rothe v. Pennsylvania Co., 195 Fed. 21, 114 C. C. A. 627; Erie R. R. Co. v. Weber, 207 Fed. 293, 125 C. C. A. 37; Detroit & Milwaukee R. R. Co. v. Van Steinburg, 17 Mich. 104; Lorenzen v. United Ry. Co., 249 Mo. 182, 155 S. W. 30. In Omaha & C. B. St. Ry. Co. v. McKeenan, 250 Fed. 386, — C. C. A. —, Judge Carland, speaking for this court, held that the admissibility of such evidence is within the discretion of the trial court.

The only other ground upon which a reversal is sought is the refusal of the court to direct a verdict for the defendant. It will serve no useful purpose to set out the evidence. We have carefully read it, and are satisfied that there was substantial evidence to require the submission of the cause to the jury.

Finding no error, the judgment is affirmed.

BELL v. TENNESSEE COAL, IRON & R. CO.

(Circuit Court of Appeals, Fifth Circuit. January 31, 1919.)

No. 3236.

MASTER AND SERVANT ⊂=217(7)—MASTER'S LIABILITY FOR DEATH OF SERVANT —FOREMAN IN CHARGE OF PLACE TO WORK.

The foreman of a section of miners, whose duty it was to make and keep the place safe for them to work, assumed the risk, and there can be no recovery for his death from the falling of rock from the roof, which was under his own superintendence, and without negligence on the part of the employer.

In Error to the District Court of the United States for the Southern Division of the Northern District of Alabama; William I. Grubb, Judge.

Action at law by G. W. Bell, administrator of the estate of T. R. Bell, deceased, against the Tennessee Coal, Iron & Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Weatherly, Deedmeyer & Birch and Jere C. King, all of Birmingham, Ala., for plaintiff in error.

Percy, Benners & Burr and James Rice, all of Birmingham, Ala., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and BEVERLY D. EVANS, District Judge.

BEVERLY D. EVANS, District Judge. Plaintiff's intestate was employed as hedge foreman in the mine of the defendant, and was killed by the falling of ore from the roof of the mine, while he was engaged in the work of his employment. The action is brought under the Employers' Liability Act of the state of Alabama (Code 1907, § 3910). The death of plaintiff's intestate was attributed in the several counts to a defect in the ways, works, machinery, or plant of the defendant, and to the negligence of the superintendent of the mine, the mine captain, and the barman in allowing the ore to fall from the roof of the mine on plaintiff's intestate, inflicting a mortal injury. The court gave a peremptory instruction to the jury, that if they believed the evidence to return a verdict for the defendant.

The evidence disclosed that the defendant company was engaged in mining iron ore. Plaintiff's intestate was a section foreman, having under his supervision a crew of men whose business was to mine the ore. He was in charge of the upset or heading of the mine where he was killed. The workmen under his control consisted of muckers, shakers, a drillman, and a barman. If in the mining operations there should be a rock which could not be dislodged by the barman with his bar of iron, it was his duty to get the advice of the foreman, plaintiff's intestate. On the morning of the injury, and about 25 or 30 minutes before its occurrence, the superintendent of the mine, in company with the bank boss and mine captain, came up to this heading, and the roof was inspected by the bank boss in the presence of the

plaintiff's intestate, the foreman. After the inspection was made, and they had left, the foreman's crew began to drill the face of the rock and to tear the ore down. While engaged in pulling down the ore rock, the drillman and the barman differed as to the manner of quarrying the rock, and as to the danger of the rock's falling, and sent for the foreman. The foreman made an examination, and as he started away the rock fell on him and killed him. This, in brief, is the testimony of the eyewitness, and is not contradicted by other testimony.

The plaintiff's intestate was employed to superintend the very work in which he lost his life; he was performing work which the law, by virtue of his employment, cast upon him, viz. to provide a safe place in which employés under his immediate superintendence could work. The evidence discloses no negligence on the part of the defendant's servants, and the plaintiff's intestate met his death in consequence of the risks incident to his employment.

Judgment affirmed.

CLARKE et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. November 20, 1918.)

No. 2385.

CRIMINAL LAW ⊂=1144(½)—REVIEW—PRESUMPTION.

Where the evidence is not in the record, the only complaint being verdict was contrary to the charge of the court, it will be assumed that proof was adduced to warrant submitting case to jury.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Criminal prosecution by the United States against Frederick H. Clarke, Henry F. Clarke, Fred J. Nagel, John A. Simpson, the Kent Motors Corporation, and the Securities Company of America. Judgment of conviction, and defendants bring error. Affirmed.

George Haldorn and W. H. K. Davey, both of New York City, for plaintiffs in error.

Archibald Palmer, of New York City, for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. In the court below the defendants were jointly indicted for using the mails in pursuance of a scheme or artifice to defraud, the details of which scheme need not be here detailed. To this indictment the defendants pleaded, and the cause was tried at great length and resulted in the conviction of these defendants. From judgments imposing sentence they have sued out this writ.

A large number of witnesses were examined, the defendants were represented by competent counsel, and the case was submitted to the jury in a charge whose fairness was such that no exception was taken thereto on behalf of the defendants. Indeed, far from there being

any complaint to the charge, the only error assigned is "that the verdict as to said defendants was contrary to the charge of the court." As the evidence has not been produced and is not before us, we must assume proof was adduced which constrained the case be submitted to the jury, and as the charge of the trial judge submitted these proofs to the jury with fairness, we cannot find any assigned error which warrants a reversal.

Another matter we refer to, lest by our silence it might be supposed we had not considered the same. That is the admission in evidence of a letter written to F. S. Nagel, dated January 29, 1917. It suffices to say that, although the admission of such letter was not assigned for error, we have, by virtue of the right provided for in our own rules, examined the question of its admission with the same force and effect as though before us on a timely exception and a due assignment, with the result that we find its admission involved no error which would justify the reversal of this judgment.

Satisfied as we are that the defendants had an impartial trial, we affirm the judgment of sentence entered by the court below.

PRATHER v. DUDLEY.

(Circuit Court of Appeals, Fifth Circuit. November 8, 1918.)

No. 3175.

COMPROMISE AND SETTLEMENT ⊂=22—PLEADING.

In action on note given to bank, answer pleading set-off of balance due defendant as depositor contained allegations as to note being given for money borrowed while defendant had a balance, but while his passbook was with the bank to be balanced. *Held* not to show that dispute as to state of account was closed by giving note.

In Error to the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Action by N. M. Dudley, receiver, against W. S. Prather. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Robert L. Berner, of Macon, Ga., for plaintiff in error.

W. A. Dodson, of Americus, Ga., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. The receiver of the Americus National Bank sued plaintiff in error upon a note. The defendant, answering, admitted the execution of the note, but pleaded as a set-off a balance due him as a depositor. Objection being made that the plea was indefinite, he amended, giving the dates and amounts of deposits, and the dates and amounts of checks paid by the bank, showing a balance due him in excess of the note. Allegations were also made to the effect that, prior to the execution of the note, he had delivered his passbook to the bank to have it balanced; that the book had

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

not been returned; that, while he had a balance due him, he at the time needed money to pay off a note given for the purchase money of his home, and that it was agreed that he should give his note for the sum borrowed; and that the question as to his deposit should remain open until his account could be properly balanced.

In sustaining a plea to strike the answer, the court, in the opinion filed, states that the defendant's account was in dispute, and that "this dispute, in the absence of fraud, accident, or mistake, was closed by the defendant giving this note." There is nothing in the pleading to suggest that the execution of the note had, or was intended to have, the effect of determining any matter in controversy between the bank and its depositor. The defendant acknowledges liability upon the note, and the plea is in no sense an effort to vary the note, or any other written instrument. According to the allegations of the answer, the amount due to defendant as a depositor remained at that time undetermined. He now specifically pleads deposits made by him and checks drawn by him, and no reason appears why the claim asserted should not be submitted to a jury. The plea was improperly stricken, and the case is remanded for action in conformity herewith.

Reversed.

STAFFORD CO. v. DRAPER CORPORATION.

(Circuit Court of Appeals, First Circuit. November 21, 1918.)

No. 1353.

1. PATENTS ⊂=328—VALIDITY—NOVELTY—ANTICIPATION.
The Roper patent, No. 821,123, for an improvement in filling-exhaustion-indicating mechanism for detecting and indicating substantial exhaustion of the filling in the running shuttle, and thereupon to cause either automatic loom stoppage or automatic replenishment of the shuttle, etc., *held* valid, not being anticipated, and showing utility and novelty.

2. PATENTS ⊂=328—INFRINGEMENT.
The Roper patent, No. 821,123, for an improvement in filling-exhaustion-indicating mechanism for detecting and indicating substantial exhaustion in the running shuttle, etc., *held* not infringed as to claims 1 and 9 by defendant's device, intended to serve the same end.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Bill by the Draper Corporation against the Stafford Company. From an interlocutory decree for plaintiff, defendant appeals. Decree vacated, and case remanded, with directions.

See, also, 255 Fed. 556, — C. C. A. —.

Melville Church, of Washington, D. C. (Nathan B. Day, of Boston, Mass., on the brief), for appellant.

W. K. Richardson, of Boston, Mass. (J. L. Stackpole, of Boston, Mass., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

BINGHAM, Circuit Judge. This is an appeal from an interlocutory decree in favor of the plaintiff relating to United States letters patent, No. 821,123, granted to C. F. Roper, May 22, 1906. The defenses are anticipation and noninfringement. It was found in the court below that claims 1 and 9 of the patent were valid and infringed, and that claims 12, 13, and 18 were invalid, not being sufficiently definite. The present appeal of the defendant is from so much of the interlocutory decree as held claims 1 and 9 valid and infringed. No appeal was taken by the plaintiff from the interlocutory decree as to claims 12, 13, and 18.

[1] The plaintiff's patent is for an improvement in filling-exhaustion-indicating mechanism "for detecting and indicating substantial exhaustion of the filling in the running shuttle, and thereupon to cause either automatic loom stoppage or automatic replenishment of the shuttle without stoppage."

In the hearing before us only one of the prior art devices relied upon in the court below was urged in opposition to the finding of validity; that device is shown in United States letters patent No. 698,579, granted to W. I. Stimpson, April 29, 1902. It is true, as the defendant contends, that the feeler members of this device are brought in contact with the filling or the filling and its carrier on each alternate beat of the lay, the same as is the case in the plaintiff's device; but the distinction between the two devices lies in the respective means provided and their mode of operation for effecting a change in the filling mechanism. In the plaintiff's device one of the feelers is pointed, so that it sinks into or penetrates the filling, when there is filling on the bobbin, which feature is essential to the working of the device; while in that of Stimpson, although one of the feelers is narrower than the other, it is not pointed, and its mode of operation is not dependent upon its possessing a penetrative capacity. On the contrary, such capacity would seem to be detrimental to its operation. Then, again, the operation of the plaintiff's feelers is dependent upon the softness or penetrability of the filling mass, as compared with the harder material of which the bobbin is composed, a feature in no way material in the operation of the Stimpson mechanism. In the plaintiff's device, when the filling on the bobbin has become so reduced as to exert no pressure upon the impinging member, the penetrating member then contacts with the hard surface of the bobbin, both members are moved forward in unison, and the change is effected; while in the device of Stimpson the change is effected only when one of the feeler members is moved forward relatively a predetermined distance by an annular enlargement on the barrel of the bobbin, which is so located with reference to one of the feeler members as to effect this result when the filling has been sufficiently exhausted to permit it.

In the court below it was found that the "patented device effects in operation a substantial saving, by diminishing the amount of the filling left on the carrier at each loom stoppage or replenishment, to an extent not attainable by any prior mechanical exhaustion-indicating device. It embodies therefore a useful improvement, and one which I also find to have been patentably new, notwithstanding that it was

made * * * in a 'refined' art." We think the proofs fully sustain the findings as to utility and patentable novelty.

[2] The question of infringement as to claims 1 and 9 remains to be considered. These claims read as follows:

"1. In a loom, a shuttle to contain a carrier having a mass of filling wound thereon, filling-replenishing mechanism, and means to control the time of its operation, said means including two adjacent and yieldingly mounted, relatively movable members one of which is adapted to penetrate, and the other to impinge against, the filling mass in the shuttle, to effect relative movement of said members, substantial exhaustion of the filling permitting the penetrating member to engage the carrier and move in unison with the impinging member, to cause the operation of the controlling means."

"9. In filling-exhaustion-indicating mechanism for looms, in combination, two adjacent and relatively movable members one of which is adapted to penetrate, and the other to impinge against, the filling mass in the shuttle to effect relative movement of said members, substantial exhaustion of the filling causing the members to move in unison, and means operated by or through such unison movement to control the operation of the loom."

Upon this question it was found in the court below that the defendant's feeler device, like that of the plaintiff, consisted of two members movable relatively under certain circumstances and movable in unison under certain other circumstances, depending upon the filling on the carrier, and adapted to co-operate with the filling mass or its carrier at each alternate beat of the lay; that both members are moved forward against spring pressure at each contact; that one of the members "presents a blunt surface at its point of contact," and is no more adapted to penetrate or sink into the filling mass than the "impinging member" of the patent; that the other member is differently shaped at its point of contact, "and while rather better adapted than its fellow to 'penetrate' or 'sink into' the filling mass, it is still by no means so well adapted for that purpose as is the penetrating member of the patent"; that "there is a distinct difference in penetrative capacity" between the two members of the defendant's device; and that "without such difference the mechanism would neither work so well, nor effect so much saving in filling." In other words that it embodies the penetration idea of the patent.

It was further found that the mode or order of operation of the defendant's feeler device in effecting a change was a mere reversal of that of the patent, and it was ruled that its mode of operation, to a substantial extent at least, was the equivalent of that of the patented device and that the defendant infringed.

In discussing the question of infringement it is important to keep in mind that the distinctive feature of the plaintiff's patent is the penetrative or sinking-in character of the pointed member of its feeler. In Stimpson's device of the prior art, the feeler members measure a predetermined distance from the surface of the yarn on the bobbin to the rim of the annular enlargement on the barrel of the bobbin, before calling a change. In the plaintiff's device the feeler members, on calling a change, measure a predetermined distance from the surface of the yarn to the bobbin; and this is true, likewise, of the defendant's device. The feeler members in all three devices move relatively to one another in reaching this predetermined measuring point. The new

idea of the plaintiff's device consists in the patentee having laid hold of the principle of the relative density of the yarn and the bobbin and provided a feeler mechanism one member of which was adapted to penetrate the yarn and the other to impinge upon it and, when the yarn was sufficiently reduced, to measure the predetermined distance, which, upon being followed by a unison movement of the members, would call a change.

In determining whether the defendant's device infringes that of the plaintiff it is necessary to ascertain whether the defendant makes use of the relative density of the yarn and the bobbin and employs as means a feeler, one member of which penetrates or sinks into the yarn, while the other impinges upon it, to effect the predetermined measurement necessary to calling a change.

In the plaintiff's feeler device the penetrating or sinking-in member is provided with two sharp points. Between them is a recess in which is located the impinging member with a blunt head. The end of the penetrating member normally projects rearwardly further than the end of the impinging member, the distance between the two being the predetermined distance or measurement to be made between the surface of the bobbin and the yarn when the change is called. Both are arranged to move relatively within a limited scope and then in unison.

In the defendant's feeler there are two members located in the same horizontal plane and but a comparatively short distance apart. Member No. 1 has a round, blunt end. This member, when the mechanism is at rest, projects rearwardly one-eighth of an inch further than No. 2. Member No. 2 has a square, blunt end measuring three-fourths of an inch across it. Both members move relatively to one another within a limited scope and then in unison, depending upon the amount of pressure exerted upon the respective members. Their relative movement is undoubtedly essential in two stages of the operation of the machine; one, in measuring the predetermined distance and effecting a change when the yarn on the bobbin is substantially depleted; and, two, in immediately thereafter resetting the feelers in an inoperative position on the beat of the lay following replenishment of the shuttle. This resetting of the feelers in an inoperative position is due to the length of their movement forward by the stroke of the newly replenished bobbin, which causes the cam *14* on the controller *7* to come in contact with the governor *15* and raise the point *71* on the controller out of engagement in the slot *5* in feeler No. 2. In the conical stage of the yarn on the bobbin, intermediate the two above-named stages, this relative movement would seem to be nonessential.

The defendant contends that the relative movement in conjunction with the cam and the governor is essential and operative not only for resetting the feelers after replenishment, but also throughout the full yarn stage of the bobbin; that during that stage, it keeps the point *71* out of slot *5* in feeler No. 2 so that a change is not called.

The plaintiff, on the other hand, says that the cam and the governor perform no useful function whatever in the operation of the device except to reset the feeler members in inoperative position after replenishment; that thereafter, even during the full stage of the bobbin, the

rearwardly projecting point on member No. 1 sinks into the yarn on the bobbin on the beating up of the lay to such an extent over that of member No. 2 as to permit point *71* on the controller to remain in position on feeler No. 2 (without engaging slot *5*), so that no change is called. In support of this contention the plaintiff introduced in evidence certain experiments made with the defendant's device with three bobbins. After the experiments were had the bobbins were still well filled with yarn. The plaintiff's expert testified that he used the three bobbins in four ways, one when the rounded feeler was used and the resetting cam *14* and governor *15* were operative, and that under those conditions the loom ran with no repeated engagement of the cam *14* and the governor *15*. If this statement—that under those conditions the loom ran with no repeated engagement of the cam *14* and governor *15*—is correct, it would fully support the plaintiff's contention that the cam and governor perform no useful function in the operation of the device after the feeler members, on replenishment of the bobbin, are reset in inoperative position. But the force of this testimony seems to us to be much weakened when the circumstances surrounding the operation of the device are considered and the conceded fact is taken into consideration that, after calling a change, immediately upon the beating up of the lay on replenishment of the bobbin the forward movement imparted to the feelers is sufficient to cause the cam *14* to engage the governor *15* and release the point *71* from the slot *5*. It is the full stage of the filling on the bobbin that causes the prolonged stroke, and it is inconceivable that the movements following the first long one, which concededly makes the cam and the governor operative to reset the feelers, should not continue to be sufficiently long, during the well filled stage of the yarn, to cause the cam and governor to contact and keep the feelers inoperative.

Furthermore the defendant's expert testified that he did not recall that his attention was directed to the cam as not touching the governor at the time the experiments were made; that, owing to the speed with which the lay beats up and the suddenness of the movements of the parts, a great deal of the feeling action is practically invisible; and that the cam might touch or pass over the governor sufficiently to prevent the controller rest from dropping without detection even when watched for.

The third use made of the bobbins in these experiments of the plaintiff was when the rounded finger was used and the resetting cam and governor were put out of commission by cutting a recess in the governor so that the cam could not engage it. Under these conditions the loom continued to run, and the explanation given by the plaintiff's expert was that it was due to the sinking of the "pointed finger into the yarn," which reduced the relative forward movement of the pointed finger No. 1 so that the point *71* on the controller rest was permitted to remain in position on feeler No. 2 and not engage in slot *5*. In answer to this the defendant's expert, who was present at the time the experiments in question were had, testified that the tests were made only with three bobbins and that the loom was operated by one of the plaintiff's skilled workmen; that the small number of bobbins thus

tried and the brief extent of the trial were insufficient to demonstrate what would be the results of continuous running of the loom and feeler mechanism throughout a day, or of actual use under ordinary mill conditions and by ordinary mill operatives; that "the action of the feeler mechanism with this notch [recess in the governor] in use would be so uncertain and unreliable in any attempt at continuous running in a mill as to render the mechanism practically inoperative and unacceptable for practical use; that "this was shown by the fact that when, upon the conclusion of Mr. Browne's tests [meaning the plaintiff's tests] the loom was run again under the same conditions for the purpose of enabling me to make further note of results, the feeler mechanism called the change prematurely in the case of two bobbins out of three;" and that "a feeler mechanism that will call replenishment at the full diameter stage is neither practicable nor acceptable." These bobbins were put in evidence. The bobbins as to which the change was called prematurely were marked "2P" and "3P." Bobbin 2P contains a large amount of filling and represents the stage spoken of as the intermediate or conical stage; bobbin 3P represents the well-filled or full diameter stage, and bobbin 1 the exhaustion or final stage.

The plaintiff introduced no evidence to refute the testimony that during the experiments with the cam and governor out of commission the feeler mechanism called a change prematurely on the bobbin which carried practically a full load of filling and did the same with the bobbin on which the filling was in the conical stage. It may be true that, during the full stage of the bobbin, the rounded feeler member No. 1, to some extent at least, sinks into the filling more than its companion member. But from the evidence presented, taken in connection with the elements that enter into the operation of the machine, we are unable to find that the depression caused by the rounded member at this stage plays any useful part in the operation of the device. It seems, rather, that the cam and governor, and not any depression caused by the feeler, are the operating means during this period which keep point *71* of the controller from engaging slot *5* and calling a change.

During the conical stage of the bobbin, the defendant's rounded feeler does not depend upon penetration or depression to permit the device to remain inoperative, but upon the conical shape of the yarn, which permits the rearwardly projecting rounded feeler, when in contact with the yarn, to extend further rearwardly than member No. 2, so that the two members are moved forward in unison and no change is called.

In the final or operative stage of the device, when the yarn is substantially removed from the bobbin, there is no penetration by the defendant's rounded member and there is no depression that can be useful in the operation of the device, the difference in diameters of the yarn on the bobbin at the points where the feelers contact with it permitting them to remain inoperative.

But the plaintiff contests this proposition and in answer thereto relies on experiments made with defendant's feeler device, (1) when the rounded member had a square cap upon it, and (2) when the cap was removed; and because more yarn was removed from the bobbin when

tested with the rounded member after the same bobbin had been discharged on the test with the capped feeler, it contends that this shows that in this stage of the operation of the device the rounded feeler penetrates or sinks into the yarn and thus delays the relative action of that feeler before calling a change. In considering this contention, it is to be borne in mind that the rounded feeler with the square ended cap upon it, when contacting with the filling, would be moved forward sooner than when the cap was removed, due to the fact that the square inner corner of the cap would come in contact with the filling sooner than if the inner corner was round, the winding of the yarn on the bobbin being conical rather than cylindrical, and consequently would call a change sooner.

In view of these facts we are of the opinion that the defendant's device in its mode of operation does not make use of the penetrative or sinking-in capacity of the plaintiff's penetrating member and does not infringe.

The decree of the District Court as to claims 1 and 9 is vacated, and the case is remanded to that court, with directions to enter a decree dismissing the bill as to said claims, with costs to the appellant.

DRAPER CORPORATION v. STAFFORD CO.

(Circuit Court of Appeals, First Circuit. December 13, 1918.)

No. 1357.

1. EQUITY ⊂=431—"FINAL DECREE"—OPERATION.
   A "final decree" is one that disposes of all the issues in the case, and a decree entered after rendition of an interlocutory decree, if final, merged the interlocutory decree in it.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. PATENTS ⊂=324(2)—INFRINGEMENT SUIT—DECISIONS APPEALABLE—FINAL DECREE.
   In an infringement suit, where defendant appealed from an interlocutory decree adjudging valid and infringed two claims of the patent, and ordering a permanent injunction, etc., *held* that, under Judicial Code, § 129 (Comp. St. 1916, § 1121), authorizing such appeal, the District Court could not enter a final decree disposing of all of the claims; and hence, where the court attempted to enter such a decree, it was not a final decree from which appeal would lie.

   Morton, District Judge, dissenting.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit by the Draper Corporation against the Stafford Company. From a final decree entered after defendant's appeal from an interlocutory decree, which adjudged invalid some of the claims of plaintiff's patent, plaintiff appeals. Appeal dismissed.

See, also, 255 Fed. 548, — C. C. A. —.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

W. K. Richardson, of Boston, Mass. (J. L. Stackpole, of Boston, Mass., on the brief), for appellant.

Melville Church, of Washington, D. C., for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and MORTON, District Judge.

BINGHAM, Circuit Judge. In this case, after full proofs, an interlocutory decree was entered in the District Court in favor of the plaintiff, adjudging claims 1 and 9 of the patent valid and infringed, ordering a permanent injunction, and directing an accounting. At the same time, and as a part of the decree, it was adjudged that claims 12, 13, and 18 were invalid. From so much of the decree as held claims 1 and 9 valid and infringed, the defendant prosecuted its appeal to this court under the provisions of section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1916, § 1121]). After this appeal had been taken, the plaintiff filed in the District Court a waiver of its right to an accounting under the decree, and the District Court, against the protest of the defendant, entered a final decree adjudging claims 1 and 9 of the patent valid and infringed, that a permanent injunction should issue, and that there be no reference to a master, and no recovery by the plaintiff of any profits, gains, or damages. It was further ordered, adjudged, and decreed that claims 12, 13, and 18 of the patent were invalid. From so much of the last-mentioned decree as adjudged claims 12, 13, and 18 of the patent invalid, the plaintiff appealed to this court, as from a final decree.

[1, 2] In this situation the defendant filed a motion in this court to dismiss the plaintiff's appeal, on the ground that the decree from which it was taken was not a final decree, for the reason that, after the defendant had appealed from the interlocutory decree, it was beyond the power of the District Court to enter a final decree until the questions raised by the defendant's appeal had been determined by this court; that pending defendant's appeal the hand of the District Court was stayed, so far as the question of the validity of claims 1 and 9 and the relief granted thereon were concerned; and that the supposed final decree was not a final decree, in that it could not dispose of all the issues in the case, it being beyond the power of the District Court to embody in a final decree the issues raised by the defendant's appeal.

The provision of the Judicial Code in question reads as follows:

"Sec. 129. Where upon a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the Circuit Court of Appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof,

during the pendency of such appeal: Provided, however, that the court below may, in its discretion, require as a condition of the appeal an additional bond."

In Ex parte National Enameling & Stamping Co., 201 U. S. 156, 161, 26 Sup. Ct. 404, 406 (50 L. Ed. 707), the Supreme Court was dealing with this statute prior to its amendment extending the right of appeal to interlocutory decrees refusing or dissolving an injunction. The provisos of the act, however, then read as they do now. In commenting upon the scope and effect of the appeal the court said:

"It will be noticed that the appeal is allowed from an interlocutory order or decree granting or continuing an injunction, that it must be taken within 30 days, that it is given precedence in the appellate court, that the other proceedings in the lower court are not to be stayed, and that the lower court may require an additional bond. Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered. It may be true, as alleged by petitioners, that 'it is of the utmost importance to all of the parties in said cause that there shall be the speediest possible adjudication * * * of all of the claims of the aforesaid letters patent which are the subject-matter thereof.' But it was not intended by this section to give to patent or other cases in which interlocutory decrees or orders were made any precedence. It is generally true that it is of importance to litigants that their cases be disposed of promptly, but other cases have the same right to early hearing. And the purpose of Congress in this legislation was that there be an immediate review of the interlocutory proceedings and not an advancement generally over other litigation."

From the language of the act and the interpretation thus placed upon it, it is apparent that the subject-matter of the decree as to which an immediate review is to be had in the Court of Appeals is the order granting or continuing an injunction, or appointing a receiver, and that other proceedings in the cause in the lower court are not to be stayed. The act does not in terms state that the hand of the court below shall be stayed as to the matter involved in the appeal, but, inasmuch as it expressly states that "proceedings in other respects in the court below shall not be stayed," it inferentially carries the idea that the hand of the court below shall be stayed as to the subject matter or question which is to be reviewed in the appellate court.

In Cuyler et al. v. Atlantic & N. C. E. Co., 132 Fed. 568, the Circuit Court for the Eastern District of North Carolina, in considering the effect of an appeal from an interlocutory decree, appointing a receiver under the act here in question, prior to the amendment, and the extent to which the appeal operated as a stay of the proceedings in that court, said:

"So that the appeal in this case could only be taken, being an appeal from an interlocutory order, and no stay is effective thereby except as provided in this act. That is the only statute which authorizes appeal, and the appeal could only be taken from the order appointing the receiver, and the suit for all other purposes remains in this court. The bill is still pending here, and the court could proceed under that statute to grant any order it might see proper, except as touching the question involved in the appeal.

"The order appointing a receiver being appealed from, as to that order only

this case is in the Circuit Court of Appeals. A proposition has been tendered by appellant to the appellee under rule 20, C. C. A. (31 C. C. A. clxii, 90 Fed. clxii), to withdraw the appeal, to which appellee refuses to consent. The appellant proposes to withdraw the appeal when the court meets. This is the only alternative. That being so, the court may make such order affecting the litigation as it sees fit, in its discretion, affecting the bill or matters not involved in the appeal; but as to the order appealed from any decree must be predicated upon the proposition to withdraw the appeal, and to be effective when this is done."

Our attention has been called to the decision in Foote v. Parsons Non-Skid Co., 196 Fed. 951, 118 C. C. A. 105. In that case it appears that, after a decree continuing a preliminary injunction had been granted, an appeal was taken in the name of Foote, and that after the appeal was perfected, the plaintiff and Foote entered into a settlement and signed a written stipulation, entitled in the court below, to the effect that a final decree for injunction, but without costs or damages, might be entered for the plaintiff, and that another stipulation was made, entitled in the Court of Appeals, to the effect that the appeal might be dismissed. The plaintiff filed the latter stipulation in the Court of Appeals and entered a motion to dismiss. The Atlas Company and the Perry Company filed a petition in the Court of Appeals to intervene and to be allowed to prosecute the appeal on the ground that they were the parties in interest in defending the suit in the court below. The motion to intervene was denied and the sole remaining question was whether the stipulation between the parties for the dismissal of the appeal should be granted. No question was presented in the Court of Appeals as to the power of the Circuit Court to enter a final decree in accordance with the stipulation of the parties, entitled as of that court, prior to the dismissal of the appeal, and we do not regard it as authority for the proposition that the lower court had the power to do so pending the appeal.

A final decree is one that disposes of all the issues in a case. If the decree in question was a final decree it merged the interlocutory decree in it. But it was beyond the power of the District Court to merge the interlocutory decree in a final decree pending the appeal therefrom, and this being so the decree from which this appeal is prosecuted was not a final decree from which an appeal will lie.

Appeal dismissed, with costs to the appellee.

MORTON, District Judge (dissenting). In my opinion the statute under which the defendant's appeal was taken was not intended to interrupt the usual procedure in equity cases with reference to the hearing and determination of the merits of the controversy; and this seems to me to be the view of the statute taken by the Supreme Court in Ex parte National Enameling & Stamping Co., 201 U. S. 156, 161–162, 26 Sup. Ct. 404, 50 L. Ed. 707, referred to in the opinion. The considerations which govern the granting or refusal of injunctions pendente lite are in many respects different from those which govern the granting or refusal of them on full hearing. It might well happen, for instance, that an injunction not proper as preliminary relief ought to be granted on final hearing. The opinion of my associates is, if I understand it correctly, that the subject-matter covered by an inter-

locutory injunction (if one be granted), or by the motion for it (if the injunction be refused), is, after an appeal be taken, withdrawn from final action in the trial court until the appeal is determined. This is an innovation in equity procedure, and one which I think will work badly.

The general rule on which my associates base their opinion, viz. that the final decree merges all interlocutory ones, was not established with reference to the practice under the statute here in question. Either the efficient procedure for determining the case must be interfered with, or the rule as to merger must be limited; and it seems to me that the rule, which is a mere technicality, is the less important. In my opinion the appeal from the interlocutory decree kept it from being merged into the final decree, and both appeals are properly before the court.

Moreover, as both parties agree, what has been done in the way of appeal has resulted in all the questions raised by the case being brought before this court in a manner adequate for the decision of them. To dismiss the appeal will be of substantial advantage to nobody except printers and will merely burden the plaintiff with a double bill for printing and with the costs following this dismissal. The case will be reprinted and brought here again on the same record. As the merits of the controversy are fully and fairly presented by the present records, I think the court should take jurisdiction, and that the decision not to do so is unfortunate and unduly exaggerates formality at the expense of substantial justice.

COFFIELD MOTOR WASHER CO. v. WAYNE MFG. CO. et al.

WAYNE MFG. CO. et al. v. COFFIELD MOTOR WASHER CO.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1918.)

Nos. 5133, 5134.

1. PATENTS ⟸322—INFRINGEMENT—ACCOUNTING—OBJECTIONS.
In infringement suit, where defendants' statement of account showed no profits, *held*, that complainant, though it filed no formal objections, was not, under equity rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii), restricted to nominal damages; such rule, when considered with equity rule 62 (198 Fed. xxxvi, 115 C. C. A. xxxvi), requiring no particular form of objections to the account filed with the master.

2. PATENTS ⟸312(1)—INFRINGEMENT—PROFITS—BURDEN OF PROOF.
In infringement suit, the complainant, who seeks to recover profits made by the infringer, who carried on other business, has the burden of showing apportionment, though this duty is often one of making a prima facie case of profit, casting on the defendant the real duty of apportionment.

3. PATENTS ⟸318(1)—INFRINGEMENT—DOUBTS.
Where the infringement was deliberate, all doubts as to profits should be resolved against the infringer.

4. PATENTS ⟸318(4)—INFRINGEMENT—ACCOUNTING.
Where defendant sold an infringing washing motor, and the ordinary sales unit consisted of the tub, fixtures, and infringing motor, *held*, that the profits from the sale of fixtures could be recovered only in so far

as the fixtures were useful solely in connection with the style of motor infringed, and complainant could not recover profits on that part of the fixtures which could be used in connection with other styles of motors.

5. PATENTS ⟸318(6)—INFRINGEMENT—PROFITS—ALLOWANCE TO DEFENDANT.
On accounting in infringement suit, *held*, that defendant was not entitled to allowance of items claimed as expense of experimental labor, or an item to cover apportionment of interest on capital stock, etc., and defendant should be restricted to interest on the stock of infringing articles kept on hand, etc.

6. PATENTS ⟸318(6)—INFRINGEMENT—PROFITS—ALLOWANCE TO DEFENDANT.
In an accounting in infringement suit, *held*, that defendant was not entitled to credit for an item claimed for patterns, as they were useful after infringement ceased, and any depreciation was covered by general depreciation allowance, etc.

7. PATENTS ⟸318(6)—INFRINGEMENT—PROFITS—ALLOWANCE TO DEFENDANT.
An infringer, accounting for profits, is entitled to credit for the expense of advertising the infringing article.

8. PATENTS ⟸318(6)—INFRINGEMENT—PROFITS—ALLOWANCE TO DEFENDANT.
In infringement suit, where complainant was entitled to recover profits on infringing motor of washing machine alone, *held*, that amount awarded to defendant as expense of tubs of machine was too great.

9. PATENTS ⟸318(3)—INFRINGEMENT—PROFITS—AMOUNT.
On appeal from a decree overruling exceptions to the report of a master in a patent accounting, the expenses of the infringer stated, and complainant *held* entitled to recover as profits the sum of $8,179.78.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit between the Coffield Motor Washer Company and the Wayne Manufacturing Company and others. From a decree overruling exceptions to the report of the master in a patent accounting, both parties appeal. Remanded, with directions.

See, also, 227 Fed. 987, 142 C. C. A. 445.

Richard J. McCarty, of Dayton, Ohio, for Coffield Motor Washer Co.

L. C. Kingsland, of St. Louis, Mo. (John D. Rippey, of St. Louis, Mo., on the brief), for Wayne Mfg. Co. and others.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

STONE, Circuit Judge. From overruling of mutual exceptions to report of master in a patent accounting, both parties appeal. The infringing device was a small water-operated motor used upon washtubs. The master's report recommended recovery of profits of $1,796.75.

[1] Defendants contend that a statement of account rendered by them under equity rule No. 63, having met no formal exceptions from complainant, must be accepted as final, and, as that account showed no profits, the recovery should be nominal damages. This contention is not well taken. Equity rule No. 63 is as follows:

"*Form of Accounts Before Master.*—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so

brought in shall be at liberty to examine the accounting party viva voce, or upon interrogatories, as the master shall direct." 198 Fed. xxxvii, 115 C. C. A. xxxvii; Compiled St. 1916, p. 2523; 2 U. S. St. Ann. 534.

The evident and beneficent purpose of this rule was to narrow the scope of the examination before the master. Beckwith v. Range Co. (D. C.) 207 Fed. 848; In re Beckwith, 203 Fed. 45, 121 C. C. A. 381. Often a plaintiff would be willing to accept many items of such an account, thus eliminating them from further controversy or proof. At the same time he is left free to examine the defendant upon any or all of the items if he objects thereto. We do not find in the rule, however, any mandatory requirement that such objections take any particular form. In our judgment, the construction which will make the rule most effective in shortening accountings, and at the same time safeguard the interests of the parties, is as follows: After the account has been filed with the master he may require the plaintiff within a reasonable time to specify the items thereon to which there is objection, and may treat as accepted any items not so specified, confining the proof to the objectionable items. This we deem in harmony with the purposes of equity rule No. 63, and within the powers of the master as defined in equity rule No. 62, 198 Fed. xxxvi, 115 C. C. A. xxxvi (Compiled St. 1916, p. 2522; 2 U. S. St. Ann. 533).

Defendants conducted a large business, of which the tub-motor-fixture portion was but a minor part. As to that portion, the custom was to sell the combined unit of motor, tub, and attaching fixture for a single price, though there were instances of separate sales of the tubs and of the motors.

[2, 3] Defendants contend that the burden of apportionment of profits is on complainant; that such burden has not been sustained, and therefore only nominal damages can be recovered. The contention that the burden of showing apportionment is on complainant is true. This duty is often one of making a prima facie case of profit, casting the real burden upon defendant to make apportionment. Westinghouse Elec. Mfg. Co. v. Wagner Elec. & Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653. But this contention carries no force here, as the apportionment is sufficiently clear. All doubts should be resolved in complainant's favor, for the infringement has been declared by this court to have been deliberate. Wayne Mfg. Co. v. Coffield Motor Washer Co., 227 Fed. 987, 997, 142 C. C. A. 445.

[4] The next challenge is to the separation of the fixtures or accessories from the motors. As to this the master regarded the ordinary sales unit as composed of three distinct elements: The tub, the motor, and the attaching fixture. Complainant claims that the fixture owed its existence and only use to the infringing motor, was therefore purely accessory thereto, and any profits therefrom should follow the motor.

The evidence discloses that portions of the fixtures, to wit, the dolly parts (dolly dasher, shaft, and collar) could be and were used in connection with any power-operated tub, whether the infringing motor or some other were used, and that the other portions of the

fixture were useful only in connection with this style motor. The profit from the latter should go to the complainant; that from the dolly parts should not.

There is no attack upon the master's finding of $48,707.62, as the total sales of units containing the infringing motors after all proper allowances for returns and collection losses. But both parties claim error as to items included or excluded by the master in arriving at the cost price of the different elements of the unit.

Complainant contends: (1) That the tub cost allowed was too high. (2) That an item ($391.11) for experimental work in connection with the infringing motor should have been rejected. (3) That an item ($958.50) of overhead expense apportioned to the motor business as "capital investment" should have been rejected.

Defendants contend: (1) That the motor labor cost was improperly reduced from $5,391.99 to $3,172.14. (2) That an item ($119.43) for patterns was improperly rejected. (3) That an item ($957.60) for experimental shop labor was improperly rejected. (4) That an item ($1,041.99) for advertising was improperly rejected.

[5, 6] Regarding these different items in the master's report to which the parties object: That of the allowance of experimental labor of $391.11, included with patterns in the item, "Cost of tools and patterns (Ferd Messmer & Co.) $973.56," should have been rejected, as the testimony is not sufficiently clear that this expenditure was made upon the infringing motors alone. The testimony shows experiments with other water motors which defendants were developing, while the infringed motor was a finished, workable article before the infringement began. The infringing motor was manufactured for and not by defendants, who bought the parts and simply put them together and tested them (the labor for which is covered in another allowance). With this reduction the balance of the item is not contested, and is allowed for $582.45. The item of "Capital investment, $958.50," allowed by the master, is rejected. This item was to cover apportionment of interest at rate of 10 per cent. on capital stock of $30,000, representing what was deemed a fair manufacturing return upon the capital stock. This should be rejected for two reasons: First, it would amount to a species of profit, and the infringer should be permitted no profit from any source arising out of the infringement; second, a consideration of the amount of money used in connection with the infringing business and a consideration of the interest allowance (from borrowed money) included in the overhead, which was apportioned, show that sufficient allowance has already been made in the interest item.

Based on yearly sales and average yearly prices, motors averaged defendant in cost $2.39. The testimony also is that the average stock of motors carried by defendant was a supply for 2 or 3 months. During the 61 months of the infringement 5,266 motors were bought and sold by defendant. Defendant carried no long accounts thereon, as practically all bills to it were paid within the discount period. It is certainly sufficiently liberal to allow during the infringing period an average carried supply of 216 motors, or 2½ months' supply. At

the above cost the money continuously invested in motors for 61 months, the accounting period, would be $516.24. During this period the defendant operated on an increasing indebtedness, for which it paid 5 per cent. interest. At that rate the above amount would yield during the infringing period interest to the amount of $131.21. This does not allow for money invested in accessories (except dolly parts), but it is certain that such investment could not have exceeded the above for motors, so that double the above sum, or $262.42, would abundantly cover use of money for both items. On the other hand, the motors and accessories (except dolly parts) are charged by the master with overhead expense, which includes interest on all money borrowed during the infringing period. This interest item allowed in overhead is $15,799.89, and, apportioned (as the parties and master have here done) on a productive labor basis, this part of the overhead would be more than $300 for motors and accessories (except dolly parts). This alone is in excess of the above liberal estimate of $262.42, and forbids any further allowance.

The item of "Labor, $3,172.14," for motors and accessories, found by the master, is approved in preference to an allowance of $5,391.99, claimed by defendant. The evidence convinces that the claimed amount was not all expended upon these infringing motors, that such an amount would be an unreasonable expenditure for the purpose, and that the amount allowed would have been amply reasonable.

[7] The item of $119.43 for patterns, rejected by the master, was properly refused. These patterns were useful after the infringement ceased, and any depreciation therein during infringement was covered in a general depreciation allowance included in the overhead.

The item of $957.60 for experimental labor was properly rejected by the master. This labor was performed before the period of infringement, and the reasons against the allowance of the other experimental labor item disposed of above apply here.

[8] The item of $1,041.99 for advertising was rejected by the master. Of this amount $344.36 is clearly for the infringing motors, and should be allowed. The balance was properly rejected, as its identity with the motor was not shown.

[9, 10] The above disposes of the specific items which were attacked in this court. There is left the matter of amount of profits and the proper apportionment. In connection with the amount of profits, there remains the contention that the allowance of tub cost was excessive. The master allowed various material, labor, and overhead items as shown by defendants' statement, and from that aggregate found the cost of the tubs, which was more than $3 each. These items were made up partially from actual book entries of expenditures and partially by estimates based upon such. On the contrary, defendants' statements repeatedly showed that in instances where the motors alone had been sold, and allowances made for the tubs, these allowances were much below $3, and several times as low as $1.50; also complainant, which bought all of the tubs it used in the same general market, paid during this period $2 and $2.05 for the same general kind as defendant made. These latter amounts, of course,

included the profit of the manufacturer. It is true, as defendants contend, that their tubs may have cost them more to make than some one else expended. However, they were selling in the same market and were making allowances for tubs at a lower figure, so it seems highly probable that the cost of manufacture by them was not more than the selling price of other manufacturers of the same article in the same market. We find the total cost price to defendants of the tubs to be $2. This includes material, labor, overhead, and all items of cost. The cost of the 5,192 tubs would be $10,384.

Proceeding further in the question of profit: The sale price of $48,707.62 for the unit is unchallenged. The cost price for the unit is made of the above tub cost ($10,384.00); motor parts ($12,114.80), undisputed; accessories ($5,362.07), undisputed; the three items found above of labor ($3,172.14), tools and patterns ($582.45), and advertising ($344.36); and of the overhead chargeable to the motor and accessories. This last item is found as follows:

The overhead of motors and accessories was reached on a productive labor apportionment (the basis used by the master and both parties). This gave the ratio of $3,172.14 (the motor and accessory labor) to $127,725.24 (the total labor), or 2.48 per cent. of the total overhead allowed; 2.48 per cent. of $202,852.44 (the total overhead) is $5,030.84 above. A tabulation of the selling price, cost price, and resulting profit is as follows:

Total net sale price			$48,707.62
Tub cost		$10,384.00	
Motor parts	$12,114.80		
Accessories	5,362.07		
Labor (motor and acces.)	3,172.14		
Motor and acces. overhead	5,030.84		
Tools and patterns	582.45		
Advertising	344.36		
Motor and accessories cost		26,606.66	
Cost of unit			36,990.66
Profit			$11,716.96

The final problem is the proper apportionment of the above profits. The master found the complainant could recover alone for the motor. We find it can recover for the motor and for the accessories (except the dolly parts). The total cost of the dolly parts is $776.66. This is found as follows: Two of the above items are "Accessories, $5,362.07," and "Labor, $3,172.14." The "accessories" item is the purchase price paid by defendants for the complete accessory unit, of which the dolly parts were a portion. The evidence shows that these dolly parts for each accessory or fixture cost $.1002 each. As there were 5,192 such fixtures sold, this cost of the dolly parts would be $520.238. To this cost should be added a proper portion of the labor item of $3,172.14 expended upon the motors and accessories, of the overhead of $5,030.84 upon motors and accessories, and of the advertising expense of $344.36, as expenses arising after purchase of the parts and while they were yet in stock. There is no showing that the "tools and patterns" item had anything to do with the ac-

cessories. There is no reason in the testimony why the apportionment in these three items should not be upon the ratio which the cost of the dolly parts ($520.238) bears to the cost of the motors ($12,114.80) and accessories other than dolly parts ($4,841.832), which is 3 per cent. ; 3 per cent. of the above labor, overhead and advertising is $256.42, which, added to $520.24, gives $776.66 as the cost of the dolly parts. Total motor and accessories cost, $26,606.66, less total dolly parts cost, gives $25,830 as total cost of motor and accessories, on account of which complainant is entitled to recover profits. This sum is 69.82 per cent. of the total cost of the entire unit (motor, accessories, and tub). Complainant is entitled to recover that percentage of the profit of $11,716.96, which is $8,179.78.

The cause is remanded to the trial court, with instructions to enter judgment for the complainant for $8,179.78 and costs.

EDMANDS v. PERLMAN.

(Circuit Court of Appeals, Third Circuit. December 6, 1918. Rehearing Denied March 10, 1919.)

No. 2404.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—ELECTRICAL SURGICAL BAKER. The Edmands and Hoyt patent, No. 775,105, for an electrical surgical baker, was not anticipated, discloses invention, and is entitled to a construction broad enough to protect the valuable contribution of the patentees to the art; also *held* infringed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by Alberta F. Edmands against Henry Perlman, doing business as the Crown Electric Hot Pack Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 248 Fed. 731.

Macleod, Calver, Copeland & Dike, of Boston, Mass., and Monroe Buckley, of Philadelphia, Pa. (George P. Dike, of Boston, Mass., of counsel), for appellant.

Daniel J. McBride and W. Preston Williamson, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. The subject here involved is the treatment of some part of the human body by confining and applying electric light and electric heat by means of an enveloping chamber. The record discloses that in that general prior art was a patent, No. 664,081, to one Gohlin, issued in 1900. It shows that Gohlin conceived the idea of applying heat and light generated by electricity to the whole of the human body below the shoulders. He used two structures, each mounted on a standard and wheeled up on either side of the bed, cot, or table on which the patient rested. From these sup-

porting standards curved parts projected inwardly and formed a top, and the two met and made a chamber substantially the length of the human body. Curtains were then drawn at the end of each chamber and the electricity turned on. There was no suggestion in the patent of the use of Gohlin's apparatus, other than to inclose the entire body; nor were the parts of the structure such that the size or shape of the chamber could be changed. What he states in his specification, and what his figures disclose, is a large, cumbersome apparatus of unchangeable proportions, designed to treat the human body as a whole.

Such remained the state of the art, and presumably the use of chambered electricity, for some 2½ years thereafter, when the patent in suit was applied for. It is quite manifest that when this patent was applied for, and its specification drawn, the applicant was unaware of what Gohlin had done, or of his patent, and when that patent was cited against his application he realized his entire specification described the art in an inadequate way, and that the broad first claim which he made would have covered Gohlin's device. When thus apprised, he at once withdrew his application, erased a number of his figures, and filed a new application and new claims, which properly described what he brought into the art.

An examination of this new application shows that what the patentee really did was to devise a simple, easily movable, readily adjustable apparatus, without standards or support. It was adapted to take such different forms that it could be used on any limb or part of the body, and thus create a chamber which could in size and shape bring its walls into closer relation to the member to be affected by its radiated heat and light. He dispensed with standards, by suspending his simple apparatus by ceiling cords. This allowed it to be swung about, and to be placed in any position desired, and dispensed with standards. Second. He made the structure a unitary movable one, which could be picked up by a handle. Third. He made it a unitary structure, by disclosing for the first time the use of a hinge, which allowed the sides to be adjusted, so as to conform to the limb or the part that is being treated, or, in other words, to be, so to speak, wrapped about the heated part. Fourth. He disclosed elements that were not shown in Gohlin's structure, which was two-part, mounted on standards, had a chamber of one fixed size, and adapted for application to the whole body.

As to those elements which alone embodied the present plaintiff's invention, and contrasting them with Gohlin's invention, we see that the only thing in common between him and Gohlin was an electric chamber. But as to those things which were new, and which are referred to above, there was nothing in Gohlin's patent which required the patentee in any way to limit or modify his claims, so long as he restricted them to the elements of novelty which he disclosed in his specification.

Bearing this in mind, we see that Gohlin's patent had no other significance or effect in the proceedings in the Patent Office than to restrict the patentee to those elements of novelty which he showed; but in so far as those elements of novelty were themselves concerned, and

his right to have claims commensurate with those disclosures, his application stood unaffected by Gohlin's patent. It was a red flag, which warned the applicant to keep off the path which Gohlin had pre-empted, but which in no way restricted his right to the new path which he himself had disclosed.

What, then, was the apparatus which the present patentee disclosed, and what claims were allowed him? His apparatus consisted of a simple structure suitable for limb treatment. His new idea of adjustment of the sides of his chamber, which adjustment could not have taken place in Gohlin's structure, but which enabled him to closely chamber a limb of the body, was provided for by a hinge at the upper end of the chamber sides, and this was embodied in his claim, to wit:

"The improved surgical baker, comprising the opposite side sections hinged together at the upper ends thereof, and adjustable toward and from each other, to vary the distance between them, and provided with means of holding the same in their position of adjustment."

It is quite evident that the particular form in which those opposite side sections were commercially built, whether they took the form of the side of a Gothic arch, as he appeared to have worked out in practice, or the quadrant of a circle, as he showed in Figure 2, with an arch flattened at the top, were matters of functional indifference. The point was that, whatever form they took, the two sides of the chamber were to be adjustable to and from each other, and this adjustability was to be secured by a hinge at the upper ends of the chamber sides, and when the desired position was obtained the hinge was controlled by a set screw. His second idea of ceiling suspensory support was embodied in his second claim by adding to it the element of an "overhead suspensory support." His third element was for the hinge novelty of his first claim, with the addition of electrical equipment.

This little structure appears to have met a need in the art. The proofs showed that, from 4 used in 1903, there was a gradual increase to 97 in 1913, at which time the merit of the device seemed to have been recognized by the medical profession, for in 1914 the sales sprang to 207, and have increased from that time to the hearing before the court. When the further fact is considered that this apparatus is not for individual use, but obviously intended for general use in hospitals, that it has been sold in Canada, Australia, and gone abroad, it is quite evident that it has up to this time met a public need, and that in all probability the remaining 2 years of the patent's life will be the period of its greatest value. During all these years there is no proof that any one challenged the patent or trespassed upon its commercial monopoly, until the defendant manufacturing company has lately put the alleged infringement upon the market. That its functional purpose is to do exactly what this patentee saw, and has for 14 years been doing, is quite clear. It shows a small, compact structure, adapted to suspension, capable of adjustment to limbs, unitary, and of such size as to be readily portable. Functionally, and in its adaptability, it does everything in the same way and for the same purpose that this plaintiff patent disclosed 14 years before.

That it may be a slight improvement over the plaintiff's structure may be admitted, but the question still remains: Did it infringe the claim by which the original patentee's disclosure was protected? That it has side walls, and that those side walls are adjustable by hinge movement from the top, is the fact. It seeks to escape infringement by reading into the plaintiff's claim a limitation to a single hinge, which physically and alone connects the plaintiff's two chamber sides, and by superimposing a third member at the top of its own chamber, which has a hinge at each end, connecting with the upper ends of its side structure, it would avoid infringement. But functionally the defendant's two hinges are the mechanical equivalent of the plaintiff's one hinge, in that the hinge mobility of both mechanisms alike effects the chamber side adaptability which this patent brought into the art. It is manifest the defendant does not use his two hinges to eliminate the function of chamber side adaptability, but solely to mask infringement.

It is clear to us that the plaintiff's claim must be read in a way to give the hinged connection, which he brought into the art, the functional breadth which would cover any hinge arrangement which, while escaping the mere form of the plaintiff's structure, embodied and secured all its hinge-functional purpose. The art has respected the monopoly of the plaintiff for 14 years, and it is quite evident to us that the value and success of this little structure have tempted this defendant manufacturing company to appropriate its substance by the substitution of what is a mere mechanical expedient, which, while it respects the literalism of the claim, filches the soul and substance of the disclosure which the claim was given him to protect.

This case must be reversed, and infringement decreed.

RAUCHBACH-GOLDSMITH CO. v. SEWARD TRUNK & BAG CO.

(Circuit Court of Appeals, Third Circuit. November 20, 1918.)

No. 2417.

PATENTS ⇐328—VALIDITY—ANTICIPATION.

The Seward patent, No. 1,135,404, for a wardrobe trunk, having in combination a gate hanger pivotally within the cover portion, brackets extending laterally from the gate hanger and garment hangers, etc., *held* valid and not anticipated.

Appeal from the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Bill by the Seward Trunk & Bag Company against the Rauchbach-Goldsmith Company. From a decree for complainant, defendant appeals. Affirmed.

Alan D. Kenyon, of New York City, for appellant.

Charles E. Brock, of Cleveland, Ohio, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

BUFFINGTON, Circuit Judge. The present case in effect involves a review of our decision in Seward v. Osterweil, reported in 252 Fed. 136, — C. C. A. —, wherein we sustained the validity of Seward's patent, No. 1,135,404, for a wardrobe trunk. In the present case we have had the benefit of the views of a third member of this court who took no part in that case, and also the further light thrown on the art by a patent not before us in the former case, to wit, No. 1,024,366, granted April 23, 1912, to Paul Schiefer, for a clothing cabinet. Reference to our former decision saves a restatement of the facts.

The validity of Seward's patent generally, and also as affected by Schiefer's patent, has had our careful consideration, but we see no reason to question our previous conclusion. Seward was the first to produce a wardrobe trunk which had in combination the three elements of (a) "a gate hanger pivotally mounted within the cover portion;" (b) "brackets extending laterally from said gate hanger;" and (c) "garment hangers having a two-pointed suspension mounted upon said bracket." As soon as Seward disclosed it, his trunk went into such wide use that his combination of elements at once attracted the covetous eyes of infringers. In the whole working art of the trunk maker, as well as in the disclosures of the Patent Office, these infringers found nothing but Seward's combination which met their commercial needs; but they now urge that in the literary archives of the Patent Office there exist, not Seward's workable combination, but isolated elements of that combination, which should have suggested to him his successful combination.

We have re-examined this art, and we nowhere find anything that anticipated Seward's threefold combination, or in any way created such a step in the trunk maker's art that Seward's threefold combination was only the mechanical development of the art from that attained step. In our judgment, Seward's was an original conception, every element of which, co-operating in a new working way, was necessary to making and did make Seward's trunk a success. So far as the record shows, these earlier trunks were either failures, or at any rate never made any headway in the art. Indeed, it is clear it is this threefold, original combination of Seward, and this combination alone, that make his device a success. No matter whether large or small, Seward's difference from the prior art was the difference between success and failure. Tested from the viewpoint of the patents that preceded Seward's, he gave the public something valued, workable, and novel in its sphere, and the disclosure was inventive in character. The public promptly put its seal of approval on his work, and this court, in sustaining the validity of the patent and staying the hand of an infringer, makes workably practical and commercially valuable the patent awarded him.

The decree below is affirmed.

ECONOMY FUSE & MFG. CO. v. BEAVER ENGINEERING CO.

(Circuit Court of Appeals, Third Circuit. January 21, 1919.)

No. 2397.

1. PATENTS ⇐328—INFRINGEMENT.
The Hornsby & Anger patent, No. 882,498, for protective appliance for electric circuits and apparatus, which is a device for mechanically indicating on the outside of the casing when a fuse has blown, *held* not infringed.

2. PATENTS ⇐328—INFRINGEMENT—FUSE HOLDER.
The Horton patent, No. 901,448, for fuse holder, as limited by the prior art, *held* not infringed.

Appeal from the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Suit in equity by the Economy Fuse & Manufacturing Company against the Beaver Engineering Company. Decree for defendant, and complainant and defendant appeal. Affirmed.

The following is the opinion of Haight, District Judge, in the court below:

This is a suit for infringement of claims 5, 6, 7, 9, 10, 13, and 24 of patent No. 882,498, granted to Hornsby & Anger on March 17, 1908, and claims 6, 12, 13, and 14 of patent No. 901,448, granted to B. D. Horton on October 20, 1908. Both patents relate to electric fuses of the inclosed indicating type. The infringement complained of is the sale by the defendant of certain fuses which were manufactured by the Chase-Shawmut Company. They will hereafter be referred to as defendant's fuses or devices. Inclosed indicating fuses are designed to reveal by a mere exterior inspection whether or not the fuse has been blown. They are of two general types. The type first evolved, and apparently, with some modifications, still very extensively used, may be generally referred to as that of the Thalacker patent (No. 502,541, issued on August 1, 1893). In that type, in addition to the main fuse, there is employed an auxiliary fuse or shunt wire, which, when the main fuse blows, carries all of the current, and, being smaller and of greater resistance, is itself immediately blown. In order that an exterior inspection may show whether the fuse has blown, a portion of the auxiliary fuse is brought to the outside of the case inclosing the main fuse, or can be seen through it. The prior art exhibits several different forms of this general type. It is claimed, however, that it is objectionable, in that, as a portion of the auxiliary fuse is exposed on the outside of or through the fuse case, there is danger of fire being communicated to nearby inflammable objects, so that the beneficial effect of inclosing the main fuse is, in a measure, lost by the new danger resulting from the burning of the exposed auxiliary fuse.

It was to overcome this objection, real or supposed, that the second type of indicating fuses, to which those of the patents in suit belong, was evolved. This type may be referred to as mechanical indicators. The prior art likewise exhibits several different forms of such. That of the Hornsby & Anger patent in suit employs the basic idea of Thalacker, in the use of an auxiliary or shunt wire. This latter wire, however, is not exposed in any way on or through the outside of the fuse case. It is attached to, and holds depressed, a coil spring, which, in turn, is attached to a plug inserted at the end of the case. When the main fuse wire blows, all of the current, as in Thalacker, is immediately diverted to and passes over the auxiliary or shunt wire, with the result that the latter is at once blown, and thereby the coil spring released, which in turn ejects the plug at the end of the case, either wholly or through an aperture in a second or outer inclosing case, and thus gives visible

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

indication that the fuse has blown. Unless a second inclosing or outer case is used, it seems entirely clear that, without some modifications which are not disclosed in either the specifications or drawings of the patent, this fuse would not overcome the difficulties which the patentees sought to obviate. It would seem, therefore, that the word "sheath," or its equivalent, in each of the claims in suit of this patent, should be construed to mean an inner case and an outer case.

However, I have not found it necessary to base my decision on that construction. It seems to me that, even if the claims are not held to require the two inclosing cases, still the defendant's devices do not infringe them. Reference to the file wrapper shows that this patent was originally applied for on December 19, 1901, but was not granted until March 17, 1908, and then only after many amendments had been made to the claims, and after the patentees had vainly endeavored to procure the allowance of claims in which were used the words "an attenuated or threadlike auxiliary fuse member" or their equivalent, without the qualifying words now found in the patent, "of small electric carrying capacity" or their equivalent. It will be noted that in each of the claims in suit, with the exception of the sixth and the twenty-fourth, the main fuse wire is referred to as carrying the principal portion of the electric current and in all the others fuse member is described as an "auxiliary" one "of small electric carrying capacity." In the twenty-fourth claim the spring element is described as "a spring adapted to project the indicator upon the breaking of the auxiliary conductor." In the ninth claim the auxiliary member is said to be "in the circuit and severed by the current when the fuse blows." This also applies to the tenth and the thirteenth claims. In addition, in the latter the auxiliary member is further described as being so arranged in the circuit that "when said fuse (the main fuse) is blown, the current will traverse said auxiliary member and cause the same to be disrupted, should it not previously have been severed by the blowing of the fuse." When the expressions in the claims, the specifications, and especially the file wrapper are considered, the conclusion seems to be irresistible that the claims in suit cover only a construction wherein the auxiliary wire is in shunt with the main fuse, in the sense that it is primarily designed to be ruptured, by the passing over it of all of the current after the main fuse has been blown, and not directly through the heat generated by the melting or fusing of the main fuse, as defendant claims is the case with its fuses. The former construction or principle of operation admittedly has advantages over the latter, because a fuse constructed on the former plan will indicate, no matter where the main fuse has blown, as will not always be the case as respects fuses constructed on the latter principle.

The argument that the claims may be given a broad enough construction to cover devices operating on the second principle, before mentioned, is based principally on the testimony of the late Prof. Ganz, which, in turn, is founded upon some of the drawings and expressions in the specifications. But this argument entirely loses sight of the fact that claims, which unquestionably would admit of and in fact make such a construction necessary, were expressly and repeatedly rejected by the Patent Office, in which rejection the patentee acquiesced. Under a familiar principle, therefore, a construction could not now be given to the claims, which would give them the full force and effect of the claims which have been rejected. In addition, such a construction as plaintiff seeks seems to be unwarranted, irrespective of the disclosures of the file wrapper, because, if the auxiliary wire were not intended to be a shunt wire in the sense of the Thalacker device, the use of the words "of small electric carrying capacity" would be quite superfluous, as the words "attenuated or threadlike member" would have been ample and sufficient to describe such a device. The fact that the specifications and drawings of this patent describe and show one form in which the auxiliary wire is not in shunt is of no materiality in this case, because that form was originally designed to be covered by broader claims—claims which did not contain the limitations before mentioned—than those in suit, but which, as before stated, were rejected. Feeling constrained to give to the claims in suit the construction before mentioned, it is entirely clear that none of the

defendant's fuses infringe any of the claims in suit of this patent, unless it be that the attenuated or fragile wire which holds the coil spring depressed, to which in turn the indicating disc is attached, is in shunt with the main fuse wire in the sense of the patent.

No witness attempted to say that it is, except a Mr. Moses, who styles himself "a patent attorney and expert," and who, as so frequently is the case with such witnesses, assumes what no one really versed in the art attempts to state, and which probably could never be proved by experiment, that, although in all of defendant's devices the disrupting of the small wire is primarily accomplished by the direct heating and burning of the main fuse, in some the small wire is so related to the main fuse strip that, if the former were not destroyed by the heat generated by the fusing of the latter, it would be in contact with the ends of the main fuse strip where it had blown, and so "momentarily bridge that gap, thereby carrying the current." Of course, testimony of this kind cannot be accepted to establish the burden which the plaintiff is, by law, required to bear, especially when a real electrical expert called by the plaintiff, does not attempt to substantiate it, and when it appears that the principle of operation of the two devices is clearly and materially different. It must be borne in mind that the prior state of the art does not permit the giving of any broad generic construction to the claims in suit of this patent, except it be, the use of the Thalacker principle of a shunt wire, inclosed entirely within the fuse case and operating a mechanical indicator, instead of, as in Thalacker, the shunt wire itself indicating whether or not the fuse has blown. But defendant's devices do not operate on or embody that principle. I therefore find that the defendant has not infringed any of the claims in suit of the Hornsby & Anger patent.

The broad principle of operation of the device of the Horton patent is substantially the same as that of the alleged infringing devices. They are both mechanical indicators, in which the indication is produced by the fusing of a small fragile wire attached to a spring which controls the indicator; the small wire being fused by the heat generated by the melting of the main fuse wire, as distinguished from being fused by the current passing over the small wire after the main fuse wire has blown, or, as in some of the Horton drawings, by the releasing, as distinguished from melting, of the indicating wire, and hence the spring and indicator, upon the blowing of the main fuse wire. They differ only in details of construction. The Horton patent came so late in the art, however, that it is not entitled to any broad construction on its principle of operation. The Cartwright patent (No. 590,750, issued on September 28, 1897) may be considered, for all present purposes, as the pioneer embodiment of this principle. The Horton patent, like the Hornsby & Anger patent, had a decidedly stormy career through the Patent Office. It was applied for on August 29, 1904, but was not granted until October 20, 1908. Although the brief of counsel for the plaintiff states that only claims 12, 13, and 14 are in issue, the memorandum which I made at the time of the oral argument indicates, as does also the brief of counsel for the defendant, that claim 6 is also in issue. Accordingly I have considered that claim.

Claims 6, 13, and 14 each contains as an element, "a spring-actuated indicator." Claim 12 refers to this element as "a movable indicator." In claims 6, 12, and 13 such indicator is described as "secured to the holder on one side thereof," or "to the exterior of the casing," and in claim 14, as upon the "outside of the casing." In claims 12 and 13 the character of the fuse wire is limited by the expression "having a weakened portion." It is urged by the defendant that the expression "a spring-actuated indicator secured to the exterior of the casing," and its equivalent expressions, must be construed as meaning a flat spring, such as is shown and described in the drawings and specifications, one end of which is permanently fastened to the outside of the case and the other end attached to the small wire which is intended to fuse or be released upon the blowing of the main fuse wire, and thus permit the spring to act and give visible indication of the blowing of the fuse. I think that such is the proper construction to be given to claims 6, 12 and 13. If they are given any other construction, they would seem to be invalid, in view of the Cartwright patent. The indicator in Cartwright is secured to the outside of the holder as fully as in Horton, unless in the latter it is held to

be secured in the sense or manner defendant contends. The only other difference between the construction shown in Cartwright and that called for in claims 12 and 13 is that in the latter the fuse is defined as having a "weakened portion." The purpose, however, to be accomplished by a weakened portion, is identically the same as was sought to be accomplished in the Cartwright patent by the use of an air chamber, namely, the making more certain the blowing of the fuse, and defining the place at which it will blow. This purpose, however, had long before the Horton patent been accomplished by notching, as Horton did, a portion of the fuse, by bending of the wire, as he also did, and by other means. It surely, therefor, did not involve invention to employ in the Cartwright invention, instead of the air chamber which he used for weakening purposes, the notched fuse wire which had been used by Thalacker and others many years before, and which was then well known and in common use. If the words, "secured," etc., in claims 12 and 13, have the meaning which I have before ascribed to them, it is clear that the same meaning must be given to them as respects claim 6.

The defendant's fuses do not have an indicator secured to the holder or case, in that sense, and consequently they do not, for that reason, infringe either claims 6, 12, or 13. The form shown in Figure 4 of Horton's patent, so far as the spring is concerned, is apparently covered by claim 14, as it is by some of the other claims which are not sued upon. In addition, claim 6 contains, as an element, "a connection between the indicator and the fuse, and a connection between the fuse and the opposite portion of the holder." Claim 12 calls for "a connection between the indicator and the weakened portion of the fuse," claim 13 for "a transverse connection between the spring actuated indicator and the weakened portion of the fuse," and claim 14 for a "wire that projects through the side of the casing and has its respective ends attached to the indicator and to the intermediate portion of the fuse." It will thus be seen that each of those claims requires a connection between the fuse and the indicator. The drawings, except Figure 7, which is covered by other claims, and the specifications, show this connection as a real or actual one; that is to say, the small or indicating wire is either directly attached to the fuse wire, or attached thereto through an insulating plate. In either case the purpose is the same, namely, that, when the fuse wire blows, the indicating wire attached thereto will be released, and thus the indicator operate, and that there will be a cross-bracing of the fuse wire.

The defendant's devices clearly have no "transverse" connection, but, if any, a diagonal one. Nor is it by any means clear that any of them have a connection in the sense of an actual one, such as that described in the Horton patent, and shown in all his drawings, except Figure 7. In the defendant's devices the indicating wire does not cause the indicator to operate because the wire is released from its connection or attachment to the main fuse wire, but because it melts when the fuse wire melts, due to its proximity thereto. But as I have heretofore found that claims 12, 13, and 6 are not infringed by the defendant's devices, for the reasons before stated, it is unnecessary for me to determine whether or not defendant's devices have a connection between the indicator and the fuse, in the sense of the patent. As before stated, claim 14 requires that the indicating wire shall have its respective ends "attached" to the indicator and to an intermediate portion of the fuse. It will be noticed that this claim does not call for a weakened portion. It was inserted at the instance of the Patent Office to meet a probable interference. The use of the word "attached" imports a physical connection and fastening. That such a meaning is the proper one is strengthened when the description and drawings are considered in connection with the prior art. The form shown in Figure 7 is clearly not covered by this claim, as in that form there is no attachment of the indicating wire to the main fuse; the former passes through an aperture in the latter. Claim 16 covers that form of device. It seems clear that the attachment intended was an actual one, so as to permit the indicator wire to expand upon the fusing of the fuse wire, or, through the insulating plate and the pulling force exerted by the spring, to be drawn through the melted fuse wire. In addition, the word "attached" is also used in claim 14, in connection with the fuse strip and the casing terminals, and there clearly means an actual physical attachment. It would seem improper

to give it one meaning in one part of a claim, and another in another part. When construed in the before-mentioned sense, I think it clear that the defendant's fuses do not have the indicating wire "attached" to the fuse wire. In some of them the indicating wire is in contact with the fuse wire, so as to burn or melt them when the fuse wire melts, but in none of them is it physically attached to the fuse wire.

As before stated, the Horton patent is not entitled to any broad construction, but must be confined very largely to the forms which the patentee has shown and described. It should be noted, in passing, that the defendant's fuses are manufactured under a patent issued to F. N. Conant on December 9, 1913 (1,081,213). I cannot find, therefore, any infringement of the claims in issue of the Horton patent. I have not overlooked the testimony of the late Prof. Ganz regarding experiments which he made. Accepting them as entirely reliable, although their reliability is questioned by defendant's counsel, I cannot find that they are of any materiality in this case. Whether or not the devices of the Hornsby & Anger patent would, under certain conditions, spit fire, or whether the Cartwright device would always correctly indicate, under all conditions, becomes quite immaterial on that question, in the light of the language used in the claims, and the reasons why such language was so used.

It follows, therefore, that the bill must be dismissed, with costs.

Hervey S. Knight and George L. Wilkinson, both of Chicago, Ill., and Clifford E. Dunn, of New York City, for appellant.

Guy Cunningham and Fish, Richardson & Neave, all of Boston, Mass., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. This bill charged infringement of two patents. The court below, in its opinion, held neither of them infringed. The plaintiff appealed to this court. The thorough discussion of the art and patents in the opinion of the court below leaves little to be said. We agree with its conclusions, summarizing our general reasons therefor as follows:

The mechanism involved is not a safety device, but merely a time saver, which visually and automatically tells an inspector that a fuse concealed by a sheath protector has been broken, and thus obviates an examination of the interior of the sheath to see if a fuse is blown.

[1] The device made under the Hornsby & Anger patent was one where the main fuse had a shunt wire of smaller size and less electric carrying capacity. We are satisfied that the claims here in suit were addressed to and intended to cover such a device, and that that was indicated by the language (claim 5) "an auxiliary fuse member of small electric carrying capacity," and (claim 6) "a member of small electric carrying capacity for normally holding said signal against operation." We are therefore of opinion that these claims do not cover the defendant's device, which, while it employed a small attenuated wire for holding its spring, such wire had no electrical connections, and did not, therefore, electrically perform the functional part which the shunt wire of the patent claims did.

[2] As to the second patent—Horton—we are of opinion the court below very properly restricted its claims to the particular device disclosed by the patentee. The art was a well-developed one, and the sphere of invention, if any existed, was restricted. The validity of

the claims was not passed upon by the court below, nor shall we consider that question, for that court rightly decided that the defendant did not infringe. The patent showed a V-shaped cut in the fuse; the patentee placed a transverse connection, the details of which we need not describe, which was fastened at one end to the interior of the sheath and at the other to the restrained indicator. The effect of this connection was to hold the fuse in situ, and when the fuse was ruptured the perforated mica sheath at the end of either connection, which had been held in place by the fuse, was released. This actuated the spring and consequently the indicator. This arrangement was one which the patentee makes a matter of substance, saying in the specification:

"The function of the plate E' and a wire e^2 is to hold the fuso in a central position in the casing A against the tension of the spring F. Without this plate and wire the tension of the spring F might be sufficient to bend the fuse and allow said spring to move away from the casing when the fuse was not burned out."

It will thus be seen that the location of the transverse wire at right angles to the fuse was a functional element in the device of the patentee. The use of the V-shaped cut in the fuse was old in the art, and we assume that the location of the transverse wire in engagement with the fuse, for the purpose of staying the fuse, was new; but neither of these elements is either physically or functionally present in the defendant's device. It has a connecting wire, anchored at one side of the sheath and at the other on the spring; but such wire is neither transverse nor is it in any way connected with the fuse, so as to in any way restrain the movement of the fuse. When burned out by the blowing of the fuse, it permits the spring to move the indicator, and up to that time it holds the indicator in normal position; but up to that time it has no attachment to the fuse, and does not serve to keep it in position.

The court below, therefore, was clearly right in holding there was no infringement.

AMERICAN GRAPHOPHONE CO. v. EMERSON PHONOGRAPH CO. et al.

(District Court, S. D. New York. December 9, 1918.)

1. PATENTS ⊂⊃327—INVENTION AND SCOPE—EFFECT OF PRIOR DECISIONS.
The view entertained by the courts in the earlier days of the life of a patent is usually a safer guide by which to judge invention and scope of claims than new and later contentions, which seek to enlarge or defeat the inventor's accomplishment.

2. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—PRODUCTION OF SOUND RECORDS.
The Jones patent, No. 688,739, for method of producing sound records, was not anticipated by the so-called Johnson prior use, and is valid, but not generic. As so construed, *held* not infringed.

3. PATENTS ⊂⊃170—LIMITATION—PRIOR ART.
A patent issued pending application for the one in suit, although on a prior application, is not in the prior art.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Equity. Suit by the American Graphophone Company against the Emerson Phonograph Company and Victor H. Emerson for infringement of claims 1 and 2 of the Jones patent, No. 688,739, for production of sound records. Decree for defendants.

Livingston Gifford, Ralph L. Scott, and C. A. L. Massie, all of New York City, for plaintiff.

Frederick P. Fish and W. Jay Ennisson, both of New York City, for defendants.

MAYER, District Judge. This patent has been the subject-matter of considerable litigation, and was adjudged valid in American Graphophone Co. v. Universal Talking Machine Mfg. Co., and Same v. American Record Co., 151 Fed. 595, 81 C. C. A. 139 (January 14, 1907), and American Graphophone Co. v. Leeds & Catlin Co. et al., 170 Fed. 327, 95 C. C. A. 511 (April 30, 1909).

The invention, as stated by Jones in his specification,

"relates to the commercial production of sound records, and has for its object the production of a number of copies of an original record characterized by lateral undulations of substantially uniform depth."

And he claimed:

"1. The herein described method of producing sound records, which consists in cutting or engraving upon a tablet of suitable material, by means of the lateral vibrations of a suitable stylus, a record groove of appreciable and practically uniform depth and having lateral undulations corresponding to the sound waves, next coating the same with a conducting material, then forming a matrix thereon by electrolysis, and finally separating this matrix and pressing the same into a tablet of suitable material, substantially as described.

"2. The process of producing commercial sound records of the type indicated, which consists of first preparing a flat tablet or disk of soft wax-like material, then engraving thereon by means of the material vibrations of a suitable stylus a record groove of appreciable and uniform depth and having lateral undulations corresponding to sound waves, next rendering the surface thereof electrically conductive, then forming a matrix thereon by electrolysis, next separating the matrix from the original record disk without the use of heat, and finally impressing said matrix into a disk of suitable material to form the ultimate record, substantially as described."

[1] The value of the opinions supra consists, not only in the fact that they state the conclusions of the court as to the questions then presented, but also that they make clear what it was which the court then considered to be a differentiation from and an advance beyond the prior art sufficient to characterize an invention.

It is an interesting and entirely human characteristic of patent litigation that, as time goes on, the owner of the patent seeks to extend the scope of its claims as far as possible, while those who seek its benefits are constantly contending for a construction which shall narrow that scope. Thus it is, where a patent has once been declared valid and a controversy later arises in a suit inter alios, that so much argument is presented as to what the court in a prior litigation really decided. Where, as in this case, the court wrote many years before,

it is helpful to remember (although not controlling) that the question of invention was looked upon with eyes which saw the art as it then seemed.

Errors, of course, may occur, especially in abstruse arts; but, speaking generally, the view entertained by the courts in the earlier days of the life of a patent is usually a safer guide with which to judge invention and scope of claims than new and later contentions, which, as the case may be, seek to enlarge or defeat the inventor's accomplishment.

[2] In the case at bar (except for the Wurth and Johnson defenses infra), the record on the question of invention seems to be substantially the same as that which received such careful consideration in the reported opinions supra. The claims are, of course, for a combination, and plaintiff contends that the great value of the Jones process lay in the matrix, and that the act of cutting the original record groove is only one of five steps in the complete Jones process. The opinion of Judge Townsend, however, in 151 Fed. 595, 81 C. C. A. 139, supra, demonstrates that the inventive feature rests in the lateral cutting step, which was then regarded as new in the art. The result was the production in the sound record of lateral undulatory grooves of even depth, corresponding to sound waves, and that result achieved a notable commercial success. Several extracts from Judge Townsend's opinion could be quoted to support the construction of his opinion here stated, but it will suffice to extract the following observation made in relation to the Young British patent, No. 1,487, which was then considered the closest reference in the prior art:

"And we conclude, in the light of the prior art, that the changes from Young to Jones involved invention, because, inter alia, Jones was practical, Young was impractical; Young was before the public for six years before any 'skilled artisan' succeeded 'in adjusting the various elements so that a flat sound record of the type in question could be produced,' and no one prior to Jones saw that it could be adapted to a practical disk record with lateral undulations; there were inherent objections to the practical production of varying depth records, which Jones found did not exist when the known or suggested processes were applied to laterally undulating grooves of even depth."

Indeed, it was in respect of what the District Court described as a "step forward," but within limit of a man skilled in the art (i. e., "the step by which the groove is cut or engraved by the lateral movement of the stylus, instead of undulations being traced or etched"), that the Circuit Court of Appeals differed from the District Court, and reversed the decrees by which the District Court had declared the patent invalid.

The file wrapper, whose history need not be recited, fully confirms the view as to the "step forward," and of several expressions in the specification itself none is more convincing than the statement of Jones:

"For the foregoing reasons I do not claim my new process in connection with sound records characterized by vertical irregularities, but limit it to records characterized by lateral undulations of practically uniform depth."

When Jones filed his application, the art was familiar with (1) the Bell & Tainter, or Edison, type, known as "graphophone" records, and (2) the Berliner type, known as "gramophone" records, both of which have survived in the art. The former, known as "hill and dale," are characterized by vertical undulations; the latter, known as "zig-zag," by lateral undulations. It was to the latter that Jones devoted his attention, and what he accomplished and all he accomplished was to so cut his groove as to obtain his characteristic lateral undulations of practically uniform depth.

In this case, defendant has presented two defenses, not heretofore directly before our Circuit Court of Appeals—the Wurth use and the Johnson defense. The former may be passed by as merely experimental, and, in any event, of no consequence in this litigation.

The Johnson defense has two aspects. It is claimed (1) that Johnson was prior to Jones, and that Johnson's prior use fully covered the Jones invention; and (2) that a decree in a suit between the Victor Company, as plaintiff, and the American Graphophone Company, as defendant (the plaintiff here), and the Johnson patent, are admissible in evidence.

The decree referred to was the result of the opinion of Judge Ray in 1911, in Victor Talking Machine Co. v. American Graphophone Co. (C. C.) 189 Fed. 359. That decree was affirmed by consent of the parties by the Circuit Court of Appeals, 190 Fed. 1023, 111 C. C. A. 675. The Johnson patent, which was the subject-matter of the decree, was No. 896,059, granted to Eldridge R. Johnson August 11, 1908, which was found to have been a divisional application of patent No. 778,975. The original application of Johnson was filed on August 16, 1898, and the divisional on November 12, 1904.

That the decree and Johnson patents supra are not admissible is too plain for argument; but the testimony as to the Johnson use is clearly admissible. Judge Ray, in his opinion, drew a very close line of distinction between the Jones patent and the Johnson patent, holding the view that they were both valid. The case on this point was so debatable that there well might be doubt as to the result in the Circuit Court of Appeals, if that controversy were reviewed by that court on the merits. The question here, however, is whether the testimony of Johnson, and those who corroborate him in various respects, establish under familiar principles that prior use which will defeat the Jones patent.

Taking the Johnson defense testimony at face value, it is apparent that Johnson's work went no further than ideas, and the formative or experimental stage, until after the Jones application date. No record produced by Johnson was put on the market until 1900. In September, 1896, Johnson, with one Haddon, visited one Du Bois, a friend of Haddon. Johnson testified:

"I explained to Mr. Du Bois substantially what I was seeking to accomplish. I asked him if wax surfaces could be electroplated with copper, and if such electroplate would be accurate reproductions of the surface of the wax. I told him they must be very accurate. Mr. Du Bois assured me that this could be done. I then gave Mr. Haddon a fragment of one of the wax

tablets upon which I had made a record. Mr. Haddon, after further consultation with Mr. Du Bois, brought to my office in a few days the piece of wax record which I had given him, having sound waves cut with laterally undulating lines of even depth on its surface. He had succeeded in making a perfect deposit of copper on the fragment of record. I took the record from him and carefully separated it, the wax from the copper, without injuring either one. I immediately made a careful examination of the same copper deposit with the strongest magnifying glass in my possession at that time. This observation and examination convinced me that the copper reproduction was very accurate, and I knew from that time on that my process could be used commercially, and that I could manufacture disc records with laterally undulating sound waves of even depth, of a superior quality to anything theretofore known in the art."

This fragment of irregular shape cannot be called a matrix for the purposes of this case.

After 1896 Johnson did nothing until December, 1897. It was not until then that he "succeeded in finding an expert" (one Nafey) whom he thought "competent to carry out" his plans. Nafey started to work in January, 1898, and the first copper matrix was made about April, 1898. Duplicate records were not manufactured until about the same date. Even then, Johnson said, "the records were not shown indiscriminately. A number of people saw them, and I reproduced them for a number of people, but it was always confidentially," and, indeed, he made every effort to keep his work secret until 1900.

Without further reference to the testimony of Johnson and his associates and friends, it must be concluded that the so-called Johnson use did not anticipate Jones. One fact, however, is established by Johnson's testimony which disposes of any emphasis as to electroplating, and that is as to the general use of the Berliner process for reproducing records by the electroplating process; such records having been electroplated and duplicated by the Duranoid Manufacturing Company, of Newark, N. J., as far back as 1896.

[3] Defendants offered in evidence the Clark and Johnson patent, No. 624,625, granted May 9, 1899, but applied for prior to the date of the Jones application. This is not prior art in this case. Autosales Gum & Choc. Co. v. Ryede (D. C.) 138 C. C. A. 648, 222 Fed. 956, affirmed 223 Fed. 1021, and cases cited. And the motion to strike out the testimony in respect thereof must be granted. With the record in this situation, the patent in suit must be held valid, and this patent must be excluded, and the case thus comes down to the question of infringement.

Emerson, for many years, was in plaintiff's employ, and plaintiff urges this fact as having some bearing on the question of infringement. So far as this record discloses, Emerson was not guilty of any wrongful or improper acts. He availed of existing knowledge open to all the world, and endeavored to devise a process different from that of the patent in suit. This he was fully entitled to do. There are, of course, cases when the conduct of employés may affect their standing in a court of equity; but this is not one of them. What Emerson did, no one else had done in all the years during which this beneficial art was progressing. He adopted what might be called the

midway between the vertical and lateral systems and tilts the cutting tool at an angle of 45°. What Emerson sought commercially was the production of a record which could be played sufficiently well for commercial purposes upon all types of phonograph machines. The artistic result might not be (and, indeed, is not) equal to that attained by the Berliner or zig-zag; but Emerson evidently appreciated the well-known fact that the majority of the buying public is well enough satisfied with pleasing music, and does not concern itself so much with that accurate and fine reproduction so necessary to the comfort of those gifted with discriminating ears and trained in artistic appreciation.

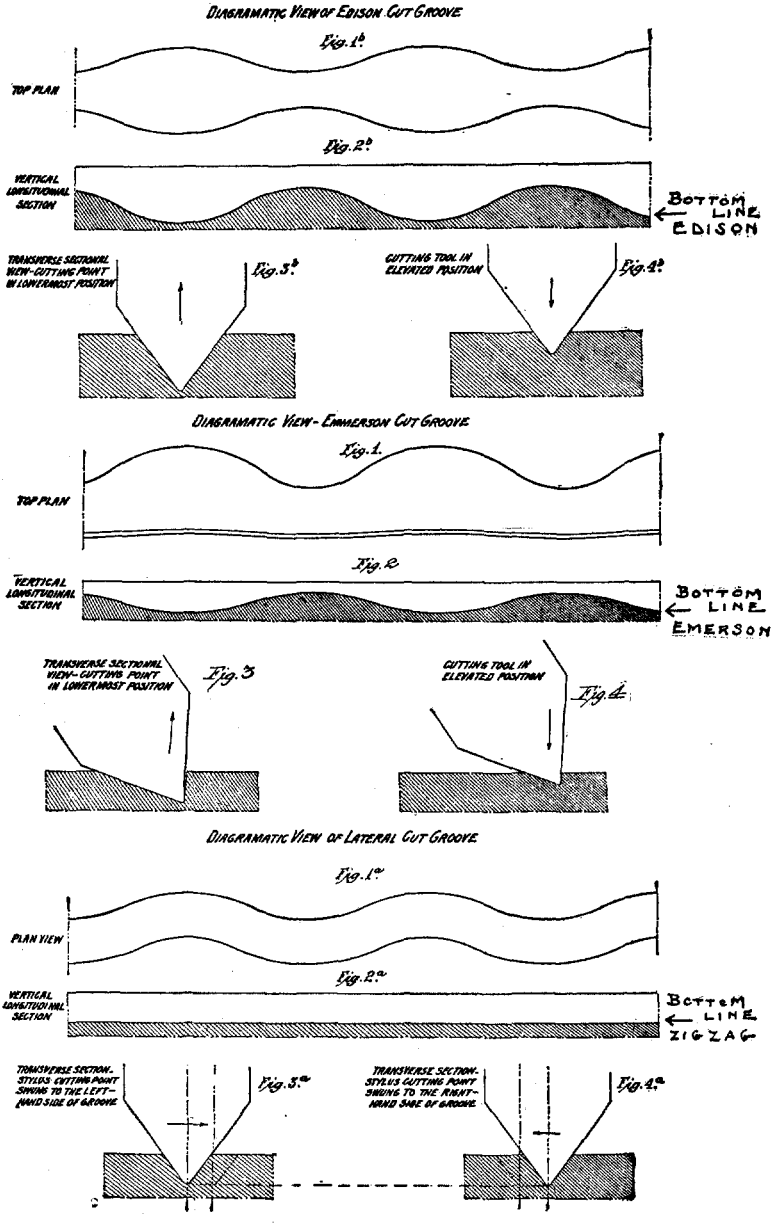
His appeal, therefore, was to owners of all types of machines, and I am satisfied that in seeking this field he has made an honest effort not to entrench on the Jones patent. On first impression, it may seem that the Emerson angle is a mere evasion; but the testimony of the experts and the demonstration of actual playing of the records in the courtroom soon make clear that the question of infringement is both real and difficult.

Preliminarily, it is important to ascertain whether the Jones patent was generic, in the sense that it covered broadly any process other than the hill and dale, up and down, or Edison (as variously called), or must be confined to the precise terms of its claims with a reasonable range of equivalents. The court and file wrapper history concur in showing that, while the Jones patent was a valuable advance, it was in no sense generic. The District Court, on two occasions (in the Universal and Leeds & Catlin Cases, supra), had held the patent invalid, and the result, as hereinabove indicated, was that the appellate court found the inventive feature, in effect, to be that which had to do with lateral undulations.

The outstanding features of the claims cannot now be modified or lightly laid aside. They are (1) a record groove of appreciable and practically uniform depth, and (2) having lateral undulations corresponding to sound waves. The word "practically," does not appear in claim 1, and is inserted merely by way of safeguard in claim 2. In effect, in this case, "uniform" and "practically uniform" mean the same thing. Further, they are words of limitation, and not of description.

The question, then, is whether the Emerson record groove is of uniform depth and has lateral undulations corresponding to sound waves, and whether the Emerson has vertical undulations which are idle, or which perform no useful function. Ocularly the grooves of plaintiff and defendants appear different. There are variations of depth in defendants' groove and vertical undulations in the bottom thereof. Defendants contend that these differences are caused by the different method and angle of cutting, and result in different aural impressions between a pure Victor or Columbia zig-zag record played on plaintiff's machine and an Emerson record played on the same machine, while, in addition, the Emerson can be well played on an Edison machine. Plaintiff insists that the vertical undulations in the Emerson record are inert and do not perform any useful function.

The following diagrammatic drawings in evidence of models in evidence show the grooves and the cutting tool in the three instances and will save much verbal description:



The Jones undulations are lateral—i. e., confined structurally and operably to the side walls—and do not extend to the bottom of the groove, and are necessarily of uniform depth, because, as plaintiff's expert stated, "what we mean ordinarily by a laterally vibrating tool is one which cuts a groove of substantially uniform depth; the two thoughts go together." Such is not the case with the Emerson groove.

The Jones lateral undulations are in both sides of the groove alike and undulate in absolute parallelism. In the Emerson groove, according to the testimony of Prof. Morris, a highly skilled microscopist, on behalf of plaintiff, "there is a correspondence" between either side with the other side, or either side with the bottom, but "there is no exact parallelism." It is but fair to add that Prof. Morris characterized the lines as coswerving; "that is to say, all swung toward the inner part of the disc or all toward the outer part of the disc together; they were not parallel but they were according."

With these important physical differences (1) in position of cutting tool, and (2) in appearance of the grooves under the microscope, came the battle of the experts. It is impracticable to go into the many contentions in detail. Both experts, Mr. Wadsworth and Mr. Dyer, have lived with the art, and are frank as well as able. Their testimony represents their sincere convictions, and I have no doubt that a court of scientists would be quite as much at variance as they are. I am disposed to conclude, however, that the Emerson groove oscillates vertically to the same extent as it oscillates laterally, and that the Emerson tool vibrates, not in a straight vertical line, nor in a straight horizontal line, but in a single straight oblique line, incidentally lowered and raised while swinging from side to side. When, however, it stops at any point of the oblique line of its travel, it stops completely, and does not swerve to the side.

The vertical, or "hill and dale," undulations of Emerson are therefore real, and do perform an active and useful function. Whether this conclusion is correct or not, it is at least apparent that the burden of proving infringement has not been sustained by plaintiff, and the situation is, as matter of law, very much like that discussed in General Electric v. Sundh, 251 Fed. at page 286, —- C. C. A. —.

I have given little consideration to the experiment (the good faith of which is not questioned) of the "buffed" matrix and the comparison with the "unbuffed" matrix. Such experiments occasionally may be reliable, but, generally speaking, they are full of uncertainties. The moment there is departure from the precise device, the controversy is diverted. To add to or subtract from a device—especially where we are dealing with infinitesimal variations—leads surely to doubt and confusion.

Finally, it is an important, outstanding, and emphatic fact in this case that, whether well or badly done, the Emerson record may be played on either a hill and dale or zigzag type of phonograph—a result which was never before commercially attempted.

The bill is dismissed, with costs.

SMITH v. POWERS.

In re RUDDY & SAUNDERS CONST. CO.

(District Court, N. D. New York. February 3, 1919.)

1. BANKRUPTCY ⟸166(4)—PREFERENCE—"REASONABLE CAUSE TO BELIEVE."
"Reasonable cause to believe" a debtor insolvent, and that payments received from him will effect a preference, is not a mere suspicion or surmise, but knowledge of facts of a character calculated to induce a belief in the mind of an ordinarily intelligent and prudent business man.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Cause.]

2. BANKRUPTCY ⟸166(4)—PREFERENCE—REASONABLE CAUSE TO BELIEVE.
If a debtor is actually insolvent, and means of knowledge of such insolvency are at hand, and facts are known to a creditor receiving payment, which clearly ought to put a prudent business man of intelligence on inquiry, he is charged with reasonable cause to believe.

3. BANKRUPTCY ⟸159—FRAUDULENT TRANSFER OF PROPERTY.
Where a corporation, which was hopelessly insolvent, within four months prior to bankruptcy, sold practically all its property and assets, disabling itself from continuing its business, and with the proceeds paid certain creditors in full, knowing such act would make it impossible for the unpaid creditors to ever get anything on their claims, and intending to accomplish that result, such payments constituted transfers with intent to hinder, delay, and defraud creditors, and under Bankruptcy Act, § 67e (Comp. St. § 9651), are recoverable by its trustee.

4. BANKRUPTCY ⟸184(1)—VOIDABLE TRANSFERS OF PROPERTY—PREFERENCE BY INSOLVENT CORPORATION.
Under Stock Corporation Law N. Y. § 66, providing that no payment made by an insolvent corporation with intent to prefer a creditor shall be valid, and Bankruptcy Act, § 67e (Comp. St. § 9651), providing that all transfers by an insolvent within four months prior to bankruptcy, which are null and void under the laws of the state, shall be null and void, payments made to certain creditors in full of their claims by an insolvent corporation are void, and recoverable by its trustee.

5. CORPORATIONS ⟸543—UNLAWFUL TRANSFER BY INSOLVENT CORPORATION—BONA FIDE PURCHASER.
A creditor, receiving payment in full from an insolvent corporation, which effected an unlawful preference, under Stock Corporation Law N. Y. § 66, is not given the status of a purchaser for value without notice, within the exception in the statute, because of the surrender of a guaranty of his debt by a third person, especially where the guarantor was president of the corporation and made the payment in its behalf.

6. GUARANTY ⟸59—DISCHARGE OF GUARANTOR—PAYMENT BY PRINCIPAL.
To discharge a guarantor, payment by the principal must be a legal and valid one.

At Law. This is an action brought by George K. Smith, as trustee in bankruptcy of the Ruddy & Saunders Construction Company, a bankrupt, against Thomas F. Powers, to recover of him the sum of $18,824.15, besides interest, paid by said Construction Company to said Powers, or to his duly authorized agent, in payment of certain notes of said company given to or held by said Powers and amounting to $13,824.15, and in payment for certain legal services rendered by said Powers to said company, amounting to the sum of $5,000, and which payments, it is claimed, were made within four months of the filing of the petition and adjudication in bankruptcy and under circumstances which,

and with such knowledge on the part of said Powers, as entitles the plaintiff to recover such sums so paid, with interest. Decree for plaintiff.

Danforth E. Ainsworth, John N. Carlisle, and C. B. Sullivan, all of Albany, N. Y., and D. G. Atkins, of Kingston, N. Y., for plaintiff.

Edward Murphy and John T. Norton, both of Troy, N. Y., for defendant.

RAY, District Judge. This action was tried before this court with a jury, and the jury, in answer to written questions submitted to it, found that at the time the Ruddy & Saunders Construction Company paid by its check to Thomas F. Powers the several sums of money shown by the evidence to have been paid in February and March, 1916, aggregating in amount the sum of $18,824.15, said Ruddy & Saunders Construction Company was insolvent, or that its insolvency was imminent, within the meaning of the state statute. The court had found and held as matter of law under the proof that when such payments were made the said company was insolvent within the meaning of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585–9656]). This court now finds the above-stated facts in accordance with the finding of the jury and its own holding on such trial.

The court submitted the following question to the jury, and it disagreed, so that no answer was obtained, viz.:

"Were the payments made by the Ruddy & Saunders Construction Company to Thomas F. Powers in February and March, 1916, and made by checks of the said company, signed by the De Lees, or by De Lee and Saunders, and which were made on notes aggregating about $13,824.15, made by the officer of the company making the payment, with the intent on his part of giving a preference to said Thomas F. Powers; that is, with the intent of enabling the said Powers to obtain and retain a greater percentage of his said claim on the notes against the company than other creditors of the said company of the same class would receive?"

The following question was submitted to the jury, and it agreed on and reported an affirmative answer thereto, viz.:

"Were the payments made by the Ruddy & Saunders Construction Company to Thomas F. Powers in February and March, 1916, and which were made by the check or checks of said company, signed by the De Lees, or one of them, and given in payment of the bill of Powers for legal services, amounting to $5,000, made by the officer of the company with the intent on his part of giving a preference to said Thomas F. Powers; that is, with the intent of enabling said Powers to obtain and retain a greater percentage of his said claim of $5,000 for legal services than other creditors of said company of the same class would receive?"

It is seen that the jury drew a distinction between the payments made on notes and those made on account of legal services, and were disagreed as to the first and agreed as to the latter. The notes referred to were given as follows for the following amounts, viz.:

June 1, 1915, note	$8,610.00
January 5, 1916, note	2,000.00
January 19, 1916, note	1,961.00
January 26, 1916, note	800.00

The payments on said notes were made as follows: February 8, 1916, $1,001.70, and February 29, 1916, $12,822.45.

The legal services were rendered at various times after the organization of the company, but the payments were made as follows, viz.: March 1, 1916, $4,000; and March 2, 1916, $1,000. It is seen there could not, probably, have been much change in actual conditions between February 29, 1916, when the last payment on notes was made, and March 1, 1916, when the large payment on legal services was made; but, of course, much information might have been obtained in one day, or two days, or even in a few hours. In fact, there was no substantial change in conditions between the 29th day of February, 1916, and the 2d day of March, 1916. Powers knew March 1 that he had received from the now bankrupt $12,822.45 on the 29th of February, and knew of the other payments which preceded the final one of March 2, 1916.

The following question was also submitted to the jury for answer, viz.:

"At the time of the several payments of money by the Ruddy & Saunders Construction Company to Thomas F. Powers, the defendant here, in February and March, 1916, amounting to $18,824.15, did said Powers have reasonable cause to believe that such payments (that is, the payment of such sums of money made by check) and the retention of same by Powers would effect a preference; that is, enable said Powers to obtain a greater percentage of his debt than any other of the creditors of said company of the same class, first, when checks were given in payment of notes; and, second, when checks were given in payment for legal services?"

As to whether or not Powers had such reasonable cause to believe, when checks were given in payment of notes, the jury was unable to agree, but the jury found that he did have such reasonable cause to believe when the checks were given in payment for legal services. Here, again, we have the same distinction drawn by the jury between the payments on the notes and payments for legal services.

Another question was and is involved in the case. It was and is claimed by the defendant, Powers, that when he made the first loan to the company he declined to make it without some sort of security for it and other contemplated loans, and that one Patrick E. De Lee, who was and is financially responsible, and who was interested in the company in a way, agreed to give and did give to him his written personal guaranty of payment of such first loan, and of such loans as he should make the company thereafter, and that, when payment of the notes was made and completed, he, shortly thereafter, surrendered and canceled such guaranty. This was and is denied by the plaintiff, and hence the following question was submitted to the jury, but it was unable to agree thereon, viz.:

"Did Patrick E. De Lee, at the time he borrowed the first money in question here, $4,000, July 31, 1914, execute and deliver to Thomas F. Powers, the defendant, his written guaranty that he would personally pay and be responsible for all sums of money the said Thomas F. Powers then loaned and thereafter might or should loan to the said Ruddy & Saunders Construction Company, now bankrupt, and did said Powers thereafter, and after payment to him of the several notes held by him executed by said company, in consideration and because of such payments, surrender such written guaranty to said Patrick E. De Lee?"

On this question of fact presented by this question I think the proof is with the defendant, and I find such written guaranty was given and surrendered at the time stated. The legal effect, if any, will be considered later.

The Ruddy & Saunders Construction Company, now the bankrupt, was organized about October 20, 1910, and existed under and pursuant to the laws of the state of New York, and had its principal place of business at Troy, Rensselaer county, N. Y., but carried on and did business in other places, in the construction and repair of state roads mainly, if not wholly, and it purchased machinery, tools, and implements for carrying on such work. Mr. Powers, the defendant, was and is an attorney at law, residing at Troy aforesaid, and he acted as attorney for the said company in regard to its organization and its suits, but claims he had nothing to do with the control or management of its financial affairs, and was not acquainted with its financial management or condition, and had little, if any, substantial information or knowledge regarding same. He insists that he did not know of its financial condition, or that it was seriously involved financially, before or at the time he received the payments above stated and referred to, and claims he had no reasonable cause to believe it was insolvent, or that the receipt and retention of such payments by him, or any of them, would result in his receiving a greater percentage of his debt or debts and claim or claims than other creditors of the said company of the same class would receive. The defendant claims he was sick when the payments, or the main ones, were made, and that he had not had occasion to inquire into the financial affairs or condition of the company, and that nothing had occurred to put him on inquiry.

The plaintiff, on the other hand, insists that the evidence discloses such a state of facts as must have brought home to his knowledge the financial condition of this company, or, at least, must have put him, as a reasonable man, of not only ordinary intelligence, but of much more than ordinary intelligence, and one of legal learning, on inquiry, and that he was and is chargeable with the information he actually had, and such as he might and would have obtained, had he made inquiry. The plaintiff claims that Mr. Powers had to do with and took an active part in the organization of this company, and knew its only capital was limited to $10,000; that at the dates mentioned he was called upon by it to loan it money to carry on its business, and that such requests for loans were frequent between June 1, 1915, and January 26, 1916, three of them being in January, 1916, and amounting to $4,761, and when that made June 1, 1915, of $8,610 had not been paid; that Mr. Powers also knew the fact that the company had no credit with the banks, and had been denied loans by the banks in Troy and Albany; that Mr. Powers knew that one or more of these loans made by him was sought and made to enable the company to meet its pay roll; that in at least one instance the company was sued, and Mr. Powers had to do with the settlement of the suit; that the defendant, Mr. Powers, had such knowledge of the financial condition of the company that he refused to make to it the loans of money re-

quested without the personal obligation and security of the father of some of those composing the company and with whom he was on terms of friendly intimacy; that in the winter and spring of 1916 Mr. Powers several times requested, and even demanded, payment of the moneys due him; that his account for legal services alone had then run up to some $5,000; that Mr. Powers knew, when he was demanding payment, that the company had not theretofore been able to pay either the notes or account for services, and that the payment of such large sums of money in such quick succession must put a heavy financial burden and drain on the corporation, and that his insistence showed a distrust of and lack of confidence in its financial ability, soundness, and responsibility; that a little inquiry would have disclosed the entire situation, and would have shown what was the fact, that to make these payments and others which were made the company was selling substantially all of its disposable property, machinery, tools, claims, and accounts, including the money which had been reserved by the state as security for the soundness of work done for it, and was in fact disabling itself from doing further business, and that in this way it had reduced its only remaining assets to about $5,000, and left over $30,000 of its indebtedness unpaid and unprovided for.

The evidence shows, and I must find, that this company did dispose of its property as stated, and did pay certain of its creditors, not including Mr. Powers, to the amount of over $20,000, to the exclusion of others, and that at the time of its bankruptcy its only property remaining did not exceed $5,000 in value, and that its then remaining unpaid and unsecured indebtedness was in excess of $30,000. That the corporation was insolvent, and knew it was insolvent, within the meaning and intent of section 66 of the Stock Corporation Law of the state of New York (Consol. Laws, c. 59), and within the meaning and intent of the national bankruptcy Act, is fully established by the evidence and beyond controversy. It is also fully shown that the officers of this company intended, when the payments to Mr. Powers and others were made, and when it so disposed of its property and turned the same into money, to pay certain of its creditors in full to the exclusion of other of its creditors of the same class. This intent was carried out. The officers are presumed to have intended the natural and well-known consequences of their own acts, knowingly done.

[1] Reasonable cause to believe is not a mere suspicion or surmise, but knowledge at the time of facts of a nature or character calculated to induce a belief in the mind of an ordinarily intelligent and prudent man that the payments made would work and effect a preference; that is, facts calculated to induce a belief that the person or corporation making them was insolvent within the meaning of the law, owing debts he or it was unable to pay in full, and that he, the person securing the payments or payment made, was getting his pay in full (in this case) when others of the same class would only receive a part of their just claims. A person has reasonable cause to believe when such a state of facts is brought to his notice and attention respecting the affairs and pecuniary condition of his debtor as would lead a prudent business man of intelligence to the conclusion

that the debtor was then insolvent, and that the payment then made to him (such creditor) would, if retained, operate to give him a greater percentage of his debt than other creditors of the same class would receive.

[2] If a person or a corporation is actually insolvent (within the meaning of the law) when a payment or payments are made to one or more creditors to the exclusion of others, and the means of knowledge of such insolvency are at hand and ascertainable on reasonable inquiry, and such facts and circumstances were known to the creditor receiving the payment as clearly ought to have put a prudent business man of intelligence on inquiry, he is charged with reasonable cause to believe if it also appears that he might, by reasonable activity and inquiry in informing himself, have ascertained the fact that the receipt and retention of such payment would operate to give him a greater percentage of his claim than other creditors of such debtor of the same class would receive. There must be either actual knowledge, or knowledge of such facts and circumstances as would put a reasonable man of ordinary intelligence on inquiry under circumstances where, if he did inquire, he might and probably would obtain the necessary knowledge. The above statements as to the law are sustained by the following cases, and others: Grant v. National Bank, 97 U. S. 81, 24 L. Ed. 971 (under act of 1867); Nichols et al. v. Farmers', etc., 225 Fed. 689, 140 C. C. A. 563; Brookheim v. Greenbaum (D. C.) 225 Fed. 635, affirmed 225 Fed. 763, 141 C. C. A. 89 (C. C. A. 2d Circuit); Rosenman v. Coppard, 228 Fed. 114, 142 C. C. A. 520 (C. C. A. 5th Circuit, citing Grant v. National Bank, supra); Aronin v. Security Bank of N. Y., 228 Fed. 888, 143 C. C. A. 286; In re States Printing Co., 238 Fed. 775, 151 C. C. A. 625; In re Gaylord (D. C.) 225 Fed. 234.

We are led to inquire, therefore, in determining whether or not Mr. Powers had reasonable cause to believe that the corporation was insolvent, and that the receipt by him of the moneys paid on the notes and account for services and the retention thereof would operate to give him a greater percentage of his claim or claims than other creditors of the company of the same class would receive, just what knowledge the evidence shows he did have and what the circumstances and surroundings known to him were. He drew the incorporation papers of the Ruddy & Saunders Construction Company, and knew the amount of its capital stock paid in, and that it was $10,000 only. He knew the business in which the company was engaged, and that the purchase of machinery, tools, etc., was necessary to carry on that business. He was friendly with the De Lees, who were interested therein, and had done business for at least one of them, the father. He knew that the company had trouble at the bank where it was doing or had done business, and could not obtain credit there, as it desired at least, and that it came to him for loans of money aggregating at least $13,000, and which loans were made at different times and in various sums, and that they were not paid when due, and that some of the later loans were made after a demand for payment of prior loans, which request for payment had not been complied with.

He knew there were eight or ten banks in the city of Troy alone. The defendant says the first loan he made to this construction company was July 31, 1914, for $4,000, and says of his talk with De Lee when the loan was made:

"I think he said something about having some trouble with the bank; that is the reason he wanted to borrow it. * * * I haven't any distinct recollection. He had asked for some loans, I think it was, and they had refused to loan him to the extent he wanted."

This was, of course, notice that this company could not get a loan of $4,000 at the bank where it had done business. Mr. Powers made no inquiry at this time into the financial condition or situation of the company, but did exact a paper from the father pledging his individual credit for not only that loan, but any subsequent loans he might make the company, and says that De Lee, the father, stated that—

"He had some trouble with the bank, and he said he had to raise money to carry on his business, and they got money from time to time from the state, and he would pay off this indebtedness just as he had been in the habit of paying them off at the bank."

For that loan, made July 31, 1914, Mr. Powers took the note of the company, also the separate guaranty signed by the father. Mr. Powers says he supposed the company was getting estimates from the state from time to time. May 12, 1915, Mr. Powers loaned this company $2,500 more, and June 12, 1915, $3,000 more, making a total of $8,500. Mr. Powers says that, instead of paying him as the company received estimates from the state, it borrowed this additional money, and that when he made the loans he made no inquiry as to the assets or affairs of the company. Mr. Powers further says that in January, 1916, he asked Mr. P. E. De Lee for payment, and that at that time the company was owing him the $8,610 note and nearly $5,000 for services; the last charge for services to make up the $5,000 having been made January 13, 1916. Mr. Powers says De Lee said they would pay him soon, but that he made no further inquiries. A few days later the company borrowed $2,000 more, and he made no inquiries. Within four days thereafter Mr. Powers loaned the company $1,000 more, and he made no inquiries. Then January 24, 1916, he loaned the company $800 more, the prior loans not having been paid, and he made no inquiries. Then February 1, 1916, Mr. Powers loaned the company $1,000 more, and made no inquiries. Mr. Powers says on one of these occasions De Lee said he wanted the money for pay rolls for the men, but he did not ask what he wanted it for on other occasions. The payments on notes between February 8, 1916, and February 29, 1916, aggregated $13,824.15, and those on legal services were made March 1, 1916, $4,000, and March 2, 1916, $1,000. Mr. Powers says he was confined to his room when the payments were made as does his stenographer, and that she indorsed the checks and deposited them to the credit of Mr. Powers. Mr. Powers says he was informed of the payments the same day when made, or the next day, and hence he had no talk or communication with the one making the payments.

There is nothing to contradict this testimony, and hence there is no evidence of knowledge gained by Mr. Powers at the time the payments were made. On this branch of the case his knowledge must be found from what had transpired before that time. In addition to what has been stated, it appears that Mr. Powers, during all this time from the organization of the company, had been its attorney in all its litigated suits, and had paid and settled one suit on a claim on a money demand against it. It is insisted by the plaintiff that these friendly relations between the parties, coupled with the relation of attorney and client, the loans of money as stated under the circumstances stated and for the purpose named, so far as appears, and the fact that this indebtedness had increased or run up to $18,000 without payment of any part, and the further fact that the company had been sued on at least one money demand, show that Mr. Powers, as an intelligent man and attorney, was put on inquiry—was put in possession of knowledge of facts and circumstances which called upon him to make inquiry and which indicated financial embarrassments.

It seems improbable and almost incredible that Mr. Powers, considering the friendly relations, the close relations of attorney and client, and frequent requests for loans without any payment, would make these large and frequent loans of money, and not inquire or be consulted about or in reference to the business or financial condition of the company. With such relations existing, it would seem not only natural, but probable, that the officers of the construction company would consult as to its financial and business relations and conditions with Mr. Powers, its general attorney in all litigated suits, and who was intimate and friendly with some of the members of the company. On the other hand, it may be argued that under such circumstances the officers of the company would be desirous to conceal the actual conditions from Mr. Powers, and would do that, and that Mr. Powers, relying on the written guaranty of P. E. De Lee, would feel perfectly safe, and not deem himself called upon to make any inquiries whatever, or under any necessity for doing so.

[3] We come to another question in this case, and one which to me seems decisive under the proven facts, and which stand substantially uncontradicted.

The indebtedness of the Ruddy & Saunders Construction Company was in excess of $70,000 at the time these notes and the account for legal services due to Mr. Powers were paid. Its total assets of every name and nature, kind, and description did not exceed $40,000 or $45,000 in value. The company was insolvent in fact; that is, its property and assets of all kinds was insufficient by more than $25,000 at any fair valuation to pay its indebtedness, and it had been doing business at a loss. It was owing thousands of dollars on notes and other demands past due, which it was unable to pay. Some, if not all, of the notes due Powers were past due, and demand of payment had been made, and payment had not been made, although promised. To do and continue business it was necessary for this company to have machinery and tools—we may say, suitable equipment. The company, by its officers, knew all these facts. With this condition of

affairs existing, and to meet or pay such of its obligations as it desired to pay, when paying some of its creditors to the necessary and inevitable exclusion of others of its creditors, this corporation, the now bankrupt, collected in everything due it, sold some of the demands due it at a considerable discount, sold moneys due it from the state, but withheld as security for the soundness of work done under its contracts, and also sold and disposed of substantially all its other personal property, including machinery, tools, etc. (it had no real estate), and in so doing disabled itself from carrying on its business or performing its contracts. It retained some tools, etc., worth perhaps $3,000 to $5,000, and allowed some of its employés in one of the down river counties to continue work for a time, but never paid them. With the proceeds of these collections and sales the company paid Mr. Powers some $18,000, to other creditors, largely friends, about $20,000, and left creditors, including about $3,000 of labor claims, entirely unpaid and unprovided for. All this, this company, through its officers and managers, well knew. There was some attempt to claim that it hoped, and even expected, to continue its business, and that it expected to perform certain outstanding contracts from which it would derive profits and be able to pay its remaining creditors. The evidence shows beyond question that the officers and managers of the company had no such real hope and no such expectation or purpose, but intended to go out of business as it did. I must and do find that in so converting its property into money and disposing of it, and when it did so, it acted, as did its officers and managers, with the purpose and intent of giving a preference to the particular creditors so paid and to the exclusion of those not paid. This was the direct and inevitable and well-known effect and consequence of what the company and its officers and managers did.

Section 67e of the Bankruptcy Act of 1898, as amended (Comp. St. § 9651), provides as follows:

"That all conveyances, transfers, assignments, or incumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

[4] It is claimed by this plaintiff that these transfers of its property made by the company with the intent stated were and are void under the provisions of section 66 of the Stock Corporation Law of the state of New York, and that the plaintiff may recover same under the provisions of section 67e of the Bankruptcy Act, above quoted, expressly that part wherein it is provided as follows:

"And all conveyances, transfers, or incumbrances of his property made at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee (trustee) and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

If these transfers of money to these creditors, or those made to the defendant Thomas F. Powers by this company in payment of notes and the account for legal services, were and are void under the provisions of section 66 of the Stock Corporation Law of the state of New York (Consolidated Laws of N. Y. 1909, vol. 5, p. 5782), then the plaintiff, as trustee in bankruptcy of the now bankrupt company, may reclaim and recover the same for the benefit of the creditors of such bankrupt, unless the surrender by Powers of the written guaranty above referred to, after the payment of such notes and accounts, operates to defeat such right of recovery. Section 66 of the Stock Corporation Law, so far as necessary to recite same here, reads as follows:

"No conveyance, assignment or transfer of any property of any such corporation [one that has refused to pay any of its notes or other obligations, when due, in lawful money] by it or any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. * * * Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. * * * Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void."

Under the provisions of section 67e of the Bankruptcy Law (30 Stat. 564, and 32 Stat. 800), and those of section 66 of the Stock Corporation Law of the state of New York, above quoted, it is immaterial what the intent and purpose of Mr. Powers was, and whether or not he knew of the insolvency of the construction company, and had reasonable cause to believe the receipt and retention by him of the payments made would operate as a preference. Grandison v. Robertson et al., 231 Fed. 785, 790, 145 C. C. A. 605, 610 (C. C. A. 2d Circuit). The Circuit Court of Appeals said and held:

"It is to be observed that under the Bankruptcy Act a preferential payment, to be voidable, must have been received by one who had 'reasonable cause to believe' that it would effect a preference; while under the New York Stock Corporation Law the invalidity of the payment is not made to depend upon the

knowledge of the one receiving the payment that it is a preferential payment, or upon his having reasonable cause to believe that it is a preferential payment. It depends upon whether the corporation or its officers in making the payment did so with the intent of giving a preference to any particular creditor over other creditors. Under the New York statute the invalidity of the payment is conditioned on two facts: (1) The corporation must have been at the time of payment insolvent, or its insolvency must have been imminent. (2) The payment must have been made (not received) with the intent of giving a preference to a particular creditor over other creditors of the corporation."

When the payments to Powers were made, the Ruddy & Saunders Construction Company was hopelessly insolvent, and it and its officers and managers well knew the fact, and the payments were made to Mr. Powers with the intent and purpose on the part of said company and its officers and managers making the payments of giving a preference to that particular creditor over other creditors of the corporation. It is immaterial on this branch of the case what the knowledge or intent of Mr. Powers was.

[5] Did the surrender, after the notes were paid, to Mr. Patrick E. De Lee of his written guaranty, held by Mr. Powers, operate in any way to defeat recovery by this plaintiff? The notes were not indorsed by Mr. De Lee, or by any one. The guaranty was a separate written instrument, and read as follows:

"For value received I guarantee the payment to Thomas F. Powers of all loans now or hereafter made by him to the Ruddy & Saunders Construction Company."

It was signed by Patrick E. De Lee.

The Stock Corporation Law referred to also provides:

"No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice."

The defendant, Mr. Powers, cites Perry v. Van Norden, 192 N. Y. 189, 84 N. E. 804, as authority for the proposition that, having surrendered this written guaranty after payment of the notes, he has lost his security in consideration of other property transferred to him by the insolvent corporation, and that he comes within the status or position of "a purchaser for a valuable consideration without notice."

In Perry v. Van Norden, supra, the trust company, defendant, held three notes of a hat company, not due, all indorsed by one F., who was and continued to be perfectly responsible financially. The hat company deposited $1,000 cash with the trust company and borrowed $3,000 of it on its promissory note, secured by an assignment of certain of its assets and accounts. With the $4,000 it then paid and took up its notes first mentioned before due, and by such act released the indorser on the notes, as they were never presented for payment or protested. By and because of this transfer of such assets and accounts the hat company became insolvent and was thrown into bankruptcy, and the trustee sued the trust company to recover the value of such accounts and assets so transferred. The Court of Appeals said:

"We have doubts whether the intent of the hat company in this transaction was to prefer the appellant [the trust company]. The latter was not affected by the exchange so long as the indorser was responsible. The object and result of what was done was doubtless the protection and relief of the indorser."

The court also held that the trust company—

"did not at the times mentioned know or have cause to believe that said company [hat company] was insolvent, or have any knowledge or notice of any intent on the part of said company or its officers to give a preference, nor did it have any intent to acquire a preference."

The court then held that under such circumstances the trust company was not subject to the provisions of the statute prohibiting preferences, but was within the protection of those other provisions enacted for the benefit of purchasers for a valuable consideration and without notice. The purpose and intent of the hat company is perfectly plain. It was desired to release the indorser, and this was accomplished by a deposit of $1,000 and the substitution and discount with the trust company of the unindorsed note of the hat company for $3,000, secured by the assignment of the accounts and assets of the hat company and the use of such deposit and proceeds of such new note to take up the old notes. By this transaction the trust company was secured and the indorser released at the expense of the general creditors of the hat company. The liability of the indorser was contingent only. The notes had not become fixed liabilities against the indorser, and he received nothing. As the old notes were surrendered and canceled before due, they could not be presented for payment and payment demanded, and this was not done, and there was no protest, and hence the trust company had lost all claim against the indorser, who took no part in the transaction. The court further said:

"Before this action was commenced all of said notes taken up as aforesaid had become due, and, of course, they were not by the appellant [the trust company] presented for payment or protested, and so far as appears *the indorser was not a party to the transaction* whereby they were taken up and protest lost, and no offer has been made to restore to appellant its original rights with respect to said notes."

In the instant case there was no indorsement of the notes and no right of protest lost. Nor has there been any loss of right of action on the part of this defendant, Powers, against De Lee, who executed the guaranty. De Lee has not paid anything, or lost anything, or surrendered any right he had against any one. Certainly Mr. Powers gave no consideration to the Ruddy & Saunders Construction Company, except as he surrendered the notes when paid; but this does not make him a purchaser for a valuable consideration without notice. If Powers became, or came into the position of, a purchaser for a valuable consideration without notice, it was for the reason he surrendered his notes on receipt of the moneys due and unpaid thereon, and *also surrendered the written guaranty of Mr. De Lee, and by such surrender lost all right of action against him.* In other words, was there a good and sufficient, or an adequate, valuable considera-

tion given by Powers for such transfer of the money of the corporation to him?

[6] As a general rule the guarantor is discharged by the payment and satisfaction of the debt guaranteed. But to discharge the guarantor the payment must be a legal and a valid one. *"But the payment must be valid and binding in order to release the guarantor."* 20 Cyc. 1475. In Maxfield v. Jones, 76 Me. 135, it was held that where notes were paid by a sale of property, and in bankruptcy proceedings the sale was declared void; the consideration for the surrender of the notes had failed. If the payment is made by giving a forged note in place of the original, the guarantor is not released. Bass v. Inhabitants of Wellesley, 192 Mass. 526, 78 N. E. 543; Allen v. Sharpe, 37 Ind. 67, 10 Am. Rep. 80; Kincaid v. Yates, 63 Mo. 45; Bank v. Buchanan, 87 Tenn. 32, 9 S. W. 202, 1 L. R. A. 199, 10 Am. St. Rep. 617. So, if the payment is made with the obligation of one under such a disability that the new obligation cannot be enforced, the guarantor is not released. Godfrey v. Crisler, 121 Ind. 203, 22 N. E. 999. So "the payment of the debt by the principal to discharge a debt must be a *valid* payment in order to release the guarantor." Winsted Bank v. Webb, 39 N. Y. 325, 100 Am. Dec. 435. See 4 N. Y. Annotated Digest, 185. In this last case payment was made of six valid notes by the giving of six notes which were void for usury, and it was held that the indorsers on the original notes were not discharged by such payment, although the original notes were surrendered and canceled. See, also, Lee v. Peckham, 17 Wis. 383.

Clearly the payments to Mr. Powers were not valid payments. They were made by the construction company in direct violation of law, of both the Stock Corporation Law of New York, supra, and of the Bankruptcy Act, which latter declares, as stated in subdivision "e" of section 67, that transfers of property made or given by a person adjudged a bankrupt within four months prior to the filing of the petition, and these payments or transfers were so made, with the intent or purpose on his part to *hinder, delay,* or defraud his creditors, or any of them, shall be null and void as against the creditors of the debtor, except as to purchasers in good faith and for *a present fair* consideration. These payments of money constituted transfers of property, and were made with the intent specified, and there was no *present* consideration.

In addition to the Maine case, cited above, we have English cases directly in point. In Petty v. Cooke, L. R. 6 Q. B. 789, the defendant, on the face of the note was a maker, but in fact he was surety only. The note was paid by the principal, but in bankruptcy proceedings he was compelled to surrender such payment. It was held the surety was not discharged and was liable to the holder of the note. In Pritchard v. Hitchcock, 6 Man. & Granger 151, 46 Eng. C. L. R. 149, the defendant in a separate agreement guaranteed the payment of two bills of exchange. The acceptor thereof paid the money due the plaintiff. Later these payments were set aside as constituting fraudulent preferences. It was held the guarantor was not discharged by such

payment, and that plaintiff could recover of the guarantor. The court said:

"Of the fact of money being passed as a payment there can be no doubt; but I think the plaintiff was at liberty to show that what appeared at the time to be a good and satisfactory payment was perfectly illusory; that the money which he had received from W. Hitchcock could not be appropriated by him to his own use, but that it belonged to the assignees."

Stearns on Suretyship (2d Ed.) 136, after stating the general rule that payment discharges the surety, says:

"While this proposition is self-evident, yet it must be observed that, in contemplation of law, nothing amounts to payment or satisfaction which has no value, and if that which is taken in payment is not that which it purports to be, or the use or retention of it is prohibited by law, or for any reason becomes a nullity, then the so-called payment or substitution is not a satisfaction of the original contract, and in the absence of actual or constructive waiver of these infirmities in the medium of payment, *the original contract, although surrendered, will be revived, and the liability of the surety or guarantor restored.*"

In this case the evidence shows, and I find: (1) That Patrick E. De Lee was a stockholder in this construction company, and from 1912, certainly, down to March 1, 1916, was its president, and signed its checks as such, and borrowed money for it of different banks when he could get it, and also of several different persons, including all these loans made by Mr. Powers, for the payment of which latter he gave this written guaranty, when unable to borrow further at the banks; that Patrick E. De Lee, as president, signed the checks for payments down to March 1, 1916, and knew the financial condition of the company of which he was president, and of which his son, John E. De Lee, was general manager, and its insolvency; that he knew that Mr. Powers was being preferred by the payments made by the company to Powers, and intended to prefer him, and also knew that he (De Lee) would be benefited by such preferential payments if they stood; and that Patrick E. De Lee was not an innocent party in such transactions.

In the Van Norden Case, supra, the court took pains to state that—

"So far as appears the indorser [who was released] was not a party to the transaction whereby they [the notes] were taken up and protest lost."

Just what or how much importance the court gave to this fact it is impossible to know, as the Court of Appeals says nothing further on that subject; but it is fair to assume the fact stated had to do with the decision made and was regarded as important, else the statement would not have been made. In the instant case, as we have seen, Patrick E. De Lee, who gave the guaranty, and who, it is claimed, was released therefrom, did have to do with and was a party to the transactions whereby the guaranty was taken up or surrendered and destroyed. However, I do not think this fact necessarily changes the legal aspect of the case, as the payments to Mr. Powers were not valid payments, and no act necessary to bind De Lee on his guaranty was omitted, and he remains bound thereby. His knowledge and partici-

pation, however, has much to do with the equities of the case. I think his participation in the transaction and knowledge of the facts prevent his claiming that the guaranty became inoperative. When Mr. Powers refunds to the estate in bankruptcy the sums received by him, he can recover of Patrick E. De Lee, the guarantor, whose rights have in no way been impaired. Mr. Powers will have no difficulty in establishing the guaranty, as Mr. De Lee testified he gave it, and that it was only surrendered because of the payments made by the construction company to Mr. Powers.

I am requested to find, not only that Mr. Powers had actual knowledge of the insolvency of the Ruddy & Saunders Construction Company at the time he received such payments, and even before, but that his participation in the organization of the corporation and his knowledge of the amount of its capital stock; knowledge of litigations in which he earned $5,000 doing trial work for the company in its litigations; knowledge of the fact the corporation was unable to obtain such loans as it desired at the bank; the frequent and large loans the company obtained of Mr. Powers and his knowledge of the purpose of some of them; the fact that such loans were not paid on request or demand, but were increased thereafter as stated; the fact that his bill for services, and no part thereof, was paid during a term of years; his knowledge that the company had once been sued on a just and valid claim, which Mr. Powers paid for the company; and his knowledge of the fact that when he made the first loan of $4,000 to the corporation he declined to make it without the personal guaranty of Patrick E. De Lee for that and subsequent loans, which the guaranty itself shows were contemplated—gave to Mr. Powers such knowledge and information as to the financial status of the corporation as would put a man of ordinary prudence and intelligence, saying nothing of a skilled and experienced attorney, familiar with the law, on inquiry, and that if he had inquired, as was his duty, he would have received and had actual knowledge of the fact that such corporation was insolvent immediately before the payments were made, and therefore at the time the payments were made, and that he was and is therefore chargeable with knowledge of such insolvency and of the fact that the receipt and retention of such payments would operate as a preference; that is, operate to give to him a greater percentage of his claims than other creditors of the company of the same class would receive.

The difficulty in so finding is that there is no proof that Mr. Powers knew of the amount of the indebtedness of the corporation, or that it was large, and the proof is he was confined to his room when the payments were made, and hence was unable to make inquiries at those particular times. Still he knew of each of them within a day or two, and his agent, who received the payments, and had authority to do so, and to indorse his name on the checks, and deposit same, might have inquired; but there is no evidence that she had reason to inquire. As I view the case, it is unnecessary to pass on that question. These payments were made by the bankrupt company in direct

violation of section 67e of the Bankruptcy Act; that is, first, in violation of section 66 of the Stock Corporation Law of the State of New York, and, secondly, the transfer of these sums of money to Mr. Powers in payment of pre-existing debts were made and given by this bankrupt company, so adjudged on the 24th day of April, 1916, on petition filed April 9, 1916, with the intent and purpose on its part to hinder, delay, and defraud its creditors, who were left unpaid, and Mr. Powers was not a purchaser in good faith and for a *present* fair consideration. The payments were made to a favored few of the friends and relatives of the corporation, or its officers and stockholders, and to its attorney, who was a close friend of the former president, who was the father of other stockholders. It was the intent and purpose to pay some in full and leave others entirely without payment, who were equally entitled to consideration. To do this the corporation stripped itself of all its available assets and voluntarily disabled itself from doing further business. The careful selection of those who were paid to the exclusion of others plainly shows an intent and purpose to so dispose of the property of the corporation as to make it impossible for those unpaid ever to obtain payment of their claims.

Coder v. Arts, 213 U. S. 223, 239, 245, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, very clearly points out the difference between transfers of property, voidable and recoverable by the trustee, because constituting preferences, and those void and recoverable because made with intent to hinder, delay, or defraud creditors, or some of them. The property and assets of a corporation constitute a trust fund in the hands of its officers and directors, first, for properly conducting and carrying on its business; second, for the payment of its creditors, and all its creditors, pro rata, unless some be entitled to preference; and, third, for payment of the balance, if any, on dissolution to its stockholders. This is the general law, and in effect the statute law of the state of New York. This now bankrupt was a corporation subject to the applicable statutes, and any designed and intended disposition of the money and property of this corporation by its officers, they knowing its insolvency and inability to pay all creditors, and intending to put it out of business, contrary to and in violation of those statutes, for the purpose of paying certain creditors, favored by such officers of the corporation, to the exclusion of other creditors, who stood on an equal basis in law and equity, constituted a transfer of its property with intent to hinder, delay, or defraud its creditors, or some of them, within the meaning of section 67e of the act. If this is not so, we have here a new kind of fraud on creditors, a new mode of disposing of property, which, while it actually hinders and delays, and also defrauds, certain creditors, does not constitute a hindering, delaying, or defrauding of creditors, within the meaning and intent of the Bankruptcy Act, for the reason it is a new kind of fraud.

I think the courts ought to be able in affording remedies, to keep pace with those bankrupt concerns which seek to evade the provisions

of the statute, when the words and plain intent of the statute cover and reach the acts done. With the creation of numerous corporations has sprung up the necessity for and the enactment of many new statutes defining the duties, etc., of their officers, and defining what acts shall be and what shall not be lawful. When acts in violation of such statutes are done by such officers with intent to hinder and delay or defraud creditors, or some of them, such unlawful and injurious acts should come under the terms and words of the statute, when clearly they come within its intent and spirit. In short, it seems to me that a conveyance by a corporation of substantially all its property, after converting it into money, not in due course of its business, but in destruction of its business, to certain favored creditors, to the exclusion of other creditors, and in violation of the statutes of the state forbidding such preferences and transfers, all being intended, and such being the purpose, constitutes a transfer of property made to hinder, delay, or defraud creditors. This is the language of the statute, and clearly the unpaid creditors to the extent of over $30,000 are hindered and delayed in the enforcement of their just claims. I am, of course, mindful of the fact that at common law mere preferences are lawful, and under the decision of Coder v. Arts, supra, a mere preference is not a hindering or a delaying or a defrauding of creditors, or any of them. But such is not this case.

There will be a decree in favor of the plaintiff and against the defendant for the sum of $18,824.15, with interest on $1,001.70 from February 8, 1916, interest on $12,822.45 from February 29, 1916, interest on $4,000 from March 1, 1916, and on $1,000 from March 2, 1916, with costs and disbursements to be taxed by the clerk. There will be a provision in the decree to the effect that Mr. Powers may prove his claims on all such notes and on the account for services, and that his dividend be ascertained as nearly as possible, and that he only pay the amount due, less such dividend.

THE WANOLA.

(District Court, D. Massachusetts. February 26, 1919.)

No. 1527.

1. SALVAGE ⊂⊃9—NATURE OF SERVICE.
   Service, incidental to salvage of cargo, in moving to Boston hull of vessel wrecked on beach at Point Allerton, *held* salvage service.
2. SALVAGE ⊂⊃30—AMOUNT OF AWARD—MOVING WRECKED VESSEL.
   A salvage award of $500 made for moving to Boston, from beach at Point Allerton, hull of wrecked vessel worth $3,000, incidental to salving, under contract, the cargo, for which service salvor had been paid.

In Admiralty. Libel for salvage by Arnette E. Betts against the schooner Wanola; William Levy, claimant. Decree for libelant.

George L. Dillaway, of Boston, Mass., for libelant.

Goodwin, Proctor & Ballantine and Fitz-Henry Smith, Jr., all of Boston, Mass., for claimant.

HALE, District Judge. The libelant, doing business under the name of Betts Bros. & Co., and as surviving partner, brings this libel for salvage services rendered to the Wanola, a three-masted schooner driven on the beach and wrecked in January, 1917, at Point Allerton, just outside Boston Harbor.

At the time of her stranding the schooner was loaded with a cargo of coal. The Scott Wrecking Company was employed in salving the schooner and cargo; it succeeded in saving a portion of the coal, and then stripped the schooner, taking everything that was movable. On January 17 the cargo was abandoned to the underwriters. The hull was sold at public auction to William Levy for the sum of $420. Levy now appears as claimant. On January 23, under an agreement with the underwriters, Betts Bros. & Co. proceeded to save the cargo for 75 per cent. of its value. The libel alleges that they agreed also with the representatives of the owners of the schooner to attempt to save the hull of said schooner "on a salvage basis"; that, in doing the salvage service, they employed two lighters, valued at $7,500, and other equipment, valued at $1,500, and employed three tugs, of a value of $43,000; that they now seek to recover $1,500 as the amount agreed upon between the parties for the salvage service, alleging also that, even if the court should not find such agreement, under the testimony, there should be a recovery of as much as $1,500 for the services.

The answer denies that any agreement was ever made fixing the amount of the compensation, or that there was ever any agreement of any kind made "concerning the salving of the hull of said schooner on a salvage or other basis." It alleges that the work on the vessel was done under agreement with the owners of the cargo for the benefit of the cargo, not for the benefit, or at the request, of the claimant. It also alleges that, after the claimant had purchased the schooner in its wrecked condition, on the beach, the representative of the claimant re-

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ceived a telephone message from Betts Bros. & Co. that the schooner had floated on the high tide, and asking what should be done with her; that the agent of the claimant requested that they procure a tug and tow the vessel to Boston; that subsequently the schooner was towed to East Boston, and left on the flats; that there was then some 310 tons of coal in the schooner; that she lay on the flats for about four days, with the coal in her hold; that on January 20, the libelant, without the knowledge of the claimant, took the schooner from the flats and left her at a coal wharf in Boston where the cargo was discharged, and where she lay for about five days while being discharged; that the libelant had an agreement with the cargo owners for 75 per cent. of the coal recovered from the schooner, the owners to have the other 25 per cent.; and that, if the libelant is entitled to any services for salvage of the schooner, the claimant should be entitled to have the value of such services reduced by the value of the use of the claimant's vessel, at the time the salvage services were rendered.

It is clear that Betts Bros. & Co. fixed the amount of their charge at $1,500, and so notified Levy's agent. The claimant strenuously denies that he ever agreed to pay so large an amount. When this sum was first mentioned as the value of the services, the claimant replied that it was too much. He had purchased the vessel on the beach for $420. He urges that he would not be likely to pay so large a sum as $1,500 to get her off the beach without at least making some effort to get the work done for a less sum. The libelant relies upon the testimony of Edward H. Betts, upon a conversation over the telephone with the claimant, and upon a memorandum in a certain book. Such memorandum, however, is to the effect only that an agreement was made; it does not bear upon the price to be paid for the services. The testimony of Betts is not convincing. Upon examination of the proofs upon this point, I am of the opinion that the libelant has not met the burden of proving an agreement that the specific sum of $1,500 was to be paid for the services.

[1, 2] It now becomes the duty of the court to determine what is a reasonable award. I think the service must be held to be a salvage service; it was not merely a towage service; it was not merely a service for expediting the voyage. But, as Judge John Lowell said in Baker v. Hemenway, Fed. Cas. No. 770:

> "The important * * * part of the case is not the name by which" the services are "to be called, but the amount which shall be decreed."

See, also, The Rebecca Shepherd (D. C.) 148 Fed. 727, 731.

The value of the vessel receiving the salvage services was fixed by agreement at $3,000. On January 25, Betts Bros. & Co. went to the wreck, taking along a lighter and two small tugs, and securing the services of a diver. The proofs lead me to the conclusion that the greater part of the service was rendered in saving the cargo. The services of the tugs Betsey Ross and Sadie Ross in pulling off the schooner towing her to Boston and leaving her on the flats, amounted to $110, and has been paid by the claimant. Certain services were,

however, rendered for the benefit of the schooner by Betts Bros. & Co. with their lighters. The schooner was taken to a place of safety on the East Boston flats and grounded there. She lay upon the flats four days, during which time the divers worked on her plugging up holes; the lighters of the libelant lying alongside and pumping. She was taken to the City Fuel Company's wharf and discharged; this took two days more; and, during this time, the divers stood by to take care of any leaks which might develop. When the salvage service was undertaken, the schooner was lying in an exposed position, where, in case of storm, she might have been lost; but it is to be noted that, during the time the service was rendered, the weather was good and the conditions favorable.

While salvage is a proper claim, even though the ship was saved in the process of saving the cargo, still the fact that the two services were rendered as a part of one transaction has some bearing upon the amount to be awarded for the salvage of the ship. The libelant has already received a substantial sum for salving the cargo. He is entitled, also, in my opinion, to some salvage award for salving the schooner. In Daniel v. Cargo of Lumber (D. C.) 240 Fed. 498, it was held that the saving of the cargo was a salvage service, for which the libelants were entitled to compensation, but that it was a service of low order, since it was incidental to the saving of the vessel. In the case at bar, the proofs tend rather to show that the salving of the schooner was incidental to the salving of the cargo.

The libelant contends that the award for this service in salving the vessel should be at least $1,500. This would be 50 per cent. of the value of the schooner. When we take into consideration all the facts in testimony relating to the adventure, I think an award of 50 per cent. would be grossly in excess of anything warranted by the proofs.

Upon the testimony, I think $500 a liberal award for the salvage services. I therefore fix the amount to which the libelant is entitled at $500. For this sum a decree may be entered, with costs.

HAMMOND v. S. TUTTLE'S SONS & CO.

(District Court, E. D. New York. January 16, 1919.)

WHARVES ⊂⊃20(7)—SINKING OF BARGE IN SLIP—FAULT.

Evidence *held* not to show that the sinking of libelant's barge in a publicly used slip was due to fault of respondent in placing her there, but to her leaking condition causing her to sink when her bow rested on the bottom at low tide.

In Admiralty. Suit by John H. Hammond against the S. Tuttle's Sons & Company. Decree for respondent.

Macklin, Brown, Purdy & Van Wyck, of New York City (William F. Purdy, of New York City, of counsel), for libelant.

S. M. & D. E. Meeker, of Brooklyn, N. Y. (Herbert Green, of New York City, of counsel), for respondent.

CHATFIELD, District Judge. The libelant seeks to recover damages for the sinking of the barge Armstrong in a slip outside the drawbridge near the outer end of the Wallabout Canal, which lies just north of the Navy Yard in Brooklyn. This slip is immediately up the creek from a dumping board in front of which rubbish scows are loaded in deep water. These scows and other vessels generally seem to use the adjoining slip as a berth while awaiting their turn at the piers further up the creek, as well as at the dumping board.

The libelant's boat, which had shortly before been overhauled, and which is said to have been used as a grain boat just before the accident, and to have been reasonably tight, was brought to the creek on August 22, 1917. She was intended for the respondent's coal yard, and could not be taken up through the drawbridge to the pier for unloading that night. The respondent's representative, therefore, directed that she remain below the drawbridge until the next day. She was moored alongside of a light scow, which was waiting to get under the refuse dump, and remained there during the night. The next morning the light scow was moved and the Armstrong was put in the corner formed by the drawbridge and the dock. She was there moored at a distance of some 10 or 15 feet from the drawbridge and 4 or 5 feet from the side of the slip.

The tide table shows that it was high tide around 11:40 in the forenoon, and the captain of the boat testifies that he was again ordered to remain at the berth, as the respondent was not yet ready to unload the boat until the afternoon, and that, as the tide went down, the bow of his boat rested upon some hard substance, which allowed the stern to settle when the small amount of water in the boat ran toward the stern, thus tilting her until the water came up over her deck, ran in the hatches, and ultimately sent her to the bottom, where only the extreme bow and the roof over the middle was out of water.

There is testimony that the berth was used by deep draft vessels at all times prior to and after this accident. Such vessels rested on the

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

mud at low tide, and no obstruction has been indicated, except by the evidence as to the tilting of the boat. This is opposed by the testimony of the captain himself, to the effect that his boat was aground at the bow, and that she settled at the stern until the water came up over her decks.

Unless the boat was leaking, no such twist could be given by merely raising the bow, for the boat was afloat for the rest of her length, unless the amount that the bow was raised was much greater than appears to have been the case in this instance. The only way in which the stern could have been put under water was by an accumulation of water inside the boat. If this had been caused by the shape of the bottom of the slip alone, it is difficult to see how the boat could have remained in the slip over one or two previous low tides, without accident. If the injury was caused by some particular obstruction, which was close to the shore and over which the barge moved when the light scow was taken away, it is difficult to see why the respondent should be responsible for such a chance condition in a public or publicly used berth.

But, further than this, the testimony of the respondent's witnesses, that the sinking occurred in the morning, that the captain said his boat was leaking and was told it would be better to get a tug, that some one called with reference to pumping out the barge, and that the boat was seen before noon going down, is too strong to be disregarded.

The libelant has not sustained the burden of proof, so as to show that the accumulation of water in the boat, which caused it to settle at the stern, was not the result of ordinary leaking, or to show that the accident was not caused by the captain's mooring his boat so close, either to the drawbridge or the side of the slip, that it was resting on the bottom at the bow and in deep water at the stern, and that this ordinary strain opened the boat's seams sufficiently to send her stern deck under by the leaking then occurring.

The libel should be dismissed.

RAILROAD COMMISSIONERS OF STATE OF FLORIDA v. BURLESON, Postmaster General, et al.

(District Court, N. D. Florida. January 24, 1919.)

1. COURTS ⟸270—DISTRICT COURT—RESIDENCE OF DEFENDANT.
When a federal question is involved, suit is maintainable only in district of defendant's residence.

2. COURTS ⟸318—DISTRICT COURT—RESIDENCE OF DEFENDANTS—IMPROPER JOINDER.
Where pleadings show that a codefendant is not responsible for acts complained of, and that the suit may be maintained against the principal defendant in the district of his residence, the suit will be dismissed as against the defendant improperly joined.

3. COURTS ⟸270—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—DISTRICT OF SUIT.
A federal court is without jurisdiction of a suit against the Postmaster General, as administrator of a telegraph and telephone system under government control, in a district of which he is not a resident and over his objection, to enjoin enforcement of intrastate telephone rates established by him, on the ground that his action is in violation of the joint resolution authorizing such control.

In Equity. Suit by the Railroad Commissioners of the State of Florida, against Albert S. Burleson, Postmaster General, United States Telegraph and Telephone Administration, and the Southern Bell Telephone & Telegraph Company On objection of defendant Burleson to jurisdiction, and motion by Telephone Company to dismiss. Bill dismissed.

Dozier A. De Vane, of Tallahassee, Fla., for complainants.

John L. Neeley, U. S. Atty., of Tallahassee, Fla., for respondent Burleson.

W. A. Blount, of Pensacola, Fla., and Fred T. Myers, of Tallahassee, Fla., for respondent Southern Bell Telephone & Telegraph Co.

SHEPPARD, District Judge. The complainants' bill, exhibited against the Postmaster General and the Telephone & Telegraph Company, asks for a restraining order against the defendants, pendente lite, and ultimately an injunction against the defendants, their agents, etc., from putting into operation, or from continuing in effect on toll lines of the Southern Bell Telephone & Telegraph Company, in Florida, on any intrastate telephonic connection, the toll rates and charges prescribed by the Postmaster General's order No. 2495, or in any wise establishing, or attempting to establish, maintain or collect toll charges for intrastate telephonic communication, other than those authorized by the Railroad Commissioners of Florida.

The jurisdictional averments of the bill show that complainants are citizens of Florida; that defendant Burleson is a nonresident of Florida, at present residing in Washington, District of Columbia; the

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Southern Bell Telephone & Telegraph Company, a "foreign corporation," organized and existing under the laws of New York.

There is no attempt to define the Telegraph and Telephone Administration, except to say that the Postmaster General has proclaimed his operation of the Bell system under that designation, and this may be passed as merely descriptio personæ. The complainants do not rest the ground of jurisdiction upon diversity of citizenship alone, but, after asserting diversity of citizenship and amount involved, aver that defendants seek to take the property of their patrons without due process of law and in violation of the Fourteenth Amendment; that the Postmaster General is assuming to take possession of and operate intrastate lines in Florida under regulations and rates prescribed by him, in virtue of a resolution of Congress and the proclamation of the President, pursuant thereto, vesting in said Burleson the assumed authority to supervise and regulate intrastate as well as interstate rates.

The bill further avers that the resolution of Congress under which the Postmaster General was designated for federal administration, by the President, limits his authority to government communications and censorship, and preserves and continues the law of the state, and authority of complainants for rate regulation over telephone lines in Florida.

The United States attorney, on behalf of the defendant Burleson, filed written objection to the granting of any injunction against the latter, because it appears by the bill that he is an inhabitant personally and officially of the city of Washington, District of Columbia, and objects to being sued in the Northern district of Florida, or elsewhere than in the district whereof he is an inhabitant.

Defendant Bell Telephone & Telegraph Company answers that it is misjoined in the suit, and that no relief can or should be granted against it, because of the resolution of Congress and proclamation of the President, pursuant thereto, and the official orders of the Postmaster General assuming exclusive control and supervision of defendant's system in Florida and designating certain persons therein named as the personnel of his administration; that the Postmaster General has taken over the entire system of defendant under the President's proclamation, and that the Postmaster General and defendant had entered into a contract for the control of the properties of defendant, the former taking its revenues as earned and paying the operating expenses, including the compensation of its employés. Quoting a pertinent paragraph in the answer:

"That on the 1st day of August, 1918, under authority of the resolution and President's proclamation, the Postmaster General went into complete and exclusive possession and control of respondent's lines. While the employés and officers of the company were continued in their positions, they ceased to operate the properties on behalf of the respondent; their services in connection with the operation, maintenance, and extension of said lines and properties were, since that date, exclusively for the United States government, conformably with the orders and instructions constantly and uniformly given by the Postmaster General. * * * That, when the contract was made with the government, provisions were made for the rental to be paid by the government to the respondent for the use of its properties, and that the respondent is

not now, has not been, and will not be, as long as the property is in the possession and control of the government, pecuniarily interested in the revenues to be derived from the operation of its lines by the government."

The answer further sets up that all changes and adjustments in rates and changes in regulations are exclusively directed by the Postmaster General, and moves, for these and kindred reasons set forth, that it be dismissed from the suit and the injunction be denied.

Exhibited with respondent's answer is the proposal of the Telephone & Telegraph Company, and the acceptance by the Postmaster General, in which respondent accepts a just compensation for federal control and operation of the telephone system taken by the President under the joint resolution, which acceptance includes all of the telephone property operated by the Bell system, whether owned or leased, except its right to use, during federal administration, such portion of the office buildings as may be reasonably necessary to provide accommodations for its corporate organization, and such private use of the federal telephone system as it may make on such terms as the Postmaster General may prescribe.

Equity rule No. 29 (198 Fed. xxvi, 115 C. C. A. xxvi) provides that defenses in point of law, arising upon the face of the bill, may be made by motion in the answer; and the objection interposed by the Postmaster General may be considered as a plea to the jurisdiction. The questions will be considered as thus submitted.

It may be seen from the foregoing summary that the complainants have proceeded upon more than one ground of jurisdiction. The bill discloses a diversity of citizenship as to both defendants, and asserts jurisdiction because of the diversity of citizenship, and, secondly, because of the federal question involved, and avers at length that the Postmaster General is attempting to prescribe telephone rates on intrastate lines of respondent to be substituted for the rates prescribed by the Railroad Commissioners of Florida, and that his pretended authority to do so is based on the resolution of Congress; that by the proviso therein his authority is limited to regulations which may effect the transmission of government messages only, and the issue of stocks and bonds; and that the authority thereby conferred upon the President was not to affect existing laws or powers of the states under lawful police regulations.

It is plain, therefore, that the allegations of the bill invoke a construction of a law of Congress, in that whether the Postmaster General, under the resolution, is invested with power to regulate tolls on intrastate lines, or whether it was reserved to the complainants, the Railroad Commissioners, under the lawful police regulations of the state, depends upon a construction of the proviso contained in the Resolution. That being so, jurisdiction cannot be sustained by reason of diversity of citizenship alone.

[1-3] It is well settled that, where jurisdiction is not founded on diversity of citizenship only, then the defendant may object to being sued in any other district than that of which he is an inhabitant. Section 51,

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. § 1033]). It is long judicially established that where the title or right set up by the party may be defeated by one construction of the law of the United States, or sustained by the opposite construction, it involves distinctly a federal question (Macon Grocery Co. v. Atlantic Coast Line Railroad, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300), and it requires only a fair interpretation of the pleader's case, made by the bill, to determine that the right or relief depends upon a construction of the proviso contained in the resolution. A case arises under the law of the United States, when it arises out of the implication of the law. Macon Grocery Co. v. Atlantic Coast Line Railroad, supra, and cases cited. It follows, therefore, inevitably that the Postmaster General may object to the venue of the present suit, and this right to be sued in the district of which he is an inhabitant was in no wise affected by the theory of the bill, that the local officers of the telephone company are his agents, and are at his instance committing the wrongs complained of. It is true that it was held by the Supreme Court, in Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204, that if the person who is the real principal, and who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, and exempt from all judicial process, it would be subversive of the best-established principles to say that the law could not afford the same remedy against the agent employed in doing the wrong which it would afford against him, could he be joined in the suit. But in that case, as distinguished from this, the principal was the state of Ohio, not amenable to process, and here it is an administrative officer of the government, attempting, according to charges of the bill, an unlawful usurpation of authority. It was observed in the Osborn Case, supra, if the party before the court would be responsible, why may not he be restrained from its commission, if no other party can be brought before the court. Yet, if the agents of the party not before the court would be responsible for the injury, they might be restrained if no other party was legally accessible. Upon the authority of the decision of the Osborn Case, supra, there are presented here two insuperable difficulties to jurisdiction: First, the Postmaster General is a proper party, and may be sued in the proper jurisdiction; secondly, the answer and exhibits of the telephone company make a complete disclaimer of any connection, by agency or otherwise, with the present federal administration of the telephone lines within the jurisdiction of the court. The contract attached as an exhibit to the answer supports this contention. It is true that the affidavit of Commissioner Blitch, exhibited with the bill, affirms "that, so far as deponent knows and has ascertained, there is no supervisor for Florida of the properties of the Southern Bell Telephone & Telegraph Company; that in all other matters relating to the regulation of the properties of the Southern Bell Telephone & Telegraph Company, within the jurisdiction of the Railroad Commissioners of Florida, the same officials of the Southern Bell Telephone & Telegraph Company have appeared before the Railroad Commissioners of Florida in the

same manner since the government control and operation of said properties as prior thereto"; and further, in substance, that the Postmaster General's order 2495, putting into effect the rate of the former, was transmitted to the Railroad Commissioners by J. Eppes Brown, first vice president of the Southern Bell Telephone & Telegraph Company.

This conduct and representation of the vice president of the company is not inconsistent, in the view of the court, with the showing of the exclusive control of the government, made by the answer and exhibits.

From what is disclosed by the record, it is patent that the Bell Telephone system, for the time being, is a governmental agency, under the control and supervision of the Postmaster General, and the agents and employés of the telephone company in a sense are loaned to federal control, and the company is not responsible for the regulations, or attempted regulations, complained of in the bill.

It follows, therefore, that the Bell Telephone Company is not a proper party to the bill, and as to it the bill should be dismissed. As to the defendant Burleson, in the absence of his consent, the court is without jurisdiction, and the bill must be dismissed as to him.

ZERBST, Warden U. S. Penitentiary, v. LYMAN.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1919.)

No. 3278.

1. CRIMINAL LAW ⊂⊃1216(2)—SENTENCE—SUCCESSIVE OR CONCURRENT TERMS. Where a convicted defendant was committed for imprisonment for a stated term on designation by the Attorney General to a prison in which he was at the time serving a sentence from another court, from the time the warden received the commitment the sentences ran concurrently.
2. CRIMINAL LAW ⊂⊃1216(2)—SENTENCE—SUCCESSIVE OR CONCURRENT TERMS. Ordinarily two or more sentences run concurrently, in the absence of specific provision in the judgment to the contrary, and this rule applies where the convictions were in different courts.

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Neuman, Judge.

Habeas corpus by John Grant Lyman against Fred G. Zerbst, Warden of the United States Pentitentiary, Atlanta, Ga. From a judgment awarding the writ defendant appeals. Affirmed.

See, also, 247 Fed. 611.

Hooper Alexander, U. S. Atty., and J. W. Henley, Asst. U. S. Atty., both of Atlanta, Ga., for appellant.

W. Carroll Latimer, of Atlanta, Ga., for appellee.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

BATTS, Circuit Judge. Pending an appeal from a judgment of conviction in the Southern District of California, Lyman, appellee, was convicted of another crime in the Southern district of New York, and committed to the United States penitentiary at Atlanta. The judgment of the California court was affirmed (Lyman v. United States, 241 Fed. 945, 154 C. C. A. 581), and a commitment was issued, reciting the conviction of Lyman; that he had been ordered to be imprisoned in the state penitentiary at San Quentin, Cal.; that the judgment was affirmed; that the Attorney General had designated the penitentiary at Atlanta as the place of confinement of defendant, and directing the marshal to deliver Lyman into the custody of the warden of the Atlanta pentitentiary forthwith, and the warden to detain him for a period of one year and three months, "in accordance with the judgment and order." The marshal transmitted this commitment to the warden with a letter, to the effect that "I am inclosing you official commitment for John Grant Lyman, to become effective upon completion of his present term." The letter contained a receipt for the prisoner, which was signed by the warden and returned to the marshal. At the time the commitment was received Lyman was serving the New York sentence. Upon the expiration of the 15 months, dating from the day of the receipt of the commitment, Lyman sued out a writ of habeas corpus. The New York sentence had in the meantime

expired, but 1 year and three months had not thereafter elapsed. The District Judge held that the sentences ran concurrently, and that the applicant was entitled to his release.

[1] After the receipt of the California commitment, the warden, already in custody of the prisoner, held him under both commitments. The time of the sentence having elapsed between the receipt of the commitment and the date of the application for the writ of habeas corpus, the only conclusion to be reached by the trial court was that the applicant had served the term. The marshal, in sending the commitment, had stated that "the punishment was to become effective upon completion of his present term." There is nothing in the commitment which indicates a time for the beginning of the punishment, other than that the marshal was to forthwith deliver Lyman into the custody of the warden at Atlanta. This commitment was the measure of the authority of the warden, and was properly the basis of the action of the District Judge upon the application for habeas corpus. The marshal had no authority to change the terms of the commitment, or determine when the punishment should begin.

It is argued that it was manifest that the California court intended that the punishment should begin after the expiration of the term imposed by the New York court. This nowhere appears. It is true that, if the original order of imprisonment in the state penitentiary at San Quentin had not been changed, the imprisonment could not have begun until the prisoner had been released from the Atlanta penitentiary. But there is nothing to indicate that the court intended to do anything other than that which was done.

[2] It could well be assumed that the court intended, if it can be assumed that it had knowledge of the pendency of another sentence, that the ordinary effect should follow. Ordinarily, two or more sentences run concurrently, in the absence of specific provisions in the judgment to the contrary. United States v. Patterson (C. C.) 29 Fed. 775; In re Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335; 1 Bishop, Crim. Procedure, 1327, 1310. This rule seems to apply where the conviction is had in different courts. Ex parte Green, 86 Cal. 427, 25 Pac. 21; Ex parte Black, 162 N. C. 457, 78 S. E. 273; Ex parte Gafford, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568. The case cited by appellant of Hightower v. Hollis, 121 Ga. 160, 48 S. E. 969, if not distinguishable by reason of the nature of the punishment, is apparently in conflict with the weight of authority.

It is suggested that if the Attorney General had not designated the Atlanta penitentiary as the place of confinement, and the District Court for the Southern District of California had caused a commitment to issue upon the original order, the appellee would have been compelled to serve both sentences fully. If the commitment had been different, and the facts different, doubtless a different conclusion would be reached. That which the court is called upon to do is to pass upon the record as it stands. The California court either knew that Lyman was in the custody of the warden of the Atlanta penitentiary, or did not know of that fact. If it had knowledge of the fact, the commitment which it caused to be issued would evidence an intention that

the sentences should run concurrently. If it had no knowledge of that fact, there could have been no intention other than that its sentence should begin forthwith, as directed by the commitment.

The appellant suggests that error was committed in not permitting the California court to amend its judgment. The record contains nothing to indicate that the trial court had any desire to make any amendment, or that it in any sense recognized or assumed that any error had been committed.

The applicant has not, as suggested by the appellant, escaped punishment because of the technical error. There is nothing to indicate that an error has been committed, and the record shows that the prisoner was held under the sentence for the period designated by the judgment.

The judgment of the lower court is affirmed.

WALKER, Circuit Judge (dissenting). It is quite apparent that the above-mentioned commitment order made by the District Court for the Southern District of California was not intended to change in any respect its previously rendered and affirmed judgment. In specifying the place of imprisonment, there was a compliance with the direction of the Attorney General. The extent of the authority conferred on the Attorney General by the statute under which he acted (10 U. S. Comp. St. Ann. § 10547) is to have the place of imprisonment changed. He is not empowered to make the period of imprisonment different from what it would have been if the place of imprisonment designated in the judgment of the court had remained unchanged. His exercise of the power conferred is not to be given the effect of accomplishing an unauthorized result. There is nothing to indicate that the above-mentioned letter of the Attorney General, or the commitment order made in pursuance of it, purported or was intended to have the effect given to it by the order appealed from. If the change of the place of confinement of the convict had not been so made, his confinement in the San Quentin penitentiary could not have commenced until he was released from confinement in the Atlanta penitentiary under the New York conviction.

Under the facts of the instant case, there is nothing upon which to base the conclusion that the sentence on the conviction in California was imposed under such circumstances as to make it run concurrently with any other sentence. So far as appears, at the time that sentence was imposed, the convict was not the subject of any other sentence, imposed by that or any other court. As above stated, the commitment order made by the California trial court does not purport to make any change in its judgment rendered at a previous term and thereafter affirmed. To give that order, the writ issued under it, and the written statement made by the warden on his receipt of the commitment writ, the effect of making the period of the convict's confinement shorter than it would have been if the place of confinement had not been changed, would amount to making a change in the effect and operation of the affirmed judgment which was not authorized, and which does not appear to have been intended by either the Attorney

General or the court making the order of commitment. It was not in the power of the warden to make an authorized change in the place of imprisonment have the further effect of shortening the period of imprisonment.

Under the circumstances of the issue of the California commitment writ and the receipt of it by the warden, the latter was thereby authorized, upon the expiration of the period of the convict's imprisonment under the New York sentence, to retain him in custody for the period required by the California sentence. The marshal did not execute the writ by arresting Lyman and delivering him to the warden. The convict was already in the warden's custody, held under another unexpired sentence. In the opinion of the writer, what was done did not have the effect of making the convict's confinement in the Atlanta penitentiary under the California sentence commence sooner than it could have commenced if the place of his confinement had not been changed. The application of the conclusion just stated to the facts disclosed leads to the further conclusion that when the writ of habeas corpus was issued, and when the order appealed from was made, the appellee was not entitled to be discharged from custody, because the period of his imprisonment under the California sentence had not expired; and that the court erred in ordering his discharge.

FRICK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3206.

1. PUBLIC LANDS ⟸120—SUIT TO CANCEL PATENT—FRAUDULENT ENTRY.
   Evidence *held* to sustain a finding that a patent to public land was obtained by fraud, to which defendant, a subsequent purchaser from the patentee, was a party.
2. PUBLIC LANDS ⟸123—PATENTS OBTAINED BY FRAUD—DAMAGES RECOVERABLE.
   Act March 2, 1896, § 2 (Comp. St. § 4902), limiting recovery from the patentee of land erroneously patented and which has passed to a bona fide purchaser to the minimum government price, does not apply to patents obtained by fraud, and where defendant, who was a party to the fraud, has sold to a bona fide purchaser, the entire amount he received may be recovered.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit by the United States against W. P. Frick and another. Decree for the United States, and defendant Frick appeals. Affirmed. For opinion below, see 244 Fed. 574.

Jordan & Brann, of San Francisco, Cal., for appellant.

Annette Abbott Adams, U. S. Atty., and Frank M. Silva, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

HUNT, Circuit Judge. The United States brought this suit to cancel a patent for certain land issued in April, 1908, to B. C. Robertson, for forfeiture of certain money paid by Robertson to the United States, and for other proper relief. The land was entered under application by Robertson made in August, 1907, to purchase as timber land, under the act of Congress approved June 3, 1878. The ground of suit is fraud alleged to consist of false representations made by Robertson in the application and affidavit accompanying the same, and by Frick and Robertson in their depositions before the land office in October, 1907, as to the character and condition of the lands.

The particular matters pleaded are: That Frick, who was a witness for Robertson in making final proof, willfully falsely swore that he had personally examined the land, that it was unfit for cultivation and was chiefly valuable for timber, that it was uninhabited and unimproved, that it contained no valuable deposits of mineral, and that there were no mining improvements upon it, whereas, the facts, which were then well known to Frick, were that the lands were more valuable for mineral than for timber; that when Frick bought the land from Robertson there were placer and quartz mining locations made thereon and owned by one Parker, and duly recorded in the office of the county recorder of El Dorado county, Cal., where the lands are situated; that there were veins exposed, and that valuable mining improvements had been made. Frick denied fraud, and pleaded that, since a time prior to the institution of the suit, he had had no interest in the land.

Upon trial it appeared that long before the institution of suit the land had been sold by Frick to the California Door Company, found to be an innocent purchaser for value. The District Court declined to cancel the patent, but rendered judgment against Frick for $6,475.95, or $32.50 per acre, which was the full amount received by Frick for the land when he sold it. Frick appeals.

[1] The principal error assigned is that the evidence was insufficient to sustain the charges of fraud against Frick. Inasmuch as the learned judge of the District Court has carefully and with detailed statement incorporated the most material parts of the evidence in his opinion in the record, there is no necessity for repeating it. The substance of it was that minerals were found upon the land; that there was a cabin upon part of it, and that mining had been done upon portions of the tract for several years; that the country thereabouts was valuable for mineral; that in 1902, and for a number of years thereafter, a Mr. Parker and his wife were living upon the land, and that Parker had built ditches, run a tunnel, and had mined and panned gold; that about 1902 Frick and another person were mining about two miles away from the ground, and that they, Frick and one Mauk, had talked about Parker having purchased the mine, and the price that they had been told Parker paid for the property. There was also evidence tending to show that Frick was familiar with the property; that he had been upon it, and must have known that there was a house upon it when Parker bought the mine. Mrs. Parker testified to the effect that she had lived upon the Parker mine with her husband; that

they owned the mine after 1906, and had made their living from the mine for about eight years; that they had built ditches, employed men, and worked the property, and at one time had taken out over $340 in gold in two days; that they had a well and a garden and a good cabin.

The testimony of the defendant himself was far from satisfactory. He said that he had been upon the property a year or two before he became a witness upon the final proofs made by Robertson; that he had had some experience in mining in that locality, but that it had not been very profitable; that when he was a proof witness, and testified that there were no improvements on the property, he did not know that there was a house upon it, or that there had been a shaft sunk in the ground, or that Mr. Parker was living there. When asked if he and his mining partner had not at one time loaned a pipe and monitor to Parker to work the mine, witness said:

"We evidently did. If we did, I did not know it went on this property. I was not familiar with it at the time. It was quite a distance."

Again, when asked if he and his partner had not discussed the price that Parker paid for the mine, he said:

"We probably did. That has passed out of my recollection. I did not know that it was on this property."

He further testified that Robertson made his final proof about October 28, 1907, and that he paid Robertson "about $5" an acre for the land about nine or ten days thereafter, but that he did not record the deed until September 29, 1909. In explanation of how he became a witness for Robertson, Frick said:

"As I remember the transaction now, Mr. Robertson asked me if I would not be a witness; that he had found some land that was vacant in El Dorado county, when he was up there fishing. He said he had one witness living in that country. He asked me if I couldn't act as a witness for him, and I said certainly I would. I knew the land when he described it to me that time, because I was familiar in that district. I was very happy to act as a witness for him."

He testified that he knew there had been prospecting in that vicinity, and that he had surveyed the property about 1904, when he had found some abandoned cuts thereabouts, but saw no evidence of any improvements, and that, if he had seen the cabin on the ground, he did not know whether he would pay attention to it, as there were many miners' shacks through that country.

The District Court, after considering all these and other facts and circumstances, was fully satisfied that the allegations of fraud were sustained, and, as the evidence well warrants such a conclusion, the case is to be judged by this court as one where the patent was obtained by fraud on the part of Frick. Cooper v. United States, 220 Fed. 867, 136 C. C. A. 497.

[2] It is said that in no event is the United States entitled to a money judgment against Frick except for that portion of the land which was more valuable for mineral than for timber "at the time of the grant," and that there were only about 20 acres shown to have been

of mineral character. To support this contention counsel cite the act of March 2, 1896 (29 Stat. 42, 43, c. 39 [Comp. St. §§ 4901–4903]), to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes. This act, however, is not applicable to the present case, for it has to do, not with cases of patents issued as a result of fraud, but with those involving rights of purchasers in good faith where patents have been erroneously issued.

In the recent case of United States v. Whited & Wheless, Ltd., et al., 246 U. S. 552, 38 Sup. Ct. 367, 62 L. Ed. 879, the United States brought suit to recover from certain officials of a dissolved corporation the value of certain public lands included in a patent which it was alleged was procured from the United States by the fraudulent conduct of the company and of its president. The Court of Appeals sustained a judgment upon a demurrer to the petition upon the ground that the cause of action stated in the complaint was barred by the statute of limitations under section 8 of an act of Congress of March 3, 1891 (26 Stat. 1099, c. 561 [Comp. St. § 5114]), wherein it was provided that suits of the United States to vacate and annul any patent heretofore issued should only be brought within five years of the passage of the act, and suits to vacate and annul patents thereafter issued should only be brought within six years after the date of the issuance of such patents. After holding that the omission of language barring the right of the government to recover the value of lands to which a patent had been fraudulently obtained was intentional and deliberate, the court considered the argument made by the appellant to the effect that the right of recovery by the government is limited by section 2 of the act of March 2, 1896, supra, to the minimum government price paid for the land. But the court said:

"But the act of 1896 deals only with patents 'erroneously issued under a railroad or wagonroad grant,' and the limited recovery allowed is restricted to cases where it shall appear that such erroneously patented lands have been sold to bona fide purchasers. That such a statute can have no application to such a case as we are considering is too obvious for comment."

Fraud on the part of Frick having been established, the lower court properly held that the United States could sue Frick for the return of the entire value of the land included in the patent obtained through his fraudulent representations. Cooper v. United States, supra; Union Coal & Coke Co. v. United States, 247 Fed. 106, 159 C. C. A. 324.

Affirmed.

STEWART v. FLORIDA, G. & W. RY. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 20, 1919.)

No. 3225.

1. RAILROADS ⟸151—BONDS—LEGALITY OF ISSUE.
Where railroad bonds by their terms were valid only when certified by the trustee, who was authorized to certify them as building and equipment of the road progressed on certificate of the president and chief engineer, a certification based only on a certificate of the engineer, who had ended his employment with the company years before, and who stated nothing as to equipment, *held* unauthorized, and the bonds invalid when issued.

2. RAILROADS ⟸152—RIGHT TO BONDS—LACHES.
The failure of a contracting company, claiming the right to railroad bonds for construction work done, to demand their issue for 22 years, *held* such laches as to bar its right.

3. RAILROADS ⟸177—MORTGAGE—RIGHT OF SUBSEQUENT PURCHASER TO CONTEST VALIDITY.
The purchaser of railroad property, claiming under an execution sale, may contest the validity of a mortgage, sought to be foreclosed thereon, and alleged to constitute a lien antedating its source of title.

Appeal from the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Suit in equity by Robert W. Stewart, substituted trustee, against the Florida, Georgia & Western Railway Company and others. Decree for defendants, and complainant appeals. Affirmed.

G. H. Brevillier, of New York City, and Fred T. Myers, of Tallahassee, Fla., for appellant.

W. J. Oven, of Tallahassee, Fla., for appellees.

Before WALKER, Circuit Judge, and GRUBB, District Judge.

GRUBB, District Judge. This is an appeal from a decree of the District Court, dismissing the bill of complaint, as amended, in the above-entitled cause, for want of equity, upon a motion to dismiss. The bill was filed for the purpose of foreclosing a railroad mortgage by the substituted trustee, and prayed the declaring of a lien on the mortgaged premises, the foreclosure and sale of the railroad, and for directions to the trustee in the execution of the trusts imposed by the mortgage or trust deed. The Seaboard Air Line Railway Company, appellee, was made a party defendant to the bill of complaint, and cited to come in and assert any interest it had in the mortgaged premises. It was upon a motion to dismiss, filed in its behalf, that the decree appealed from was rendered by the District Judge.

The motion was made upon many grounds. Among them were: (1) That the defendant was not the proper party defendant, or not sued in its proper corporate name; (2) that the certificate furnished the substituted trustee by the mortgagor company was insufficient authority to justify the trustee in certifying any bonds under the mort-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

gage; and (3) laches on the part of the owner and holder of the only bonds outstanding, in securing their issue and certification by the trustee.

The District Judge seems to have relied upon the first of the three named grounds. If, however, the decree can be sustained upon any ground contained in the motion to dismiss, the decree will be affirmed on this appeal.

The original mortgagor corporation was organized by a special act of the Legislature of Florida, approved May 7, 1891 (chapter 4098 of the Florida Laws of 1891), as a railroad company authorized to construct a railroad from Gainesville to Tallahassee, Fla., with certain branches and extensions. Certain land grants were conferred upon the corporation by the state. The corporate name was designated as the Florida, Georgia & Western Railway Company. By the terms of section 9 of the act:

"No rights shall vest under this act unless the construction of said railroad shall be commenced within ten days, and twenty miles of said road shall be completed within one year from the date of the passage of this act, and the whole of said main line shall be constructed within three years from the date hereof."

In June, 1891, a contract for the construction of the railroad was entered into with the Interstate Land & Construction Company, by which it was to build the road, in consideration of the stock, bonds, and notes of the railroad company. A mortgage was executed by the railroad company to the Central Trust Company of New York, as trustee, on October 21, 1891, which is the mortgage now sought to be foreclosed. The road was not built according to the terms of the original act of incorporation, and the land grants, at least, if not the corporate franchise also, lapsed on May 7, 1894, according to the terms of the act, and were subject to forfeiture.

On May 30, 1895, an amendatory act was approved (chapter 4477 of the Florida Laws of 1895), by which the original incorporators were reincorporated under a new name (Tallahassee Southeastern Railway Company), and granted the right to build and operate a railroad from Tallahassee to Gainesville, Fla., with extensions, and the original land grant was revived. Section 9 of the original act was amended by conferring on the new corporation all the rights vested in the old corporation by sections 6 and 7 of the original act, and which were then subject to forfeiture by the terms of the original act "upon the completion of twenty miles of said road within one year from the date of the passage of this act, and the construction of its main line from Tallahassee to Gainesville within four years from the date hereof" (May 30, 1895).

A question is made as to whether the effect of the amendatory act was to create a separate corporate entity, or merely to change the name of the entity created by the original act of 1891. The contention of the defendant is that, if it created a new corporation, there was a defect of parties to the bill, inasmuch as the new corporation was omitted as a party to it, and, if it merely changed the name of the old corporation, then the old corporation was suable only under its new

name. The District Judge held the defendant suable only under the amended name, and dismissed the bill for that reason. We think the bill should have been dismissed for both the other reasons assigned in the motion, and find it unnecessary to determine whether it was properly dismissed for the reason assigned in the court below.

[1] The terms of the bond, to be secured by the mortgage, provided that—

"This bond shall not be valid until the certificate endorsed hereon shall have been signed by the trustee or its successor or successors in the trust, and it is issued and held under and subject to the terms and conditions of said mortgage or deed of trust."

The terms of the mortgage itself provided for the certification of the bonds issued under the mortgage and delivered to the trustee by the railroad company for certification by the trustee, at the rate of $12,000 for each mile of single track of railway covered by the mortgage, and for their delivery to the railroad company, or upon the order of its president or treasurer, when certified. It also provided that—

"Before the party of the first part [the railroad company] shall be entitled to the delivery of such bonds or any thereof, the party of the first part shall deliver to said trustee a certified copy of a resolution of the board of directors or executive committee of the party of the first part, authorizing the issue of such bonds, and stating the amount of bonds required at the time, and also a certificate signed by the president and chief engineer of the party of the first part, and verified by their affidavits, showing the entire number of miles of single track of main line, branches and extensions of said railway belonging to the party of the first part, actually completed and equipped, and stations, section houses, water tanks, and all necessary appurtenances and ready for the passage of trains, and such certified copy, certificates and affidavits shall be sufficient evidence to said trustee of the truth of the statements therein contained, and shall constitute full and sufficient authority to said trustee to certify and deliver bonds of this issue at the rate aforesaid."

The bonds were valid only when certified by the trustee. The trustee was authorized to certify the bonds only upon presentation to him of evidence of the completion of the railroad, or a part of it of the kind described in the mortgage. If the bonds were not certified at all, or if they were certified without proper authority, they would be invalid in the hands of the original holder, and would not constitute a lien upon the premises described in the mortgage. The bill discloses that bonds in the amount of $84,000 were certified by the substituted trustee. None was certified by the original trustee. The bonds were certified to by the substituted trustee at the request of the contractor, as averred in the bill, and the substituted trustee was directed by the railroad company to deliver the bonds to Mrs. E. J. H. Richardson for account of the contractor. The bonds must therefore be treated as being held by the contractor when the foreclosure bill was filed. These are the only bonds outstanding under the mortgage. The certificate of the chief engineer, on which the substituted trustee acted in certifying these bonds, is attached as an exhibit to the bill. We think it was insufficient on its face to justify the certification of the bonds. In the first place, it affirmatively shows that the maker of it had long ceased to have any official connection with the railroad company. The

terms of the mortgage contemplate that the maker of the sworn certificate shall bear an official relation to the railroad company when the certificate is made. The sanction arising from the trust relation of officer is important. The certificate of a stranger is obviously less to be relied upon.

Again, the certificate of the former chief engineer is not to the effect that, while he was chief engineer, a single mile of track of main line, branches, and extensions of said railway, belonging to the party of the first part, was "completed and equipped with stations, section houses, water tanks and all necessary appurtenances, and ready for passage of trains." It only asserts that "the track was laid and said road completed for seven miles from Tallahassee towards Perry, and was in operation for construction purposes." He does certify that, at the time of making the certificate in May, 1913, 30 miles of road, commencing at Tallahassee, was in operation and equipped with stations, section houses, water tanks and all necessary appurtenances, and being used in the passage of trains." The difference of manner of statement would seem to be deliberate and advised. The want of authority in the former chief engineer to certify as to a status, long after his official relation terminated, is obvious. The mortgage requires the sworn certificate of both the president and chief engineer to be presented to the trustee before bonds can be certified. A failure to comply with this requirement would invalidate bonds in the hands of the original holder. For these reasons the action of the substituted trustee in certifying and delivering the bonds was unauthorized; the bonds so certified had no validity, and never obtained the protection of the lien of the mortgage; and, there being no other bonds outstanding, secured by the mortgage, no reason for its foreclosure is shown by the bill.

[2] Again, the amended bill of complaint avers that bonds in the par value of $84,000 were delivered by the railroad company to the original trustee for certification prior to the year 1893, and that the contractor had, prior to the year 1893, completed seven miles of railroad and then had become entitled to receive $84,000 of the first mortgage bonds of the original railroad company. The construction contract between the railroad company and the contractor provided for the delivery to the contractor by the railroad company of its first mortgage bonds, in amounts of not more than $12,000 per mile of its railroad, "at such time as said Interstate Land & Construction Company shall request." This imposed an affirmative duty on the part of the contractor to make a request of the railroad company for the bonds to which it became entitled. The bill avers that bonds in the amount of $84,000 were delivered to the original trustee for certification prior to 1893. They were first certified by the substituted trustee after September 3, 1915, a period to 22 years. If the contractor had secured its certified bonds, it may be true that it might delay their enforcement, though interest was not currently paid, until their maturity, before prescription would begin to run, or it be charged with laches. The laches in this case is predicated on the failure of the contractor, for 22 years, to secure the possession of bonds to which the

bill avers he was entitled during all this period, and not upon his failure to enforce their collection. If the railroad company wrongfully withheld delivery of the bonds, or the trustee wrongfully refused to certify them, the contractor had a remedy against either or both, which he failed to resort to for a period of more than 20 years. The evidence then at hand upon the issue of his right to the bonds may long have disappeared. The period of prescription was intended to cover such a case.

The bill affirmatively shows a delay of more than 20 years to resort to a remedy to secure delivery of the bonds, and there is no attempt in the bill to explain the delay. We think the bill shows that the cause of action is barred by laches. Bryan v. Kales, 134 U. S. 126, 10 Sup. Ct. 435, 33 L. Ed. 829; Richards v. Mackall, 124 U. S. 183, 8 Sup. Ct. 437, 31 L. Ed. 396; Abraham v. Ordway, 158 U. S. 421, 15 Sup. Ct. 894, 39 L. Ed. 1036; Mackall v. Willoughby, 167 U. S. 637, 17 Sup. Ct. 954, 42 L. Ed. 323; Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431; Foster v. Mansfield C. & L. M. R. Co., 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899. It is hardly consistent with the ordinary course of business that a contractor, if entitled to the bonds, would have been content to postpone securing possession of them for 22 years. Presumably, either the contractor failed to perform his contract and lost his right to the bonds, or the railroad enterprise itself failed, because of the noncompletion of the railroad in 3 years, or of a 20-mile section in one year from the approval of the act of May 7, 1891, and the right to the bonds became valueless, until at least the forfeiture was relieved by the amendatory act of 1895. We are clearly of the opinion that the only holder of outstanding bonds issued under the mortgage delayed asserting its right until barred by laches.

[3] The contention is advanced by appellant that the Seaboard Air Line Railway Company, on whose motion to dismiss the decree was rendered, is not in a position to rely upon either the insufficiency of the certificate of the chief engineer to invalidate the bonds, or upon the laches of the contractor, as a defense to the bill. The bill alleges that the defendant, the Seaboard Air Line Railway Company, has, or claims to have, an interest in the mortgaged premises adverse to plaintiff, as the successor or assign of James M. Mayo, who purchased the physical property of the railroad under an execution issued on a judgment in his favor against it. It is also averred that Mayo subsequently conveyed his rights to the Tallahassee Southeastern Railway Company, and that the Seaboard Air Line Railway Company claims through Mayo, and consequently through his grantee. It is contended that the sale to Mayo was void, because the franchise was not conveyed to him. However, he and his successors in title took and maintained possession of and operated the railroad. It also appears that the physical property and the franchise were joined again by the conveyance from Mayo to the Tallahassee Southeastern Railway Company, in which the Legislature had vested or revived the original franchise of the Florida, Georgia & Western Railway Company.

The bill therefore shows, at least by fair inference, that the Seaboard Air Line Railway Company acquired its interest in the tangible property from Mayo, a judgment creditor of and a purchaser at execution sale from the original railroad company, and that it also acquired the franchise to operate the railroad from the Tallahassee Southeastern Railway Company, in which it was vested by the Legislature of Florida. Invested with the title of the judgment creditor and purchaser at execution sale, the Seaboard Air Line Railway Company was entitled to defend against the foreclosure of a mortgage that the bill averred outranked in priority of lien the judgment and the title acquired by the purchaser at execution sale under it.

For the reasons assigned, we think the decree dismissing the bill of complaint should be affirmed, with costs; and it is so ordered.

Affirmed.

FOREMAN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1648.

1. POISONS ⟸9—HARRISON NARCOTIC ACT—OFFENSES—INDICTMENT.
An indictment charging in substance that defendant did "dispense, distribute and sell" a derivative of opium to persons named without a written order on the prescribed form and not in the course of his professional practice as a physician *held* to charge an offense under Harrison Narcotic Act Dec. 17, 1914, § 2 (Comp. St. § 6287h).

2. WORDS AND PHRASES—"DISPENSE"—"DISTRIBUTE."
To dispense is to deal out or divide out generally, while to distribute is to deal or divide out in proportion or in shares.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dispense; Distribute.]

3. INTERNAL REVENUE ⟸2—HARRISON NARCOTIC ACT—CONSTITUTIONALITY.
The provisions of Harrison Narcotic Act Dec. 17, 1914, § 2 (Comp. St. § 6287h) which impose restraints on the disposition of narcotic drugs by one who has registered and paid the tax as a physician or dealer have direct relation to the revenue provisions of the Act and are within the constitutional powers of Congress.

4. POISONS ⟸4—HARRISON NARCOTIC ACT—OFFENSES—"SALE" OF NARCOTICS.
The mere issuance of a prescription by a physician for a narcotic drug, to be filled by any druggist, without participation by the physician in the sale made under it is not a sale or such dispensing or distribution as amounts to a sale within the meaning of Harrison Narcotic Act Dec. 17, 1914, § 2 (Comp. St. § 6287h).
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Judge.

Criminal prosecution by the United States against Walter T. Foreman. Judgment of conviction, and defendant brings error. Reversed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

D. Lawrence Groner, of Norfolk, Va. (R. M. Lett, of Newport News, Va., on the brief), for plaintiff in error.

Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va. (Richard H. Mann, U. S. Atty., of Petersburg, Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

WOODS, Circuit Judge. Defendant was convicted and sentenced under an indictment which in the first count charges that on November 27, 1916, he did—

"unlawfully and feloniously dispense, distribute, and sell to one Elsie Davis a certain quantity of a certain derivative of opium, to wit, three grains of morphine sulphate, he, the said Walter T. Foreman, then and there issuing to the said Elsie Davis a certain prescription wherein he, the said Walter T. Foreman, prescribed for the said Elsie Davis three grains of morphine sulphate, which said prescription, so issued by the said Walter T. Foreman to the said Elsie Davis, was not issued by Walter T. Foreman in the course of his professional practice only, and which morphine sulphate was not dispensed, distributed, sold, bartered, exchanged, or given away in pursuance of a written order from the said Elsie Davis on a form issued in blank by the Commissioner of Internal Revenue for that purpose."

Two other counts make the same charge as to sales of different amounts of the same drug by prescriptions given to other persons.

[1] The demurrer to the indictment was properly overruled. Section 1 of the act of 1914 (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. § 6287g]) requires, under penalty, registration and payment of a tax of $1 as a condition of production, importation, manufacturing, compounding, dealing in, dispensing, distributing, or giving away opium or its derivatives. Section 2 (section 6287h) regulates, in the public interest, traffic in the deleterious drugs by those who have registered and paid the tax, by forbidding under penalty—

"any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

The order forms can be issued only to those persons who have registered and paid the tax.

This section in terms provides that it shall not apply "to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only," or "to the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this act."

The substance of the charge in the indictment is that defendant did dispense, distribute and sell opium to the persons named without a written order and not in the course of his professional practice. The indictment being laid under section 2 of the act, it is necessary to

allege either sale, barter, exchange, or gift of the drug. In criminal law all these terms connote ownership, possession, or control, actual, apparent, or pretensive, in the dealer for himself or for another, and the voluntary parting with that ownership, possession, or control.

[2] To dispense is to deal out or divide out generally; to distribute is to deal or divide out in proportion or in shares. These words also connote ownership, possession, or control, actual, apparent, or pretensive, in the dispenser for himself or another, and the voluntary parting with the possession, ownership, or control; but the general allegation of dispensing or distribution would not indicate whether the voluntary parting with possession, ownership, or control was by selling, or bartering, or exchanging, or giving. Hence, if the indictment had charged only distribution and dispensing, the words would be too general to indicate with certainty whether the particular statutory offense charged was sale or barter or exchange or gift of the drug.

But the charge in the indictment of selling without the order required is a charge of one of the precise acts denounced in the statute. The dependent clause "issuing to the said Elsie Davis a certain prescription and," etc., does not affect the matter, for proof of a sale without the order would be sufficient, even if made under the guise of a prescription. The defendant was therefore informed by the indictment that he was charged with selling to the persons named. Whether proof that the defendant had made a sale in some other way than under the guise of a physician's prescription would have been fatal variance between the charge and the proof is a question which does not affect the validity of the indictment.

[3] The indictment is attacked on the additional ground that it charges no offense which the Congress had the power to create. The act was sustained as a revenue measure in United States v. Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854. It is argued that, when the dealer complies with the first section of the act by registry and payment of the tax, all that affects the revenue is done, and that the further restraints on his business provided by the second section of the act do not affect the revenue, and are therefore invalid as an attempted invasion of the police power of the states. The Supreme Court has answered such objections by holding that in a revenue statute the Congress may make any rule or regulation which is not in itself unreasonable, although its effect on the revenue be only remote or incidental, and its effect on the public health or morals direct and obvious. In re Kollock, 165 U. S. 526–536, 17 Sup. Ct. 444, 41 L. Ed. 813; Felsenheld v. United States, 186 U. S. 126, 22 Sup. Ct. 740, 46 L. Ed. 1085. All the regulations of section 2 tend to promote public health and morals and doubtless that consideration influenced its enactment. But these regulations also bear directly on the revenue in that the procurement of the drugs only on orders and prescriptions to be filed and kept enable the officers of the government to ascertain whether unregistered persons are using the orders and prescriptions authorized by the statute. These requirements are also

valuable in connection with section 1 providing for the collection of the current revenue in that the information as to the extent of the business to be derived from the orders and prescriptions filed may be of value in fixing the tax upon dealers.

[4] There was no motion to direct a verdict for failure of evidence, and therefore the assignment of error in refusing to direct acquittal is without foundation. The omission is not material, however, since the sufficiency of the evidence is involved in the assignment of error in the following instruction to which exception was taken:

"And the court further charges you, as a matter of law, that the issuing of prescriptions by a registered physician to persons other than his patients, and in the course of his professional practice only, whereby they could procure and did procure the inhibited drugs, is a sale, a dispensing and distribution, of such drugs within the meaning of the act of Congress under which the accused is being prosecuted."

Resolving all conflicting testimony against the defendant, no direct sale, barter, exchange, or gift, and no dispensing or distribution that would denote participation in a sale, barter, exchange, or gift by him, was proved. He registered and paid the tax. Afterwards he gave prescriptions for morphine and cocaine to the persons named in the indictment, who were drug addicts, calling for such quantities of the drugs as to indicate that he was merely gratifying the craving of the addicts and that he was not seeking to cure them of the habit. The drugs were not furnished by the defendant. On the contrary, the prescriptions were carried by the recipients to different registered druggists and by them filled. There was no evidence that defendant was interested in the business of any of the druggists, or had any arrangement to share the profits of the sales with them, or that he was agent for any druggist, or that he even knew where the prescriptions were to be carried. What the statute forbids is sale, barter, exchange, or gift, including such distribution and dispensing by a physician not in the course of his practice as would amount to participation in a sale, barter, exchange, or gift. The mere issuance of a prescription by a physician to be filled by any druggist, without participation by the physician in the sale made under it, would not be a sale as charged in the indictment, or such distribution or dispensing as amounts to a sale. The instruction quoted was therefore erroneous.

Reversed.

McDOWELL, District Judge, concurs, except as to the ruling on the demurrer.

NORTH BRITISH & MERCANTILE INS. CO. v. H. BAARS & CO.

(Circuit Court of Appeals, Fifth Circuit. January 20, 1919.)

No. 3294.

1. INSURANCE ⊂=314—MARINE INSURANCE—DEVIATION—ABANDONMENT.
An intended deviation from the voyage described in a policy will not avoid the policy, where loss occurred before the point of deviation was reached; but it is avoided by an abandonment of the voyage, although the vessel was still on the intended course.

2. INSURANCE ⊂=314—MARINE INSURANCE—DEVIATION FROM VOYAGE.
Plaintiff chartered a steamship, then in London, for a voyage from a Gulf port to Europe, and insured the profits of the voyage with defendant, including war risks. Owing to war conditions and the requirement of the British authorities, the vessel was to proceed first to Algiers, and on leaving there was to stop at Huelva, Spain, for cargo for New Orleans, which was the ultimate destination of the voyage, for delivery under the charter. Shortly after leaving England she was sunk by a submarine, although on a course advised as safer than a direct one to the Gulf. *Held*, that the intended course by way of Algiers and Huelva was connected with the ultimate voyage, and was not a deviation which invalidated the policy.

In Error to the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Action at law by H. Baars & Co., a corporation, against the North British & Mercantile Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Francis B. Carter, of Pensacola, Fla., and Oscar R. Houston, of New York City, for plaintiff in error.

Wm. H. Watson and S. Pasco, Jr., both of Pensacola, Fla., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This was an action at law, instituted on a marine policy of insurance, covering the anticipated profits of a voyage of the steamship Gamen under a charter party with the defendants in error, who were plaintiffs in the District Court. The vessel was sunk by a submarine about 35 miles west southwest off the Scilly Islands, while on its way to Algiers. The marine policy included war risks, and insured the profits of the future voyage which the vessel was chartered to make to a European port after its arrival at a Gulf port in the United States. The plaintiff in error defended the action upon two theories. The first was that the vessel had abandoned the voyage for which she was insured, prior to the time of her loss, and that for that reason the insurance did not attach. The second was that there was a concealment of material information from the insurer, of which the insured or its agents and brokers were in possession before the policy was written.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] The solution of the first question depends upon whether the Gamen had abandoned the voyage from London to a Gulf port in the United States before she was lost. The facts are not seriously in dispute. The owners had, before the vessel reached London, entered into a charter with the defendants in error for the future voyage from a Gulf port in this country to a European port. By its terms she was required to report to the charterers at a port on the Gulf of Mexico, between October 1st and November 25th, for the future voyage. She was sunk on September 8, 1916. Shortly before that time she had sailed from London for Barry, in Wales, to get bunker coal for the voyage across the Atlantic. Her master knew of the charter she was required to fill for the defendants in error on leaving London, but, up to the time of the loss of the vessel, had not received orders from his owners to proceed further than Algiers. One reason for her voyage from Barry to Algiers was that the British authorities at Barry refused to supply the vessel with bunker coal, "unless the steamer carried an intermediate outward cargo for the benefit of Great Britain or her Allies in the present war." The vessel had also been chartered for a voyage from Algiers to Huelva, a port on the Mediterranean in Spain, to take on a cargo of ore, for delivery at New Orleans. The master was to receive orders to sail to Huelva, upon his arrival at Algiers. The ship was sunk while on a course different from the ordinary course pursued from Barry to an American Gulf port before the war.

The undisputed evidence is to the effect, however, that she was then pursuing the safest course, though not the quickest or most direct, to an American Gulf port, in view of the greater danger from submarines, if she adopted the usual prewar course, which did not hug the English coast so close, and was pursuing the one advised by the British admiralty, and generally adopted since the war. The policy sued on permitted deviations of the vessel from the voyage described, provided the deviations were communicated to the insurer as soon as known to the assured, and an additional premium paid, if required. It is conceded that the deviation in this case was not known to the insured until after the loss of the vessel, and that no additional premium had been required to be paid by it. It also appears that there was no actual deviation up to the time of the loss, as the route pursued up to that time was the common route to Algiers and to an American Gulf port. An intended deviation, to be accomplished thereafter, would not avoid the insurance. An abandonment of the voyage insured would, however, avoid the policy, since it was not permitted by the policy, and this would be true, though the loss occurred while the vessel was still on the common course and before it had reached the point of divergence.

[2] The District Judge charged the jury that an abandonment of the insured voyage was necessary to avoid the insurance, and that if there was no departure upon the part of the owners from the time the vessel left London from the intended voyage to an American Gulf port, and if the ports in the Mediterranean were to be called at on a voyage, the ultimate destination of which was a port in the Gulf of Mexico, then the voyages to Barry and to the Mediterranean ports were deviations merely, and did not avoid the policy. The correctness of this

portion of the charge presents the question. In the case of Marine Insurance Company v. Tucker, 3 Cranch, 357, the Supreme Court made the identity of the ultimate destination of the insured and the actual voyage the determining factor as to whether or not the voyage had been abandoned. Each justice wrote a separate opinion, and all concurred in this view.

The plaintiff in error dissents from the principle that identity of termini should be determinative, and insists that the intermediate voyage must also be connected with and subordinate to the insured voyage. If that be conceded to be a correct limitation on the rule announced in the case cited, we are of the opinion that the facts, without dispute, showed that the voyages to Barry and Algiers, and to Huelva, were all connected with the insured voyage from London to a Gulf port, in the sense that would prevent any or all of them from constituting an abandonment of it. The purpose of the voyage to Barry was to get bunker coal for the voyage across the Atlantic. It is conceded that this was at most a deviation. The record shows that the ship could procure bunker coal at Barry only by agreeing to carry an intermediate outward cargo for the benefit of Great Britain or her Allies. She carried a cargo of coal to Algiers for that purpose. If it was necessary for her to proceed to Barry to get bunker coal, it was necessary for her to go where the British authorities required her to go as a condition of being furnished such coal. The fair inference from the record is that she was making the voyage to Algiers in response to this requirement, at least partly. If it was partly made upon the demand of the British authorities, that would supply the necessary connection between it and the insured voyage. The contemplated voyage from Algiers to Huelva was for the purpose of loading ore at the latter port for New Orleans, which is a port covered by the description of the terminus for the insured voyage. Departing from Algiers on the insured voyage, she had to pass through the straits of Gibraltar.

We do not think that her stopping at the port of Huelva, on the south coast of Spain, to secure cargo for the insured voyage, was an abandonment of the insured voyage, or was an entirely separate and unconnected voyage from it. She was not required to sail in ballast at the risk of being held otherwise to have abandoned the insured voyage, provided the intention to make a Gulf port in the United States, her ultimate destination, remained that of her owners. The District Judge left it to the jury to determine whether this intention on the part of her owners did remain up to the time of the loss. The evidence is persuasive that it did. The Gamen took on bunker coal at Barry in sufficient quantity to make the insured voyage. She was insured by her owners for a round-trip voyage to a Gulf of Mexico port. She was to take cargo at Huelva for such a port. Her charter with defendants in error required her to be in a Gulf of Mexico port between October 1st and November 25th. The mere fact that her master had orders, on leaving Barry, which controlled him only to Algiers, is not persuasive to the contrary, since it is undisputed she was to go thence at least to Huelva, under charter requirement, and when it is

also considered that her master knew of the necessity of being in a Gulf of Mexico port before November 25th.

Our conclusion is that, whether or not identical termini always make identical voyages, in this case the voyages to Barry, to Algiers, and to Huelva are all shown by the record to have been connected with the insured voyage, so that, if the Gamen was intended ultimately by her owners to have been sent to a Gulf port in the United States, they, singly or together, did not constitute an abandonment of the insured voyage. The jury found that such was the owner's intention, on evidence amply justifying the finding.

The second ground of defense against a recovery on the policy was that there had been a concealment of material information from the insurer, which the insured, through its agents, was in possession of before the policy was issued. The information alleged to have been suppressed was that the Gamen would probably carry a cargo of coal to the Western or Azores Islands, and stop there for that purpose. It admits of doubt from the record that the agents of the insured had any specific information to that effect of a character that the law would require them to disclose to the insurer. It would seem to have been a mere probability, based on custom, and not actual information as to the specific voyage. However this may be, the District Judge left this question to the jury under proper instructions, and the jury found against the plaintiff in error upon it.

There are many assignments of error relied upon in the briefs of counsel for plaintiff in error, but not orally argued. Our examination of them has disclosed none which we think constitutes reversible error. We think the issues were fairly presented to the jury, and that the judgment should be, and it is, ordered affirmed, with costs.

Affirmed.

POLLMAN et al. v. CURTICE et al.

(Circuit Court of Appeals, Eighth Circuit. January 15, 1919.)

No. 5079.

1. TRUSTS ⊂=72—RESULTING TRUST—PAYMENT OF PURCHASE MONEY FOR LAND.

One who buys land with money of another as his representative, but takes conveyance to himself, holds the title in trust for such other.

2. BANKS AND BANKING ⊂=116(1)—NOTICE TO PRESIDENT.

A bank, which through its president and managing officer made a loan on land, and the president, who afterward bought the land subject to the mortgage, *held* not bona fide purchasers for value without notice, where the grantor in fact held the title in trust for another, who on purchase of the land a year before paid the consideration, which was known to the president, through whom the negotiations were conducted, and who also knew other facts sufficient to put him on inquiry, and whose knowledge was attributable to the bank.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Suit by Laura A. Curtice and another against F. W. Pollman and others. Decree for complainants, and certain defendants appeal. Affirmed.

John H. Crain, of Ft. Scott, Kan., for appellants.

William C. Scarritt, of Kansas City, Mo. (Isaac P. Ryland, of Kansas City, Mo., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

BOOTH, District Judge. This is a suit in equity brought by Laura A. Curtice and Miriam S. Curtice, widow and child, respectively, of J. M. Curtice, against F. W. Pollman and wife, Linn County Bank, and A. G. Copeland and wife.

Plaintiffs ask a decree adjudging that they are the owners of a described tract of land in Linn county, Kan.; that a mortgage on the land made by the Copelands to the bank, and a deed of the land made by the Copelands to Pollman, be declared null and void; and that the Copelands be ordered to make conveyance of the land to plaintiffs.

The trial court by its decree granted the relief sought. Appeal was taken by the defendants Pollman and the bank only; the defendants Copeland expressly declining to join in the appeal.

Briefly the facts disclosed by the record are as follows: J. M. Curtice, of Kansas City, and A. G. Copeland, of La Cygne, Linn county, Kan., were friends, and had been accustomed to hunt together in Linn county. Curtice, in the fall of 1914, authorized Copeland to purchase the land in question, which was then owned by D. C. and C. L. Boomer, of Iowa. Correspondence was had with the Boomers, and a purchase agreed upon. This correspondence was largely carried on in behalf of Copeland through the defendant bank, acting by Pollman, its president and sole managing officer. The correspondence shows that the deed finally made by the Boomers was transmitted to the bank in February, 1915, with the name of the grantee left blank at the request of the Linn County Bank. The name of Copeland was afterward filled in as grantee, with the knowledge of Pollman. A payment of $500 prior to the transmitting of the deed had been made to the Boomers through the bank, by means of the proceeds of a draft made out by Pollman, signed by Copeland, drawn on Curtice, and honored by him. Final payment was also made through the bank by means of a second draft, for $3,500, also made out by Pollman, signed by Copeland, and drawn on Curtice. The bank, by Pollman looked after the extension of the abstract and attended to fulfilling the requirements of the examining attorney. Pollman had met Curtice a number of times, knew that he was reputed to be wealthy, and he also knew Copeland was a man of limited means. The correspondence between the bank and the representative of the Boomers discloses that Copeland was to receive $200 as a commission. The Boomers authorized the bank to retain and pay this commission out of the final payment coming to them, and the bank did retain that amount and credited it to Copeland upon his account with the bank. The bank also retained out of the purchase price certain charges made

by it and certain expenses for abstract, etc. The transaction was closed in March, 1915, the negotiations having extended over a period of two months. All of these facts were known fully to Pollman, who was acting for the bank in carrying through the transaction for Copeland.

[1] Before the draft of $3,500 had been honored by Curtice, a declaration of trust had been forwarded by Curtice's attorney to Copeland, who signed and acknowledged the same and returned it. The declaration reads as follows:

"Know all men by these presents, that I, A. G. Copeland, of La Cygne, Linn county, Kansas, do hereby publish and declare that I hold title in my name to the following described real estate situated in the county of Linn, state of Kansas, to wit: The east half (½) of the southwest quarter (¼) and the west half (½) of the southeast quarter (¼) the southeast quarter (¼) of the southeast quarter (¼) all in section 18, township 20, range 25, in trust for J. M. Curtice, of Kansas City, Missouri, and that I have no right, title, or interest therein, except as trustee for said J. M. Curtice; and I further declare and covenant that I will transfer, convey, and deliver by proper deed or conveyance the said property to the said J. M. Curtice, or to any one whom he may designate, upon his request."

It does not appear directly from the evidence that Pollman knew of this declaration of trust. Curtice died February 11, 1916, and, the declaration of trust being found amongst his papers, his widow, plaintiff Laura Curtice, in March, 1916, went to La Cygne, Kan., saw Copeland, and told him that she had come to see him about the farm held under the declaration of trust, and that she would wish him later to make a deed therefor. Copeland made no claim of title or interest in the land, and promised to make a deed of the same at any time that he was requested to do so. On May 20, 1916, the attorneys for Mrs. Curtice wrote to Copeland, inclosing a deed of the land for him to sign. No reply was received from Copeland, and the deed was not returned. A second letter was written June 13, 1916, requesting a return of the deed. No reply was received to this letter.

Copeland made a mortgage for $3,000 covering the land to the bank, dated May 15, 1916; but the transaction was closed and the mortgage recorded May 22, 1916, and on the same day Copeland deeded to Pollman the equity in the land, receiving as consideration certain lands in Oklahoma, upon which he gave a purchase-money mortgage.

Upon the facts stated Copeland held the title in trust for Curtice, who became the equitable owner of the land. Perry on Trusts (6th Ed.) § 126; Pomeroy, Eq. Jur. (3d Ed.) vol. 3, § 1037; Brainard v. Buck, 184 U. S. 99, 107, 22 Sup. Ct. 458, 46 L. Ed. 449. The trust thus created was a valid one under the statutes and decisions of the state of Kansas. Section 11681, Gen. Stat. of Kans. 1915; Franklin v. Colley, 10 Kan. 260; Lyons v. Berlau, 67 Kan. 426, 73 Pac. 52; Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 Pac. 1014; Piper v. Piper, 78 Kan. 82, 95 Pac. 1051; Garten v. Trobridge, 80 Kan. 720, 104 Pac. 1067.

[2] That Copeland violated his trust in mortgaging the land to the bank, and in conveying the equity to Pollman, is clear from the evidence, and is not disputed by the appellants. But it is claimed by the appellants that they are protected by the general principle of equity,

also embodied in the statutes of Kansas, that such a trust as here created cannot defeat the title of a purchaser for a valuable consideration and without notice of the trust. The vital question in the case is whether the appellants have shown themselves to be within the principle stated.

It may be conceled that the bank and Pollman paid valuable consideration for their mortgage and deed, respectively. It may be conceded also that neither Pollman nor the bank had actual knowledge of the ownership of Curtice, and of the breach of trust and the fraud which Copeland committed in making the mortgage and the deed. But it was not necessary that plaintiffs in order to establish their rights should prove that Pollman and the bank had actual knowledge of the ownership of Curtice and of the fraud of Copeland in making the mortgage and the deed. It was enough for plaintiffs to prove that Pollman had such knowledge of facts as was sufficient to put a prudent man upon inquiry as to the real ownership of the land, and that such inquiry if pursued would have revealed the truth.

"Notice to the purchaser may be either actual or constructive. Actual notice is a knowledge of the facts of the trust brought home to the purchaser, or a knowledge of such facts as should lead him to a knowledge of the actual facts of the case." Perry on Trusts (6th Ed.) vol. 1, § 223.

"If it appears that the party has knowledge or information of such facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun it fails to prosecute it in a reasonable manner, then, also, the inference of actual notice is necessary and absolute." Pomeroy, Eq. Jur. (6th Ed.) vol. 2, § 597; Weniger v. Success Mining Co., 227 Fed. 548, 557, 142 C. C. A. 180; Grandison v. Nat. Bk. of Commerce, 231 Fed. 800, 809, 145 C. C. A. 620.

The facts known to Pollman at the time of the purchase from the Boomers were clearly sufficient to bring him within the foregoing rule, and it cannot be doubted that these facts were present in his mind when the deed and mortgage were made by Copeland, in May, 1916. It is true something over a year had elapsed since the purchase from the Boomers and that this was too long a time to sustain a legal presumption that Pollman's former knowledge of the facts was present in his mind. Guaranty Trust Co. v. Koehler, 195 Fed. 669, 683, 115 C. C. A. 475.

But the evidence as to the surrounding circumstances is convincing. The town was small, having 1,000 or 1,200 inhabitants. Pollman was not a mere clerk in the bank, but its managing officer, and had been such for 24 years. He had lived in Linn county all his life; had been engaged, not only in banking, but in farming and stock raising, and was the owner of several tracts of land. Most of the real estate transactions in that part of the county passed through his bank. The purchase from the Boomers was not the mere ordinary one of delivering a deed and receiving the consideration; it was unusual in several particulars, and the negotiations extended over some weeks. Pollman had attended to the matter in all its minutest details.

The later transactions, in May, 1916, were also somewhat complicated, and again Pollman attended to all the details. He had a twofold interest in these later transactions: First, as an officer of the

bank which was taking the mortgage; and, second, a personal interest, since he was buying the land himself and assuming the mortgage. He knew that Curtice had died since the purchase from the Boomers. He knew that Mrs. Curtice had been to La Cygne to see Copeland. At the time of these later transactions Pollman had the abstract brought down to date and again examined. It is unthinkable that the facts of the former transaction were not present in his mind at the time of the making of the mortgage and deed.

Furthermore, he does not claim that he had forgotten any of the facts known to him at the time of the purchase from the Boomers. He simply insists that those facts were not sufficient to put him upon inquiry. To this contention we cannot assent; the facts were clearly sufficient to put Pollman upon inquiry, and such inquiry, without question, would have resulted in disclosing the trust agreement and the ownership of the Curtices.

The notice to Pollman must also be imputed to the bank. Subject to certain exceptions, the law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or, according to the weight of authority, which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. Mechem on Agency, vol. 2, § 1813; The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; American Nat. Bk. v. Miller, Agent, etc., 229 U. S. 517, 33 Sup. Ct. 883, 57 L. Ed. 1310; Mut. Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. Ed. 1202; Curtice v. Bank, 118 Fed. 390, 56 C. C. A. 174; Interstate Bank v. Yates Bank, 245 Fed. 294, 157 C. C. A. 486; Loring v. Brodie, 134 Mass. 453.

The facts which were known to Pollman were known to him as agent and officer of the bank, and came to him in due course of his duties as such officer. He was the sole representative of the bank, both in what was done by him relative to the purchase from the Boomers, and also, later on, in taking the mortgage from Copeland to the bank.

Nor do the facts bring the case within any of the exceptions to the rule above stated. It is not claimed, and could not be claimed on the evidence, that it was not Pollman's duty to disclose to the bank. Nor is it claimed that Pollman's interests were so adverse to those of the bank as practically to destroy the relation of agency. Nor, finally, is it claimed by the bank that Pollman was engaged in an attempt to cheat or defraud it; on the contrary, this is expressly disclaimed by the bank.

It follows that neither Pollman nor the bank were bona fide purchasers for valuable consideration without notice. The decree of the court below was right, and should be affirmed; and it is so ordered.

CUTTING v. WOODWARD et al.*

(Circuit Court of Appeals, Ninth Circuit. February 3, 1918.)

No. 3152.

1. CORPORATIONS ⟸320(11)—OFFICERS—FRAUDULENT ACQUISITION OF PROPERTY FROM CORPORATION.
   Evidence *held* to sustain a finding that a transfer of corporate stock by a corporation to its president was obtained by fraud and without consideration.
2. COURTS ⟸317—JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—REARRANGEMENT OF PARTIES.
   In a stockholders' suit in a federal court against the corporation and its president, to set aside a fraudulent transfer of property to the president, where defendants join in the answer denying fraud, the corporation cannot be aligned with complainants to defeat the jurisdiction of the court.
3. CORPORATIONS ⟸320(3)—STOCKHOLDERS' SUIT—LACHES—CONCEALMENT OF FRAUD.
   A stockholders' suit to set aside a fraudulent transfer of property by the corporation to its president *held* not barred by laches, where the bill alleged that the fraud was concealed by defendants, and not discovered by complainants until within a year before suit.
4. CORPORATIONS ⟸89(5)—UNPAID SUBSCRIPTIONS—INTEREST—MUTUAL INDEBTEDNESS.
   The president of a corporation, who owed for his stock from the time of its issuance, cannot convert his indebtedness into one on account, and stop the running of interest, by making payments for the corporation from time to time, which were credited to him.

Appeal from the District Court of the United States for the Northern District of the Second Division of California; William C. Van Fleet, Judge.

Suit in equity by Henry J. Woodward and Francis A. Woodward against the Monetary Trust Company and Henry C. Cutting. Decree for complainants, and defendant Cutting appeals. Affirmed.

Douglas A. Nye and Albert H. Elliott, both of San Francisco, Cal., for appellant.

W. H. H. Hart, of San Francisco, Cal., for appellee Monetary Trust Co.

John B. Clayberg and Welles Whitmore, both of San Francisco, Cal., for appellees Woodward.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellees Henry J. and Francis A. Woodward, for themselves and other stockholders of the Monetary Trust Company, brought suit against that corporation and the appellant to set aside as fraudulent and void an alleged purchase of 1,175 shares of the capital stock of the Point Richmond Canal & Land Company, made by the appellant from the trust company, and to require the appellant to account for moneys of the trust company alleged to have been fraudulently misapplied and misappropriated by him. On the trial the court below entered an interlocutory decree, holding the

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 12, 1919.

purchase of stock to be fraudulent and void, and directing that the appellant account. An accounting was had, and thereafter final decree was entered commanding the appellant to restore said 1,175 shares of the capital stock of the Canal & Land Company to the name of the trust company, and adjudging that he pay the said appellees, for and in behalf of the trust company, $8,021.72 found by the master upon the accounting to be due from him, and the sum of $7,500 was allowed as attorney's fees for the prosecution of the suit, and was decreed to be a first lien upon the money judgment before granted, and upon said 1,175 shares of the capital stock of the Canal & Land Company. From that decree the present appeal is taken.

[1] The Monetary Trust Company was organized in 1904. The appellant subscribed to, but never paid for, 523 shares of its stock at $10 per share. About that time the Point Richmond Canal & Land Company was incorporated, and its promotion was undertaken by the trust company. In the spring of 1905, 1,175 shares of the Canal & Land Company were issued to the trust company in settlement for services and for moneys expended. The by-laws of the trust company provided for an executive committee of three, to consist of the president, the chief counsel, and a third member, to be selected by the directors, and the committee was authorized to conduct and carry on the business of the corporation, and was required to report its actions to the board of directors at each next ensuing meeting. Since 1905 the appellant has been the president and a director of the trust company. Gen. Hart was the general counsel of the company, and Wernse was the third member of the executive committee.

The appellant contended that in the fall of 1906 the other two members of the committee gave him an option to purchase the said 1,175 shares of stock in the Canal & Land Company at $1 per share. No written option could be produced in evidence, but Wernse testified that the option gave the appellant the right to purchase the stock at $1 per share, and that he thought it was to run six months from September 3, 1906. The minutes of the board of directors of the trust company show that a meeting was held on September 3, 1906, at which it was resolved that the annual meeting of the stockholders be held on September 29, 1906, at an hour and place named, and one purpose of the meeting was declared to be the taking into consideration whether or not the assets of the company should be disposed of. There was no evidence that notice of the meeting was ever given, and there was no record of the minutes of a stockholders' meeting on September 29, 1906. The secretary testified that no such meeting was ever held. There was introduced, however, a record of a stockholders' meeting held on November 10, 1906, recited to have been held "pursuant to adjournment," at which Wernse, who was the only member of the executive committee present, offered for ratification and approval "the following option given to H. C. Cutting," which motion was approved by the holders of a majority of the shares of the corporation. No option, however, was inserted in the minutes, or attached to the record. The minutes show also a meeting of the directors on December 20, 1906, at which Wernse presented the check of the appellant for $1,175,

and stated that the appellant desired to exercise his right under the option given him by the company, ratified and confirmed by the stockholders at their last meeting, to purchase 1,175 shares of the Canal & Land Company's stock at $1 per share, and that the motion was carried.

The evidence was that the appellant's check for $1,175 was presented at that meeting by Wernse, but was not cashed by the trust company; that shortly after that date the $1,175 was loaned to the appellant upon his promissory note, and $1,093 was also loaned to him upon his note; that neither of the notes was ever paid; and that the statute of limitations was permitted to run against both. Wernse testified that no meeting of the directors considered or authorized either of the loans. The court below found that the transfer of the 1,175 shares of stock in the Canal & Land Company was the merest sham, and was not made in good faith, that the intention was to transfer the stock to the appellant without any consideration whatever, and that the trust company having failed to act in the premises for its own protection, the appellees were entitled to recover the stock for the corporate benefit.

We find no ground to disturb the finding of the trial court. At no meeting of the stockholders was the question of the sale of the company's assets considered. The board consisted of five members, of whom three were a quorum. At the meeting of the stockholders of November 10, 1906, at which the option was offered for ratification and approval, it was necessary to vote the appellant's stock in order to constitute a sufficient representation of stock to hold the meeting, and to carry the resolution. At the following meeting of the directors on December 20, 1906, but three directors were present, and the appellant was counted a member of the board in order to make a quorum. At no meeting of the directors was a resolution passed authorizing either of the loans to the appellant. The court below found that during all this period the appellant had virtual control of the majority of the board of directors, and that they were ever ready to do his bidding. These transactions constitute actual and not constructive fraud.

[2] The trust company raises the question of jurisdiction, asserting that the company is not an adversary party to the plaintiffs in the suit, but is the real party in interest as plaintiff, and that consequently there is no diversity of citizenship. But this is not a case in which the trust company, although made a defendant, should be realigned as a plaintiff, as in Hamer v. New York Railways, 244 U. S. 266, 274, 37 Sup. Ct. 511, 61 L. Ed. 1125. Here the attitude of the trust company is hostile to the plaintiffs. It appeared in a joint answer with the appellant, and by the same counsel, and it denied the allegations of the bill and prayed for the dismissal thereof. The cause is therefore one in which plaintiffs, citizens of Illinois, bring suit against defendants who are citizens of California. Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606; Venner v. Great Northern Railway, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666.

[3] The appellant relies upon the defense of laches. The only assignment which brings that question before us is that the court below erred in overruling the motion to dismiss the complaint, one ground

of which motion was that it appeared from the complaint that the plaintiffs therein were guilty of laches, in that the sale of stock complained of occurred in October, 1906, and the suit was not brought until February 19, 1913, "by reason whereof the causes of action are barred." This presents the question whether, upon the allegations of the bill, the delay in bringing the suit constitutes laches. The complaint alleged that the plaintiffs, during all the times referred to therein, were citizens and residents of the state of Illinois; that the appellant purposely, intentionally, and fraudulently concealed his fraudulent practices and the performance of said acts and doings from the plaintiffs and other stockholders, by causing to be kept insufficient and inaccurate books of account and corporate records of the affairs of said company, and lulled the plaintiffs and other stockholders into seeming security by statements made by him that all the stockholders of the trust company should be jointly interested with him in all profits which might accrue out of any of his transactions with or pertaining to the business, property, and affairs of the trust company, and that he would hold the title of the 1,175 shares of stock of the land company in trust for the trust company; that the plaintiffs were made to believe that the acts of the appellant, so far as any of them were known to plaintiffs, were for the best interests of the trust company, and its stockholders, and that the appellant was honest in the performance of all such acts; that, acting under such belief, plaintiffs made no careful investigation of the records and transactions of the appellant, and that they did not discover his fraud and fraudulent practices until on or about the month of January, 1913; that the appellant was the president and a director of the trust company, and acted in a fiduciary capacity for and towards the plaintiffs.

Taking these allegations to be true, they were sufficient, we think, to show prima facie that the causes of action were not barred. In Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636, Mr. Justice Miller said:

"In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud."

In that case the allegations of the complaint were that the defendants "kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge" of the plaintiff, whereby he was "prevented from obtaining any sufficient knowledge or information thereof until within the last two years."

In Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395, the court reaffirmed the rule that where it is sought to obtain redress against fraud concealed by the defendant, or which, from its nature remains secret, the bar of the statute of limitations does not begin to run until the fraud is discovered, citing Bailey v. Glover, which case, said the court, "has been often cited by this court, but has never been doubted or qualified." We followed and applied the doctrine of those cases in Pickens v. Merriam, 242 Fed. 363, 155 C. C. A. 139.

In Townsend v. Vanderwerker, 160 U. S. 171, 186, 16 Sup. Ct. 258, 262 (40 L. Ed. 383), it was said:

"The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

[4] It is contended that interest was erroneously allowed on the money due from the appellant for his subscription to the 523 shares of the stock of the trust company. No assignment of error presents that question, but nevertheless we have given it consideration. The shares were subscribed in various amounts from April, 1904, to September, 1906, and $10 per share were to be paid therefor. The master found from the evidence that the shares were to be paid for in cash upon delivery. The shares not having been paid for when payment was due, interest was payable thereon at 7 per cent. per annum under the provisions of section 1917, Civil Code of California, which makes interest payable upon moneys at the rate of 7 per cent. per annum as they "become due on any instrument in writing except a judgment."

But the appellant contends that the matter falls within another provision of the same section, which provides that interest shall be paid on money due on a statement of account from the day on which the balance is ascertained, and this for the reason that in his dealings with the trust company various payments had been entered to his credit up to the time of the accounting before the master, and he asserts that interest can run only upon the balance found due at that time. The master allowed the appellant interest on all his payments from the time when made, and this was proper. From and after August, 1907, all the said payments were for state license taxes and other taxes and advertising. There was no mutual account. The appellant could not stop interest on the sums he owed on and prior to September 1, 1906, by thereafter making from time to time payments to the corporation or for its benefit.

The decree is affirmed.

LUCK v. STAPLES (two cases).

In re LUCK CONST. CO., Inc.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

Nos. 1634, 1649.

1. BANKRUPTCY ⇐440—APPELLATE PROCEEDINGS—MODE OF REVIEW.
An order of a bankruptcy court denying validity of a lien, where the matter was determined on questions of fact, is reviewable by appeal, and not on petition to revise.

2. BANKRUPTCY ⇐467—FINDINGS OF FACT—REVIEW ON APPEAL.
Order of a bankruptcy court, made on report of referee finding that a mortgage on the property of bankrupt corporation, executed when it was insolvent by its president, to secure a past indebtedness to himself as executor, was executed without authority and void, and subject to attack by the trustee, would be affirmed.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

On Petition to Superintend and Revise in Matter of Law Proceedings of and Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke, in Bankruptcy; Henry Clay McDowell, Judge.

In the matter of the Luck Construction Company, bankrupt; Abram P. Staples, Trustee. Petition to revise and appeal by H. M. Luck, executor, to review order of District Court. Petition to revise dismissed, and order affirmed on appeal.

W. L. Welborn, of Roanoke, Va., for petitioner and appellant.

Horace M. Fox and Abram P. Staples, both of Roanoke, Va., for respondent and appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

PRITCHARD, Circuit Judge. As will be observed by the caption, these causes come here (No. 1634) on petition to superintend and revise in matter of law and (No. 1649) on appeal from the District Court, sitting as a court of bankruptcy, for the Western District of Virginia.

[1, 2] On the petition to superintend and revise in matter of law, we will consider first the point as to whether a petition to superintend and revise in matter of law is the proper mode of having the cause reviewed. The main question involved is as to the validity of a lien of a deed of trust and chattel mortgage dated August 29 and September 1, 1916, upon practically all of the assets of the bankrupt alleged to have been given to secure H. M. Luck, executor of N. C. Luck, deceased, the payment of $3,000. It appears that the controversy herein involved is as to the validity of said lien, and is a controversy arising in bankruptcy between the trustee on one side, representing the other creditors, and the said executor on the other.

The order of the District Court, in disallowing this debt and disallowing this claim as a secured claim, is challenged in the petition to superintend and revise in matter of law, wherein it is alleged that the court below erred in certain findings of fact, as set out in said petition under paragraphs 3, 4, 5, 6, 7, 8, 9, 11, and 14; therefore it will be observed that the real issue involved in this controversy is as to questions involved in issues of fact. We think that the law as to this point it so well settled that it is unnecessary to enter into an extended discussion of the same, further than to cite the following cases: Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Security Warehousing Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789; Home Bank for Savings v. Lohm, 223 Fed. 633, 139 C. C. A. 179 (4th Cir.); Holden v. Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116; Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; American Piano Co. v. Heazel, 38 Am. Bankr. Rep. 677, 240 Fed. 410, 153 C. C. A. 336 (4th Cir.).

For the reasons stated, the petition to superintend and revise is dismissed.

The referee found the facts as follows:

"The Luck Construction Company, Incorporated, the bankrupt, was a Virginia corporation. Its officers were H. M. Luck, president; G. T. Fogel, secretary and treasurer; E. E. Francey, vice president. These three parties owned all the stock of the corporation and were its directors. While E. E. Francey had advanced to G. T. Fogel the money with which to purchase his stock, yet the Fogel stock, amounting to $10,000 par value, had been issued to him (Fogel) and stood on the books of the company in his name.

"In the spring and summer of 1916 the Luck Construction Company was engaged in doing certain railroad construction in Nelson county, Va., for the Blue Ridge Railway Company, and so far as the record shows this was all the business it had at this time. Some years prior to 1916, N. C. Luck, father of H. M. Luck, had died, leaving a will whereunder H. M. Luck was appointed executor, and H. M. Luck afterwards qualified as such. Under said will the beneficiaries were the said H. M. Luck and his four sisters, Mrs. Welborn, Mrs. Marshall, Mrs. Runge, and Mrs. Wilson. That certain funds of the N. C. Luck estate came into the hands of H. M. Luck as executor, either prior to or about June, 1916. That by a paper purporting to be dated June 6, 1916, the Luck Construction Company, by H. M. Luck, as president, and R. S. Sale, purporting to be assistant secretary, undertook to give a chattel mortgage on certain steel rail belonging to the Luck Construction Company at Westport, Md., to secure H. M. Luck, executor, $2,000. This instrument was not in fact executed by Luck and Sale until after June 21, 1916. That Sale was never elected by the stockholders or directors' assistant secretary, but undertook to act as such under a power of attorney from G. T. Fogel, given on March 10, 1911. That Luck, as president, and Sale, purporting to be assistant secretary, had no authority from either the board of directors, nor from Francey or Fogel, individually or as stockholders to give this chattel mortgage and in fact Fogel was never informed of it and Francey probably never heard of it, certainly not till long after it had been given. This paper was never taken out of the office of the company or recorded. That on June 21, 1916, H. M. Luck, executor, advanced the Luck Construction Company $1,000; on June 22, 1916, $1,000; and on July 3, 1916, $1,000. That on August 30, 1916, he advanced $250; August 30th, $629.07; September 8, $100; September 16, $300; September 20, $200. The first $3,000 so advanced, on June 21, June 22, and July 3, are the $3,000 claimed as secured by the deed of trust and chattel mortgage of August 29, 1916, here, particularly in controversy. That the accounts of the Luck Construction Company were being kept in the Colonial Bank & Trust Company of Roanoke, Va., in the name of H. M. Luck personally, during this time. That the rail at Westport was sold by the Luck Construction Company in July, 1916, for $2,000, and the money was paid to the company and entered on the books as 'Julys Rail Westport $776.25;' 'August 20th—By check rail from Westport $1,370.33.' These payments were to the company, and the money thereby received was the property of the company. No formal release was made of the attempted chattel mortgage which Luck and Sale had undertaken to give on this rail, but the rail was sold clear of liens to the purchasers. At the time these rails were sold by Luck Construction Company there was no understanding of any kind between that company and H. M. Luck, executor, that he should receive other security for $2,000.

"The entire $3,000 advanced by Luck, executor, to the Luck Construction Company, was expended and paid out by the Luck Construction Company on the Virginia Blue Ridge job in June, July, and August, 1916. That on August 29, 1916, and for some months prior thereto, the Luck Construction Company was hopelessly insolvent, owing debts of about $50,000 or over, with assets as nearly as can be judged of less than $10,000. That in July the Luck Construction Company had assigned all its equities and profits in the Virginia Blue Ridge Railway Company job to a trustee to secure certain Lynchburg creditors, and the amount of $1,279 then afterwards received paid only a small portion of these Lynchburg debts. That on August 29, 1916, the said company had no other assets, except certain equipment, which as sold in this proceeding brought only $5,000, which was a very fair price.

"That on or about August 29, 1916, H. M. Luck undertook as president of the Luck Construction Company to give a deed of trust and chattel mortgage

on practically all the assets of the company to secure himself as executor the said $3,000 already advanced to the Luck Construction Company by himself and already paid out on the Virginia Blue Ridge job. That no meeting of the stockholders or directors of said company was called, or ever undertaken to be held. That no notice or knowledge to G. T. Fogel, the owner of $10,000 of the stock of the company, also a director, was given. That E. E. Francey, the remaining stockholder and director, was about this time written to by Sale, or Luck, asking his consent to give a mortgage to secure some money to be borrowed from the Luck estate, which was to be used in carrying on a new job just taken by the company in Alleghany county, Md., 'and that in order to start that work up then I agreed they should execute the deed of trust.' That Francey knew nothing about the Luck estate having advanced money in the summer of 1916, and that this money had already been expended in the Virginia Blue Ridge job. That he never authorized the giving of a mortgage or deed of trust to secure such money, and Francey testified that, if he had known the facts he would not have consented. That at this very time Francey himself was a creditor for money advanced and loaned to the Luck Construction Company, in the sum of about $20,000. That $2,000 which was turned over by check of H. M. Luck on or about the date of the alleged deed of trust and mortgage was really the money of the company itself, representing the proceeds of the company's rail at Westport, and was not the money of H. M. Luck, executor.

"That H. M. Luck had actual knowledge of all the above facts.

"No ratification of these attempted liens is shown by the evidence to have been made by Francey or Fogel. The moneys advanced by H. M. Luck, executor, to the Luck Construction Company, on August 30, 1916, and subsequent dates (set out in detail, supra), and totaling $1,479.67, are not claimed, either as set out in the original and amended proofs of debt, and exhibits filed therewith, or in the evidence and statement of counsel for H. M. Luck, executor, to be included in the alleged security of the deed of trust and chattel mortgage, here in controversy. The deed of trust and mortgage are only claimed as security for the payment made to and expended by the Luck Construction Company in June and July, 1916, 'which money was loaned some months before the security was given.'"

In determining as to the correctness of the rulings of the court below, it should be borne in mind that all questions of fact were found by the referee and in turn affirmed by the court below.

The referee in making his report filed an opinion which we think clearly and accurately states the law. We quote the opinion in full:

"Ordinarily a corporation cannot legally act in matters of this kind, except through its board of directors in meeting assembled—in a board meeting where the matter may be acted upon as a board sitting as such. This is the general rule. That the board of directors of the bankrupt corporation held no meeting authorizing the execution of the deed of trust in question is clearly established by the evidence. 10 Cyc. pp. 774, 775; 3 Cook on Corporations (6th Ed.) § 1713a; 2 Thompson on Corporations (2d Ed.) §§ 1071–1073.

"While this is the general rule, it will be observed that the great majority of cases cited by the authorities in support of this rule were cases arising out of suits instituted by stockholders, and not creditors. On the other hand, there is good authority for the proposition that where innocent parties, for a present fair consideration, deal with officers of a corporation who have been held out as having authority to do certain acts, who have apparent or ostensible authority to act for the corporation in certain matters, the innocent party, having acted in good faith and having changed his position by virtue thereof, will be protected, even though it turns out that the officer with whom he was dealing in reality had no authority to bind the corporation, or that the transaction has been otherwise irregular. In seeking this protection, however, the party must bring himself clearly within the rule, and show that he did not have actual knowledge of the true condition and acted in the utmost good faith. 10 Cyc. p. 912; Thompson on Corporations, § 2560.

"But here we have no such condition. This is neither a suit by a stockholder, nor did the petitioner herein part with his property for a present fair consideration, nor can he claim that he was innocent of the true state of affairs. On the contrary, the beneficiary under the deed of trust in question had full and actual knowledge of the company's condition, knew that no corporate action had been taken, knew that he was not applying the proceeds derived from the deed of trust in the manner agreed upon by Francey, the largest stockholder, vice president of the company, and one of its three directors. He had actual knowledge that Fogel, who was the owner of $10,000 of the stock of the corporation, and also a director, did not even know of the proposed deed of trust. Luck, executor, was dealing with himself as president of the Luck Construction Company, and merely directed Sale, at most a de facto officer, to sign the deed as secretary and place thereon the seal of the corporation. In reality Luck was the only officer and stockholder of the corporation who knew what was taking place. The evidence shows that Sale was not a stockholder, and held the office of assistant secretary of the corporation by virtue of a power of attorney in which Fogel, the real secretary of the company, undertook to delegate the duties of his office to Sale. Luck, executor, therefore, cannot be heard to say that he did not have actual knowledge of all these facts. What he did was not the act of the corporation, and the attempted conveyance of the property described in the deed of trust and chattel mortgage of August 29, 1916, must be held to be absolutely void.

"Here we find Luck as president of the corporation dealing with himself as executor of the N. C. Luck estate. The evidence shows that Luck is one of the legatees under the will of N. C. Luck, and therefore interested in the transaction in three different capacities: First, as president; second, as executor; and, third, individually. The decisions and authorities holding that transactions of this kind are invalid are too clear to admit of argument. 10 Cyc. p. 918; Thompson on Corporations, § 1411.

"It is contended by the petitioner that the trustee in bankruptcy cannot properly attack the validity of the deed of trust under consideration. It is argued that the trustee stands in the shoes of the bankrupt corporation, and that if the corporation could not raise any question concerning the validity of the deed of trust (under the doctrines of estoppel) then the trustee could not. While this may have been true prior to the amendment of the Bankruptcy Act, it is not now a correct statement of the law. Section 47 of the Bankruptcy Act of July 1, 1898 (30 Stat. 577, c. 541) as amended by Act June 25, 1910, 36 Stat. 840 (Comp. St. § 9631), provides in part as follows: '* * * (2) And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.'"

In view of the foregoing, which meets with our hearty approval, we do not deem it necessary to enter into an extended discussion of the matters involved in this controversy, inasmuch as what we might say would of a necessity be simply a repetition of what the referee has already so well said, further than to cite the case of Loan & Trust Co. v. Graham, 14 Am. Bankr. Rep. 313, 135 Fed. 717, 68 C. C. A. 355. This court, in discussing this phase of the question, said:

"The question of whether or not the lien claimed by the trust company constituted a valid preference under the bankruptcy law was one dependent upon the correct determination of the facts in relation to the particular transaction; and that fact both the referee and the lower court having determined adversely to the trust company, this court, treating this as a petition for review, could not disturb, and, treating it as an appeal, should only do so where those tribunals appear plainly to have been wrong in the conclusions reached by them. Under the facts of this case it may be said that there was

room for difference of opinion as to just what was the true transaction between the parties; but certainly no such doubt as would justify this court in departing from the well-established rule of accepting the decision of the lower courts, particularly where they both coincide as to what are the facts."

In view of what we have said, it necessarily follows that the decree of the lower court should be affirmed.

Affirmed.

THE PINNA.

(Circuit Court of Appeals, Fifth Circuit. January 31, 1919.)

No. 3306.

1. SEAMEN ⟸24—DEMAND FOR HALF PAY AT INTERMEDIATE PORT—SUFFICIENCY OF COMPLIANCE.
   Where, on demand by seamen on arrival at American port for payment of half their earned wages, the master stated that he did not have money and banks had closed, but offered them store orders, which they accepted and used in part, they could not thereafter dispute validity of payment pro tanto, nor put master in default, so as to entitle them to full payment and discharge without a further demand.
2. SEAMEN ⟸24—DEMAND FOR HALF WAGES AT INTERMEDIATE PORT—TIME FOR COMPLIANCE.
   The master of a vessel is entitled to reasonable time to prepare himself to comply with a demand by seamen for half of their wages under Seamen's Act, § 4 (Comp. St. § 8322).
3. SEAMEN ⟸21—WAGES—FORFEITURE BY DESERTION.
   Seamen, who demanded instant compliance with their demand for half their earned wages in an American port, and when the master obtained the money shortly afterward, while they were still on the vessel or wharf, refused to accept it and left the vessel, forfeited their wages as deserters.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by H. Olsen and others against the steamship Pinna; Lane & McAndrew, Limited, claimant. Decree for claimant, and libelants appeal. Affirmed.

For opinion below, see 252 Fed. 203.

W. J. Waguespack and Herbert W. Waguespack, both of New Orleans, La., for appellants.

W. W. Young, of New Orleans, La. (Terriberry, Rice & Young, of New Orleans, La., on the brief), for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is an appeal from a decree in admiralty, dismissing a libel, filed by 14 seamen, as to 12 who are appellants in this court. A decree in favor of the other 2 libelants is not appealed from. The question presented by the appeal is whether the appellants properly demanded, and were entitled to the payment of, half wages earned, when their ship reached Port Arthur, Tex.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The libelants were shipped in London for a voyage to certain ports in the Gulf of Mexico, and back to a final port of destination in the United Kingdom, not to exceed one year. They signed shipping articles on November 26, 1916, and then received certain advances, and made certain allotments of their pay. The ship arrived at Port Arthur on January 9, 1917, and loaded some oil. There is a dispute as to the time of her arrival; the libelants testifying that she arrived in the morning, and the master and chief engineer that she docked at 3 p. m. After the ship docked, and on the same day, the crew demanded a payment of wages, in varying amounts from $5 to $15, as indicated on a list presented to the captain. The master told them that he had no money on the ship, and that it was impossible to then get it on shore, because the banks had closed, and offered the men orders for merchandise on the Gulf Refining Company's store at Port Arthur. The men demurred, but accepted the orders, were granted shore leave, and traded part of the amount of their orders in merchandise at the store. The succeeding morning they made another demand for half wages then earned, in cash, without deduction for advances and allotments made in London. The master replied to their demand that he had not enough money in the ship to pay their half wages, offering them $5 each, in addition to the amounts taken up by them in merchandise. The master and chief engineer also testified that the master also told the appellants that he would get more money for them from the bank as soon as he could, and return to the ship with it. The appellants declined to await his return, and left the ship for the purpose of libeling it, claiming that the captain's failure to pay them half wages earned entitled them to collect their full wages due and to their discharge from the ship. The captain, upon his return from Port Arthur with additional money, testified that he found some of them on the ship or on the dock, after a visit to the ship to get their effects, and offered then to pay them according to their demand, but that they declined to receive anything from him, upon the ground that it was too late. The ship sailed from Port Arthur without the appellants, and the captain entered them on the log as deserters from the ship. Upon the ship's arrival in New Orleans, the libel against it was filed.

The rightfulness of the appellants' position in leaving the ship depends (1) upon their right under section 4 of the Seamen's Act of 1915 (Act March 4, 1915, c. 153, 38 Stat. 1165 [Comp. St. § 8322]) to receive half wages earned from the time the voyage commenced till its arrival at Port Arthur, without deductions, and in money; and (2) upon whether they properly demanded half then earned wages from the master. The first question depends upon whether the ship should be credited with advances and allotments made in London, and upon whether payments in orders payable in merchandise are properly to be taken into account.

[1] We think an answer to the first question is unnecessary to a decision of the case. Whether there was an amount due the appellants or not, the master could be put in default, so as to entitle them to full wages and a discharge, only for failure to comply with a proper and

legal demand. Conceding that the first demand on the day of the ship's arrival at Port Arthur could only have been complied with by a money payment, if the appellants had stood on their right to nothing but a money payment, yet the fact is that they all both accepted and partly used the store orders. They could not use the orders and still dispute the validity of the payment. The acceptance of the orders and the use of them for less than the amount of half of their earned wages would not prevent their making a second demand for the unpaid portion of the then half of their earned wages. They made a demand on the morning of the second day. It may be conceded that it was a demand for the amount of wages they were entitled to demand under section 4 of the Seamen's Act. The captain, in response to the demand, according to appellee's testimony, which the District Judge found to be true, did not refuse to comply with the demand, but offered appellants each $5 immediately, and asked for time to get more money from the Port Arthur bank with which to supply any deficiency. There is a conflict in the evidence as to what happened between the master and the appellants on the occasion of the second demand, but the District Judge found the facts to be as stated, and an examination of the record supports the correctness of his conclusion. The appellee's evidence is also to the effect that the master thereafter procured the money and offered it to those of appellants who were at the ship or on the dock upon his return, and that they declined to receive it. No reference to this offer and refusal is found in appellants' testimony.

[2] A demand, to be legal, must afford the person on whom the demand is made a reasonable time to accede to it. If, upon the second demand, the master had pleaded inability to immediately comply, not coupled with a request for time to put himself in shape to comply, it might be construed to be a refusal to comply, which would entitle the appellants to full wages and a discharge. Upon the ship's arrival in port, the master was entitled to a reasonable time to prepare himself to comply with any demands made upon him for wages. The acceptance of the orders tendered by the master in response to the first demand authorized the master to assume that the men would not insist on further payment, at least until he was notified to the contrary by the second demand. He was not, therefore, in default for not having anticipated and prepared for the second demand. He was entitled to a reasonable time, after the making of the second demand, to get the money to comply with it. This was certainly true, if he requested the extension of such indulgence to him and expressed a purpose to put himself in shape to comply shortly with the demand, if granted, and this is what the record discloses in this case. The purpose of section 4 of the Seamen's Act was to furnish a remedy by which sailors could procure a proportion of their earned wages at each port, and not to provide a method by which the shipping articles could be terminated at the will of the seaman, because of a failure on the master's part to instantly comply with a demand by the seaman, which was made with the purpose of procuring the right to demand a discharge from the shipping articles, rather than the payment of half of the earned wages under them.

[3] The refusal of the appellants to grant the master a reasonable opportunity to get the money to comply with their demand indicates that the purpose of the demand was to put the appellants in a position to demand full wages due and their discharge. The object of the law would be perverted, if permitted to be so used. Our conclusion is that the District Judge correctly held that instant compliance with appellants' demand for half of their earned wages was an unreasonable requirement, and that appellants wrongfully left the ship, when they left for the purpose of enforcing their claim for full wages, after such a demand, and, as they left without the master's permission and with the intention not to return to it, are to be considered as deserters. As deserters, they forfeited their wages, and for that reason the libel, as to the appellants, was properly dismissed. Section 7 of the Seamen's Act of March 4, 1915 (Comp. St. § 8380); The London, 241 Fed. 863, 154 C. C. A. 565; In re Ivertsen (D. C.) 237 Fed. 498; The Elswick Tower (D. C.) 241 Fed. 706.

The decree appealed from is affirmed.

MULLINS LUMBER CO. v. WILLIAMSON & BROWN LAND & LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. December 6, 1918.)

No. 1660.

1. EVIDENCE ⊜472(1)—OPINION EVIDENCE—INVASION OF PROVINCE OF JURY.
   Exclusion of a question to a witness *held* not error, where it called for his opinion on a material fact, which the jury were capable of determining from the evidence.
2. APPEAL AND ERROR ⊜1033(3)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.
   Exclusion of evidence is not ground for reversal, where it does not appear that it would have been favorable to plaintiff in error.
3. ADVERSE POSSESSION ⊜23—NATURE AND REQUISITES—CUTTING OF TIMBER.
   The occasional cutting of timber on wild swamp land, not continuously occupied or used, is not sufficient to establish adverse possession.
4. COURTS ⊜365—TRESPASS ⊜52—CUTTING OF TIMBER—MEASURE OF DAMAGES—QUESTION FOR JURY.
   Under the law as established by decision in South Carolina, which governs in the federal court in an action to recover damages for the cutting of timber in that state, where the primary question involved is the title to the land, the jury may award as damages either the value of the timber at the time of the trespass and conversion, or the highest market value up to the time of trial, in their discretion.
5. APPEAL AND ERROR ⊜1140(1)—CONDITIONAL AFFIRMANCE—REMISSION OF PART OF RECOVERY.
   Where a jury by its verdict has settled all issues in favor of plaintiff, but because of an erroneous instruction may have awarded excessive damages, an appellate court may properly permit the judgment to stand on remission by plaintiff of all above the lowest amount the evidence would warrant.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Florence; Henry A. M. Smith, Judge.

Action at law by the Williamson & Brown Land & Lumber Com-

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pany against the Mullins Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed, subject to condition.

W. F. Stevenson, of Cheraw, S. C., for plaintiff in error.

F. L. Willcox, of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. In this action to recover damages for cutting and removing timber, the main issue was the title to the land. Both parties claimed under Wilson Lewis. Plaintiff's chain of title is as follows:

Wilson Lewis to S. W. Morrison, 1,000 acres, more or less, July 27, 1893; Sessions, sheriff, to H. T. Morrison, under tax execution against S. W. Morrison, August 3, 1897; H. T. Morrison to Cape Fear Lumber Company, February 17, 1902; Cape Fear Lumber Company to plaintiff, September 9, 1910. To prove that defendant derived junior claim from the common source, plaintiff introduced conveyances as follows: Wilson Lewis to D. T. Lewis, September 5, 1895; D. T. Lewis to C. H. Strickland, May 20, 1910; C. H. Strickland to defendant, August 24, 1910.

At the first trial the chief subject of contest was whether the conveyance of Wilson Lewis to S. W. Morrison embraced the 110 acres in dispute. This court reversed the judgment in favor of the plaintiff for error in the instruction of the trial court on that issue. 246 Fed. 232.[1] On the second trial the jury again found for the plaintiff, and the case is here on assignments of error in the exclusion of testimony, and the instructions of the court as to adverse possession, and the measure of damages.

[1] The question whether the conveyance of Wilson Lewis to S. W. Morrison embraced the land in dispute depended to a great extent on the meaning of a plat made by H. T. Morrison at the time of the conveyance: if Morrison meant one line marked on the plat as the boundary, the disputed land was covered; if another line, it was not. Roberts, a surveyor, testified that he was familiar with Morrison's methods of marking his lines and illustrated it by referring to the lines on the plat in issue. He was then asked:

"On that map, without any further explanation, what would you say were the boundary lines?"

Objection to the question and answer was sustained. The witness could not know which of the doubtful lines Morrison meant as the boundary, except from what he had testified of Morrison's method of marking. With the information given by this witness and others, the jury was as well qualified to draw the correct inference on the point as the witness.

[2] We think, therefore, the trial judge exercised a wise discretion in excluding the question as tending to invade the province of the jury on one of the most material issues of fact. Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469–476, 24 L. Ed. 256. But, even if the

[1] 158 C. C. A. 392.

question was improperly excluded, the error could not avail, because it does not appear that the answer would have been favorable to defendant. Shauer v. Alterton, 151 U. S. 607–616, 14 Sup. Ct. 442, 38 L. Ed. 286.

The court was asked to direct a verdict for the defendant on the ground that the statute of South Carolina requires the sheriff to put the purchaser at a tax sale in possession, and the evidence was to the effect that H. T. Morrison had never been put in possession by the sheriff after his purchase. The only evidence on the subject shows that at the time of his purchase H. T. Morrison was already in possession as agent of his wife, S. W. Morrison, the defaulting taxpayer. The law evidently does not contemplate that the purchaser should be ousted, and immediately restored to the possession.

[3] The land in dispute was wild swamp land, incapable of cultivation. The testimony relied on to establish adverse possession proved no continuous use or acts of trespass, but only occasional cutting of timber. This is not sufficient to establish the requisite continuity of possession. Bailey v. Irby, 2 Nott & McC. (S. C.) 343, 10 Am. Dec. 609; Duren v. Sinclair, 22 S. C. 361–366; Love v. Turner, 78 S. C. 513–519, 59 S. E. 529. It is therefore needless to consider the correctness of the charge on the subject of adverse possession, or the alleged error in the exclusion of evidence of Wilson Lewis as to the location of his line after his conveyance to S. W. Morrison.

[4] The District Judge instructed the jury that, if they found the title in the plaintiff, it was—

"entitled to recovery for the highest market value of the timber cut from the time of the cutting in 1915 until the date of this trial."

The cause arose out of a bona fide dispute as to the title to this land, and the defendant cut the timber in the belief that it had a right to do so. As correctly held by the District Judge, there was no evidence of malicious or reckless invasion of another's property, and therefore no basis for punitive damages. In such cases, where no state law is involved, the Supreme Court holds the measure of damages to be the value of the property at the time of the taking. Woodenware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; United States v. St. Anthony R. R. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548. In this case, however, the land was in the state of South Carolina, and in a legal sense the primary question involved in the cause was the title to the land; the damages recoverable were incidental to and dependent on the title. Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913. Hence the cause was governed by the applicable decisions of the Supreme Court of South Carolina. Jackson v. Chew, 12 Wheat. 153, 6 L. Ed. 583. In that state the rule is that the jury may take as the measure of damages either the value at the time of the trespass and conversion or the highest market value up to the time of the trial, according to their views of the justice of the case. Carter v. Du Pre, 18 S. C. 179; Gregg v. Bank of Columbia, 72 S. C. 458–464, 52 S. E. 195, 110 Am. St. Rep. 633; Davis v. Reynolds, 91 S. C. 439–442, 74 S. E. 827. It was there-

fore error to charge that the plaintiff was entitled, as a matter of law, to the highest market value.

[5] But the utmost injury that could have resulted to the defendant from the erroneous instruction was the difference between $1,884, the amount of the verdict, and the amount the jury must have found had they taken the lowest estimate of the quantity and value of the timber. The lowest estimate of both quantity and value was that of the witnesses Smith and McCants. Computing by these lowest estimates the verdict could not have been less than $847.80.

Since all other issues were settled in favor of the plaintiff by the verdict of the jury under proper instructions, common sense requires that the plaintiff should have the option to accept this lowest possible verdict rather than put all the issues at large again in a new trial. Such a provision in the judgment does not deprive the defendant of the right of trial by jury. Arkansas Cattle Co. v. Mann, 130 U. S. 69–75, 9 Sup. Ct. 458, 32 L. Ed. 854; Chesbrough v. Woodworth, 221 Fed. 912, 137 C. C. A. 482; Id., 244 U. S. 72, 37 Sup. Ct. 579, 61 L. Ed. 1000; Citizens T. & G. Co. v. Globe & Rutgers Fire Ins. Co., 229 Fed. 326, 143 C. C. A. 446, Ann. Cas. 1917C, 416.

It is therefore the judgment of this court that the judgment of the District Court be reversed, and the cause remanded for a new trial, unless the plaintiff shall within 60 days pay all the costs of this court, and shall remit in writing on the judgment in the District Court $1,036.20; that if the plaintiff shall pay the costs of this court, and remit the sum of $1,036.20 within 60 days, the judgment of the District Court stand as affirmed.

Reversed nisi.

IOWA CENT. RY. CO. et al. v. WALKER.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1919.)

No. 5149.

1. APPEAL AND ERROR ⟸1212(3)—REVIEW—LAW OF THE CASE.
   Where a former judgment for plaintiff, administrator of deceased, was based on the last clear chance rule, which was the only question not withdrawn from the jury, was reversed on appeal, such reversal does not become the law of the case, so as to preclude judgment for plaintiff on retrial on issues of negligence, which at the first trial were withdrawn from the jury, for the only question presented to the court was whether the submission of the last clear chance rule was prejudicial.

2. RAILROADS ⟸282(8)—INJURIES TO PERSONS ON TRACKS—NEGLIGENCE.
   Where one struck by a freight train was informed by the dispatcher that the train was at a station 8 miles distant, from which, according to schedule, it would have taken 25 minutes to reach the point of the accident, and he testified that before getting a truck he looked for the train and saw none approaching, his contributory negligence was for the jury.

3. APPEAL AND ERROR ⟸1067—REVIEW—HARMLESS ERROR.
   Refusal of instructions as to questions withdrawn from the jury is not prejudicial though the instructions were correct.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. APPEAL AND ERROR ⇐1050(1)—REVIEW—HARMLESS ERROR.
In personal injury action against a railroad company admission of its rules requiring the engine bell to be rung, when approaching a grade crossing, and the whistle to be sounded at the whistling post is harmless, where, under Code Iowa, § 2072, such precautions were required.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Action by William A. Walker, administrator of the estate of Allen H. Walker, against the Iowa Central Railway Company and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

See, also, 241 Fed. 395.

J. A. Devitt, of Oskaloosa, Iowa, and William McNett, of Ottumwa, Iowa (F. M. Miner, of Minneapolis, Minn., Burrell & Devitt, of Oskaloosa, Iowa, and McNett & McNett, of Ottumwa, Iowa, on the brief), for plaintiffs in error.

John N. McCoy, of Oskaloosa, Iowa (S. V. Reynolds, of Oskaloosa, Iowa, and J. R. Jaques, on the brief), for defendant in error.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. This is the second time this cause has been brought to this court on writ of error. The first time the judgment in favor of the plaintiff was reversed (203 Fed. 685, 121 C. C. A. 579), and upon the second trial to a jury a verdict for the defendant in error was again returned, and judgment thereon entered.

The allegations in the complaint are set out in the fo · opinion of the court (203 Fed. 685, 121 C. C. A. 579), and need not be repeated here. The answers of the defendants, in addition to a general denial of the acts of negligence charged, pleaded contributory negligence.

There are ten assignments of error, but counsel in their briefs present them under five specifications, and we will dispose of them on these specifications, as they present all issues involved.

[1] 1. It is claimed that, as the former judgment was reversed on the ground that the court erred in refusing to direct a verdict in favor of the defendants, and upon the second trial the cause was heard on the same pleadings and the same evidence, in fact the evidence was read from the transcript of the record which was before this court on the first hearing, that decision is now the law of the case, and therefore the request of the defendants for a directed verdict should have been granted.

By reference to the opinion of this court at the former hearing, it will be seen that the only question before the court then was whether upon the facts, as shown by the record, the last chance doctrine applied; all other questions in issue having been withdrawn from consideration of the jury by the trial court. We held that, as the undisputed evidence established the fact that as soon as the engineer, operating the engine discovered that the plaintiff was in a position of danger, he applied the emergency brake, and stopped the train as soon

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

as possible, the court erred in not directing a verdict for the defendants on the last chance rule of law.

The other charges of negligence alleged in the complaint, having been withdrawn from the jury, and determined by the trial court in favor of the defendant, and the verdict having been in favor of the plaintiff upon the only issue submitted to the jury, errors of the trial court prejudicial to the plaintiff were not subject to review on that writ of error, prosecuted by the defendant. Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788. This question was settled by this court, after a careful review of the authorities, in Guarantee Co. v. Phenix Insurance Co., 124 Fed. 170, 59 C. C. A. 376, and has since been followed by this court in a number of cases. Cook v. Foley, 152 Fed. 41, 81 C. C. A. 237; Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co., 154 Fed. 545, 83 C. C. A. 431; Rogers v. Penobscot Mining Co., 154 Fed. 606, 83 C. C. A. 380; Morrison v. Burnette, 154 Fed. 617, 83 C. C. A. 391; Midland Valley R. R. Co. v. Fulgham, 181 Fed. 91, 104 C. C. A. 151. Only those issues of law which were before the appellate court and by it determined, become the law of the case, when, upon reversal, the cause is retried. None of the cases cited by the learned counsel for plaintiff in error are to the contrary.

It follows that the court did not err in refusing to direct a verdict upon that ground.

[2] 2. Do the facts show that the plaintiff was guilty of contributory negligence, independently of the question adjudicated on the former writ of error?

The complaint, among other allegations of negligence, charged, and there was substantial evidence to require the submission of that issue, whether the train, which caused the injury complained of, came into the station at New Sharon without warning and without a signal, the plaintiff being at the place of danger by reason of the fact that he had been informed by the train dispatcher, in charge of that office, that the freight train, which caused the injury, was not yet at Searsboro, a station 8 miles away, and according to the schedule it required 25 minutes to reach New Sharon, where the plaintiff was injured. There was also evidence that only 3 minutes had elapsed after that information, when he had moved the truck and was struck by the freight train. It is claimed it was the duty of the plaintiff to look out for the train, notwithstanding the information he received from the train dispatcher, which led him, and rightly so, to believe that the train would not reach the place where he was wheeling the truck for 25 minutes, and failing to do so he was guilty of contributory negligence. He testified, "upon getting the truck, he looked to the north, whence the train would come, and saw no sign of an approaching train," so there was evidence that he looked for the train. We are of the opinion that the court committed no error in holding upon these facts that the plaintiff was not guilty of negligence as a matter of law. Negligence is not imputable, as a matter of law, to a person for doing what, as a reasonable person, he had good and sufficient reason for believing he can do or omit to do with safety, and without apprehension of danger. St.

Louis-San Francisco Ry. Co. v. Maynord, 246 Fed. 115, 158 C. C. A. 341. It is a question to be determined by the jury under proper instructions of the court. Northern Pacific R. R. Co. v. Amato, 49 Fed. 881, 1 C. C. A. 468, affirmed 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506. The Supreme Court in affirming the judgment of the Circuit Court of Appeals said:

"We concur also with the view of the Circuit Court of Appeals, in the opinion of that court, given by Judge Lacombe, that it was fairly a question for the jury to determine, whether or not it was negligence on the part of the plaintiff not to keep a lookout for a coming engine, in view of the assurance of the boss that there was none to come."

Other federal cases in point are McGhee v. Campbell, 101 Fed. 936, 42 C. C. A. 94; Slentz v. Western Bank Note, etc., Co., 180 Fed. 389, 103 C. C. A. 535; Fried & Reineman Packing Co. v. Hugel, 183 Fed. 110, 105 C. C. A. 402. In none of the authorities relied on by the plaintiff in error, had the injured person been informed by one in authority, what practically amounted to an assurance of safety, before doing the act claimed to have been negligence.

[3] 3. It is assigned as error that the court refused to give certain instructions asked by the plaintiff in error. The instructions refused and assigned as error in the fourth and fifth assignments, referred to the speed of the train; but as that question was by the court withdrawn from the jury, the defendant cannot complain that it was prejudicial to refuse them, even if they were correct, on which we express no opinion.

4. The exceptions to parts of the charge of the court all relate to the questions of contributory negligence which have been fully discussed hereinbefore, and it would serve no useful purpose to reiterate them.

[4] 5. The court properly admitted in evidence the rules of the defendant company, requiring the engine bell to be rung when approaching road crossings at grade, and the whistle to be sounded at all whistling posts. But even if it were error, it would not be prejudicial, as the law of the state of Iowa required it to be done. Section 2072, Code of Iowa.

Other questions have been presented and carefully considered; but as they present no question of law, not well settled, it is unnecessary to refer to them.

There was no error in the trial of the cause, and the judgment is accordingly affirmed.

SCHENK & McDONALD v. WORTHEN LUMBER MILLS.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3179.

1. LOGS AND LOGGING ⊂=34(1)—MODIFICATION OF CONTRACT BY SUBSEQUENT AGREEMENT.
That logs to be cut and delivered by defendants to plaintiff, which by the terms of the contract were to be cut from certain lands, were by subsequent agreement of the parties cut from other lands, did not take them out of the contract, where they were delivered and paid for at the price fixed therein.

2. LOGS AND LOGGINGS ⊂=34(1)—CONTRACTS—ASCERTAINMENT OF QUANTITY—PROVISION FOR SUBMISSION TO THIRD PARTY.
A provision, in a contract for the sale of logs to be cut and delivered by defendants to plaintiffs, that "in case of dispute over scale the scale of a competent disinterested person shall be accepted as final by both parties," is valid and binding.

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Action at law by the Worthen Lumber Mills against Schenk & McDonald, a copartnership, and Edward Schenk and Gordon D. McDonald, individually. Judgment for plaintiff, and defendants bring error. Affirmed.

John Rustgard, of Juneau, Alaska, for plaintiffs in error.

J. A. Hellenthal and Simon Hellenthal, both of Juneau, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The defendant in error brought this action in the court below to recover $1,900.03, alleged to have been overpaid the plaintiffs in error, defendants there, for certain logs theretofore delivered to it by the defendants to the action. The mill of the plaintiff company is located at Juneau, Alaska, and the logs respecting which the respective parties contracted were to be cut upon the forest reserve of the government in Alaska, and, according to the record, were to be received by the milling company when dumped into the water and properly boomed by the sellers. One of the essential portions of the two written contracts into which the parties entered was a stipulation to the effect that such delivery should take place not exceeding a certain stipulated number of miles from the mill of the plaintiff company.

With the exception of the price per thousand feet of the logs and of the number of miles just referred to, the two contracts are in all essential particulars the same, so that it will be sufficient to set out the substance of the first one, which was entered into on the 27th day of March, 1916, by which the defendants to the action agreed to furnish and deliver to the plaintiff company 1,000,000, more or less, feet of first-class merchantable spruce and cedar logs of a specific description, securely boomed in a prescribed way in the waters of the sea,

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

inlet, or bay contiguous to the place where cut for the tugboat of the plaintiff to reach when ready to tow, such place not to exceed 175 miles distant from the mill of the plaintiff at Juneau by the ordinary route of water travel. The price fixed for the logs covered by that contract per 1,000 feet was $6 free of all taxes and stumpage, which price was to be paid by the plaintiff at its mill; it, however, agreeing to advance to the defendants the money required for stumpage, the amount so advanced to be a lien on the logs, and to be deducted from the purchase price thereof.

Besides other provisions of the contract not pertinent to the present inquiry, it contained these provisions, which are pertinent:

"The said logs shall be scaled by the Scribner log rule and the said first party [defendant] agrees to accept the mill scale. The said logs shall be cut at north end Prince of Wales Island, Alaska, under the terms and conditions required by the forest reserve regulations. * * * Said logs shall be cut, properly boomed, and lodged in a safe and secure, but accessible, place, and ready for towing, as follows: As soon as possible, but not later than September 1, 1916. Each boom of logs shall be scaled by the party of the first part [defendant], and this scale shall be sent to party of the second part [plaintiff] for the purpose of comparison with number of pieces in boom: and said logs shall be considered delivered when and in such amounts as taken in tow by the tugboat of the said second party [plaintiff]. And the first party [defendant] agrees to notify the party of the second part [plaintiff] at its place of business in Juneau when any boom is ready for towing. And it is further agreed that, in case of dispute over scale, the scale of a competent disinterested person shall be accepted as final by both parties. It is further agreed that party of the first part [defendant] shall furnish a boat of at least 50 horse power to assist in towing said logs as far as Petersburg, Alaska; cost of said assistance included in above price of logs."

The case was tried with a jury, which returned a verdict for the plaintiff in the sum of $838.53, upon which judgment was entered against the defendants for that sum, with costs.

[1] One of the points urged on behalf of the plaintiffs in error is that the logs, which it is conceded they delivered to the milling company in 1916, were not delivered under the contract of March 27, 1916, and this because they were not cut from the north end of Prince of Wales Island.

We think it is apparent from the contract of the parties that what they were contracting for was logs of a specific kind and description at a specified price, which at the time of the making of the contract it was supposed could and would be cut from lands at the north end of Prince of Wales Island. But the testimony of the defendant McDonald, who signed the contract for himself and on behalf of his associate, expressly states, in effect, that he subsequently found, upon examination of the timber at the north end of that island, that it was not of the required quality, and so informed the plaintiff in the case, with whom he agreed to and did deliver in four different rafts the logs contracted for, cut from other lands, and gathered at Portage Bay, Port Malmsbury, and Duncan Canal. It is not pretended that the logs so delivered were not delivered at the price fixed in the contract of March 27, 1916, and paid for thereunder.

We think there is no merit whatever in the contention of the plain-

tiffs in error that such logs were not delivered pursuant to the provisions of the written contract of March 27th.

Another complete answer to the position of the plaintiffs in error respecting the contract of March 27, 1916, is that the record shows that the defendants to the action demanded of and received from the plaintiff a bill of particulars, together with undisputed evidence that the plaintiff paid the defendants in full for all the logs delivered by them under the 1916 contract, except the sum of $74.42, thereby leaving the plaintiff indebted to the defendants in that sum for logs delivered under that contract; and the court expressly instructed the jury that the plaintiff had and could have no claim against the defendants by virtue of the contract of March 27, 1916, whether anything was or was not done under it.

[2] Both contracts, as has been said, provided for two scalings—one by the sellers, which scaling, according to the contracts, was to be sent to the purchaser "for the purpose of comparison with number of pieces in boom"; the other to be made by the milling company according to the "Scribner log rule," which the sellers expressly agreed to accept, with the further and express stipulation of both parties that, "in case of dispute over scale, the scale of a competent disinterested person shall be accepted as final by both parties."

The court below in its rulings held, and we think rightly, that the last-quoted provision of the contracts was binding and conclusive upon them.

But one other matter need be alluded to, although we have given careful consideration to all the contentions on the part of the plaintiffs in error. The defendants set up several counterclaims against the plaintiff, the first and third of which were rightly withdrawn by the court from the jury for lack of any evidence in support of them. The second was:

"That on and between June 24, 1916, and the 16th day of September, 1916, defendants furnished to plaintiff at the latter's instance and request the use of a towboat with crew for periods aggregating 172 hours; that the same was actually and reasonably worth the sum of $5 per hour, totaling $860."

With respect to that matter the contention of the plaintiff was that the defendants were to charge only the actual cost, which question the court, under appropriate instructions, left to the jury to determine.

The fourth counterclaim was as follows:

"That during the months of July and August, 1917, defendants loaned to plaintiff 72 boom chains and 3 piling chains, which plaintiff agreed either to return to defendants or pay for at their value; that plaintiff has neglected and refused to return the said chains, and that the actual and reasonable value of said boom chains is $3 for each, or the total of $216, and the value of the said piling chains is $7.50 for each, or the total of $22.50."

The fifth counterclaim is this:

"That on the 15th day of September, A. D. 1916, at plaintiff's special instance and request, and for its benefit, defendants furnished six workmen for rebooming a raft of logs at Duncan Canal, Alaska, which work continued for a period of 9 hours, making a total of 54 hours; that the same was actually and reasonably worth and of the value of 50 cents per hour, or a total of $27; and that no part of the same has ever been paid."

The facts regarding the two last-mentioned counterclaims the court left to the determination of the jury, with appropriate instructions, in the event of its finding thereon in favor of the defendant.

The record containing no error calling for a reversal, the judgment is affirmed.

UNITED STATES v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. January 15, 1919.)

No. 5115.

COMMERCE ⊂⇒27(7)—SAFETY APPLIANCE ACT—TRAINS SUBJECT TO AIR BRAKE PROVISIONS—"SWITCHING OPERATION."

The movement by a switch engine of 40 or more cars coupled together over a Duluth terminal track, used only to connect different terminal yards, over which no through or local trains pass, and on which trains are moved slowly, without orders, time cards, or block signals, *held* a "switching operation," not within the air brake provision of Safety Appliance Act 1893, § 1 (Comp. St. § 8605).

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by the United States against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Roscoe F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C. (Alfred Jaques, U. S. Atty., of Duluth, Minn., on the brief), for the United States.

D. F. Lyons, of St. Paul, Minn. (C. W. Bunn, of St. Paul, Minn., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. The plaintiff in error, plaintiff in the court below, seeks a reversal of a judgment in favor of the defendant railway company, entered on a directed verdict of a jury.

There are two counts involved, each of them complaining of a violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended and supplemented by Act April 1, 1896, c. 87, 29 Stat. 85 (Comp. St. §§ 8605–8612), Act March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. §§ 8613–8615), and Act April 14, 1910, c. 160, 36 Stat. 298 (Comp. St. §§ 8617–8619, 8621–8623). The first count charges that the defendant on September 21, 1916, operated a transfer train of 48 cars over its interstate line of railroad in and about Duluth, Minn., when less than 85 per cent. of the cars in said train had their air brakes used and operated, or so assembled and connected that they could be used and operated by the engineer of the locomotive drawing the train. The second count charged a similar violation in the operation of a transfer train of 40 cars on September 22, 1916.

The only issue involved is whether the tracks over which these trains were operated were a part of defendant's interstate line of railroad

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or merely side tracks used for switching purposes only. In United States v. Erie Ry. Co., 237 U. S. 402, 35 Sup. Ct. 621, 59 L. Ed. 1019, it was held:

"A train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements, but mere switching operations, and so are not within the air brake provision."

The court, in that case, found the facts to be that the trains complained of were made up in yards like other trains and then proceeded to their destinations over main line tracks used by other freight trains, both through and local. The court in its opinion said:

"They were not moving cars about in a yard or on tracks set apart for switching operations, but were engaged in main line transportation, and this in circumstances where they had to pass through a dark tunnel, over switches leading to other tracks and across passenger tracks whereon trains were frequently moving. Thus it is plain that, in common with other trains using the same main line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling their movements."

And it was held that they were subject to the provisions of the act.

In United States v. Chicago, Burlington & Quincy R. R., 237 U. S. 410, 35 Sup. Ct. 634, 59 L. Ed. 1023, the facts found were:

"The defendant operates a railroad which passes through Kansas City, Mo., and is used largely in interstate commerce. Among its terminal facilities at that point are two freight yards known as the Twelfth Street yard and the Murray yard. These yards are on opposite sides of the Missouri river, the distance between their nearest points being about two miles. The track connecting them is one by which passenger and freight trains enter and leave the city; in other words, a main line track. For a distance of 3,000 feet it is upon a single track bridge spanning the river, and off the bridge it intersects at grade 12 or 15 tracks of other companies and passes through the Union Depot tracks. Besides its use by the defendant's trains, a considerable portion of it is also the line by which the passenger trains and some of the freight trains of the Rock Island and Wabash Railroads enter and leave the city.

"Both yards are used for receiving and breaking up incoming trains, assembling and starting outgoing trains, and assorting, storing and distributing cars. To reach their ultimate destinations, whether on the defendant's road or on those of other carriers, a large proportion of the cars have to be moved from one yard to the other, and this is accomplished by transfer trains which are run over the main line track connecting the yards. These trains usually consist of an engine and about 35 cars, are operated by what are termed yard or switching crews, and carry no caboose or markers. They have no fixed schedules and are not controlled by a train dispatcher, but by block signals, as are all other trains moving over the same track. Each train is moved as a unit from one yard to the other, and not infrequently is both preceded and followed by other trains, passenger and freight.

"The three trains, the running of which is charged to have been violative of the statute, were transfer trains of the class just described. They were run from one yard to the other on August 9, 1910, and were composed, respectively, of 42, 36, and 39 cars, of which only 9 in one train and 10 in each of the others had their air brakes connected for use by the engineer. At that time air brakes were required to be used on 75 per cent. of the cars in a train. [In re Power or Train Brakes] 11 I. C. C. 429, 437."

And the court held that as the trains were engaged—

"not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main line track—one that was a busy thoroughfare for interstate passengers and freight traffic. Every condition suggested by the letter and spirit of the air brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect."

And it was held that upon these facts they were trains in the sense of the statute.

The undisputed evidence in this case establishes the fact that neither of the trains was operated on the dates alleged with 85 per cent. of air brakes, and that the tracks over which they were operated were not main tracks, but tracks used for switching purposes only.

Owing to the topographical conditions at Duluth, it is necessary that the yard and industrial tracks be confined to a narrow space, and the terminals at Duluth are, owing to the many industries and the large shipping there, necessarily very extensive in length. Duluth is the largest terminal on that railway. At Rice's Point there are 55 tracks, each 4,000 feet long. The main tracks, over which all trains, not used for switching purposes exclusively, are operated, are north of the tracks over which the trains in controversy were operated. Along these switch tracks there are a number of yards, among them Rice's Point yard and Furnace yard, all termed "Duluth Terminals," and commonly referred to as "D. T. Tracks." It was between these two yards the trains mentioned in these two counts were operated without having 85 per cent. of the cars equipped with air brakes.

At one of the points this track crossed the tracks of the Duluth, Winnipeg & Pacific Railroad, which is used by that road for freight trains moving through West Duluth to Superior, Wis. Further east this track crosses the tracks of another line, which are used for general traffic. It also crosses a track of the Duluth, Missabe & Northern Railroad. The yards along this "D. T." track are all operated as one yard. There are no train orders, time cards or block signals giving the movement of cars along this track, and no train has the right of way over any other train; they are all operated at a slow speed, so that they may be stopped within vision. No freight or passenger trains, either local or through, ever use any part of these "D. T." tracks. The book of rules of the defendant railway company, which governs the operation of the railway, defines the meaning of a main line or main track:

"A track extending through yards and between stations, upon which trains are operated by time-table or train order, or the use of which is controlled by block signals."

The undisputed testimony also establishes the fact that no part of any of these tracks is ever used by any of the trains running between stations, freight or passenger, but that they are used exclusively for switching purposes to supply the industries along these tracks with

loaded cars or empties to be loaded for outgoing freight, for delivery to the main line.

From these facts no other conclusion can be reached than that of the learned trial judge, that these train movements were mere switching operations, and therefore not within the air brake provision of the act of Congress, as determined in the Erie and Chicago, Burlington & Quincy Railroad Cases, supra.

The District Court committed no error in directing a verdict on these counts for the defendant, and its judgment is affirmed.

TWENTY-ONE MINING CO. v. ORIGINAL SIXTEEN TO ONE MINE, Inc.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3205.

MINES AND MINERALS ⟸31(1)—MINING CLAIMS—EXTRALATERAL RIGHTS.

Under Rev. St. § 2322 (Comp. St. § 4618), which gives the owner of a mining claim "the exclusive right of possession and enjoyment of all veins * * * throughout their entire depth" which apex in his claim, in following such a vein beyond his side lines he is not confined to the vein itself, but may extend his workings beyond its walls, if necessary for the proper and economical working of the vein.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit in equity by the Twenty-One Mining Company against the Original Sixteen to One Mine, Incorporated. From an order denying a preliminary injunction, complainant appeals. Affirmed.

See, also, 254 Fed. 630.

John B. Clayberg, Frank R. Wehe, and Bert Schlesinger, all of San Francisco, Cal., for appellant.

William E. Colby, John S. Partridge, and Grant H. Smith, all of San Francisco, Cal., and Carroll Searls, of Nevada City, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and DOOLING, District Judge.

DOOLING, District Judge. The appellant was plaintiff and the appellee defendant in the lower court, and they will be so designated here. The plaintiff is the owner of two quartz lode mining claims, the Valentine and the Belmont, located in Sierra county, Cal. The defendant is the owner of a similar claim, the Sixteen to One, adjoining the Belmont. Beneath the surface of the Belmont and Valentine claims there is a valuable vein. The District Court for the Northern District of California has by decree determined that the apex of this vein is located within the surface boundaries of the Sixteen to One claim.

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The defendant, pursuing this vein downwards from its own claim, is operating beneath the surface of the Belmont and Valentine claims. The present action is for the purpose of enjoining such operation as is now, and unless prevented will be, carried on. The complaint is that defendant in pursuing the vein beneath the surface of plaintiff's claims has not confined its operations to the vein itself, but has gone, and will continue to go, outside the boundaries and limits of the vein, and commit irreparable damage and injury to the said claims beneath their surface by digging up, excavating, and removing quartz, rock, and earth therefrom.

The defendant claims the right, and alleges its purpose, to remove only such quantities of barren and worthless country rock in the immediate vicinity of the vein in the walls thereof as may be necessary for the profitable and economic working of the vein, and as may be reasonably necessary for such purpose, and in accordance with the customs and usages of the art and science of mining under similar circumstances. The vein is undulating and waving in its character and of varying width, narrowing down in some instances to about 2 feet and in other places widening out to a width of over 8 feet between the walls. The defendant has run and is running its main working shaft in as nearly a straight line as possible, and in so doing it does not follow the undulations, curvatures, and faults of the vein.

The plaintiff applied to the trial court for a preliminary injunction upon notice. When the matter came on for hearing, plaintiff's counsel stated to the court:

"That the whole question involved and presented for determination was whether, in mining the Sixteen to One vein extralaterally underneath the surface of plaintiff's claims, the defendant was confined to working entirely within the walls of its vein, or whether it had the right to cut into the country rock on either side of the vein, where necessary for its mining operations, either to keep its workings straight or regular, as is customary in such operations where the vein undulates or changes in direction, or when the vein narrows down to a width less than the convenient and ordinary width of the usual mining operations; plaintiff's contention being that the right of defendant was confined entirely within the walls of its vein and that these walls could not be transgressed, no matter how narrow the space."

Upon this statement the court declared that it did not think the plaintiff's proposition could be sustained, and that the application for a preliminary injunction would have to be denied. From the order denying such application this appeal is taken.

It will be observed that the question as to how far defendant has departed or will depart from the vein itself in its operations beneath the surface of plaintiff's claims was not presented to the court below, nor was the court asked to consider it. It was asked to determine as a matter of law that—

"the right of the defendant was confined to operations entirely within the walls of the vein, and that those walls could not be transgressed, no matter how narrow the space."

The court held that the proposition as stated could not be sustained. Whether or not it erred in so holding is the sole question presented here. The rights of both parties are derived from section 2322, Re-

vised Statutes (Comp. St. § 4618), which provides that the locators of all mining locations on any mineral vein, lode, or ledge situated on the public domain—

"shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downwards vertically."

This statute must be so construed as to give it effect. Its language is:

"Exclusive right of possession and enjoyment of *all* veins, lodes or ledges throughout their entire depth."

It would be difficult to select language more comprehensive. It does not include such veins only as are wide enough to permit of mining operations within their walls, but includes all veins of whatever width. It gives, not only the exclusive right of possession of such veins, but the exclusive right of enjoyment as well, and throughout their entire depth.

To that extent the rights of the owner of a claim beneath the surface of which such veins extend downward are diminished. He takes his claim under the statute subject to the exclusive right by another to the possession and enjoyment of such veins, granted to such other by the same statute. To give this statute any practical effect we must accord to the word "enjoyment" a practical meaning. The exclusive right of enjoyment of a vein, to be of any value, must include the right to mine and extract the mineral contained in it. To say that one has the exclusive right of possession and enjoyment of a valuable vein throughout its entire depth, but that he cannot extract the mineral therefrom, because it is too narrow, or in places becomes too narrow, to permit of mining operations within its walls, is to say that, when Congress used the words "all veins," it meant only "all wide and straight veins."

Mining is a practical business. In its operations no miner knowingly goes to the expense of removing unnecessary rock, running unnecessary tunnels, or wandering further from the vein the enjoyment of which the statute gives to him, than is necessary for economical work. The extent to which one may deviate from the vein itself must, of course, depend upon the characteristics of each particular vein, and no rule can be formulated of general application; but that in following a vein downwards the apex owner is not confined to the vein itself is indicated by the closing provision of section 2322:

"Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

By this provision he is prevented from entering upon the surface of the claim beneath which his vein extends, and his exclusion in terms from the surface suggests that beneath the surface some latitude of operation was contemplated. In the present case the trial court was called upon to decide that there could be no departure from within the walls of the vein under any circumstances.

We are convinced that, in stating its claim thus broadly, plaintiff gave to the statute a construction entirely too narrow, and one which in many, if not, indeed, in all, cases would defeat the right which Congress not only intended to grant, but which it did grant in very apt words.

Counsel for plaintiff declares that the trial court—

"exercised no discretion in the matter at all, but decided that the fundamental legal principle upon which we based the right to a preliminary injunction could not be sustained."

We agree with the trial court that the principle as stated cannot be sustained. This being so, we do not feel called upon to balance the affidavits to ascertain whether defendant has departed or will depart from the vein in question to a greater extent than the conditions require, but will leave that to be determined by the trial court upon the final hearing of the cause.

The order is therefore affirmed.

THE FEARLESS.*

SHIPOWNERS' & MERCHANTS' TUGBOAT CO. v. A. H. BULL & CO., Inc.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3199.

TOWAGE ⇐11(7)—ASSISTING MOVING STEAMSHIP—NEGLIGENCE.

A tug, employed to assist a steamship in moving to dry dock, which, without speaking to her captain, towed her stern first from her slip and dropped the towline, which fouled her propeller, *held* in fault for her injury by being driven by wind and tide against a pier.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit in admiralty by A. H. Bull & Co., Incorporated, against the tug Fearless; the Shipowners' & Merchants' Tugboat Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

William Denman and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant.

E. S. Pillsbury, F. D. Madison, Alfred Sutro, and Oscar Sutro, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. We think this a plain case, and that it was rightly decided by the learned judge of the court below. It grew out of damage to the appellee's steamship Edith, caused by its collision with Pier 32 in the harbor of San Francisco, by reason of the alleged negligent management and maneuvering of the tug Fearless, which the ship had employed to assist it in moving from its then position in the slip between Piers 44 and 46 to the dry dock at Hunter's Point. The

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 12, 1919.

piers there are numbered consecutively to the northerly from Pier 46, as 44, 42, 40, 38, 36, 34, and 32, and the maneuvers involved in the case were confined to the waters of the bay off Piers 46 to 32. Pier 46 extends into the bay about 800 feet from the water-front line; 44, 42, and 40 extend 650 feet from the water-front line; 38, 667 feet; 36, 721 feet; 34, 662 feet; and 32, 805 feet. On account of the bend in the shore, pier head 32 extends to the easterly over 300 feet beyond pier heads 44, 42, 40, and 38, while it extends over 200 feet beyond pier head 34. At the time in question a southeasterly wind of about 18 miles was blowing, and an ebb tide was then flowing in direction from Pier 46 to Pier 32, and, on account of the narrowing of the bay at that point, on towards the shore line.

The Edith was lying in the slip between Piers 46 and 44, with her bow to the shore and with her stern consequently pointing off shore. The tug was, as has been said, engaged to assist the ship in her movement from her place in the slip to the dry dock; the ship being under her own steam, and her master intending to back his ship out of the slip, and, with the assistance of the tug, to turn her bow into the wind and tide, and thus proceed in a southeasterly direction to the dry dock at Hunter's Point.

The evidence is without conflict to the effect that, although the tug was engaged to assist the ship in that maneuver, the captain of the tug proceeded with its undertaking without the slightest effort to ascertain from the master of the ship what his plans were with respect to the maneuver. We extract from the testimony of the captain of the tug, as follows:

"Q. What instructions did you get from the captain of the Edith? A. I didn't get any instructions from the captain of the Edith, except to go ahead. Q. Did you consult with him before you went out of the slip? A. No. Q. Did you have a talk with anybody at the office (of the tugboat company) as to what should be done? A. Capt. Randall at the office told me what to do. Q. What did he tell you to do? A. He told me to go up there and assist the ship to dry dock. Q. Did he say anything else? A. Nothing else. Q. When you got up to the Edith, did you have any consultation with the captain? A. No. Q. You waited until he got ready— A. (interrupting). Waited until he got ready and told me to go ahead. Q. Did you consider this a towage contract, or what you call an assist? A. They call it an assist. Q. In an assist, you take the orders of the master of the vessel? A. Take the orders from the master. Q. You make the lines fast that he tells you? A. We generally arrange it, making fast the line ourselves. Q. You do not wait for his orders about that? A. When I had enough, I told him to make fast. Q. Did you drop the line when he told you to? A. In this particular case he did not tell me to. Q. Now, I am talking about an assist. As I understand it, there are two kinds of towage arrangements; one is where you have a straight tow, a towage contract, a towage duty, and the other where you have what they call an assist. Isn't that correct? A. Correct. Q. You distinguish between those two cases? A. Yes; I do. Q. And they are generally distinguished, aren't they? They are generally recognized as two kinds of service? A. Yes. Q. One is called towage, and the other is called an assist? A. An assist; that is also a tow, to assist. Q. As a matter of fact, is there any difference between the two kinds of service? A. Well, there is. Q. In one case you take your orders—in one case you are in charge and the other you are not? A. Correct. Q. Is that the difference? A. That is the difference. Q. Now, in those cases in which you are in charge, the thing is done the way you direct? A. Yes. Q. And in those cases in which you are not in charge you get orders as to how it should be done. Is that correct? A. Yes. Q. Is that

correct? A. Correct. Q. So that, in the case of an assist, you would be getting the orders of the captain, would you? A. I would be getting the orders from the captain; yes."

The Edith was about 328 feet long and of about 2,700 tons register, and drew about 10 feet aft and 6 feet forward. The towline used by the tug in assisting the ship in backing from the dock was about 30 fathoms in length, and at the end of it attached to the ship her master stationed his second mate for the purpose, according to his deposition, of by that means communicating with the tug, concerning which, however, the mate in the course of his deposition testified as follows:

"Q. You said you expected the tug to get orders from the master? A. Yes. Q. How were you expecting the master of your ship—he was on the bridge; isn't that right? A. Yes. Q. How did you expect the master on the bridge of your ship to give an order to the tug to go ahead? A. By the whistle. Q. What whistle would he make? A. That depends on which way they make it out between them. Q. What? A. They make that out between them, what kind of a whistle they are going to use. Q. They usually agree on what the signal shall be? A. Yes. * * * Q. Your duty on the stern is to keep an eye on the towing line? A. But we are not supposed to watch the tug, too; he is supposed to give us a signal what to do. Q. Who is? A. The tug captain. Q. What signal did you expect the tug to give? A. I expected the tug captain to blow a short blast, the same as the rest of them do. Q. Had you ever been towed by that tug before? A. No. Q. Did you ever have any conversation with her master before starting out as to what signals he would give you? A. No, sir."

The case shows that in that condition of affairs the maneuver in question commenced by the reverse movement of the engines of the ship, and by the pulling of the tug on the towline attached to the stern of the ship, by which the latter was carried out into the water of the bay, variously stated in the record at from 30 or 40 to about 700 feet from the slip. Whatever the real distance, from that point the ship's captain intended to swing her bow southeasterly and proceed to the dry dock, using the holding of the towline attached to the stern of the ship as a pivot. It appears, however, that the tug's captain, without direction from the master of the ship, and without giving him any notice whatever of his intention so to do, let go the towline, which soon got into the wheel, thus fouling the ship's propeller and making necessary the stopping of her engines. We think it does not admit of doubt that such action of the captain of the tug was a gross fault on its part and the real cause of the resultant damage.

It is suggested that the operation which the tug intended and attempted was to drop the stern towline of the Edith (which it did), then circle around to her starboard bow, and there take a bowline, and by means of that pull the ship's bow into the tide and wind. Indeed, the captain of the tug so testified in effect in answer to questions by the court, as is shown by this extract from his testimony:

"Q. Why did you cast off there 700 feet away from the wharf? A. Well, we cast off because I intended to come under the bow of the ship and get a bowline and pull her around. Q. Did you have room enough for that? A. I had room enough; if I had got the line, I would have had room enough. Q. You made no investigation or inquiry to find out whether there was a line you could get? A. I never went aboard the ship; I didn't know what they had there. Q. You undertook that maneuver without finding out what they

had aboard ship? A. I took the captain's word for that. Q. What did he tell you? A. He told me to pull the ship out of the wharf, from the wharf. Q. You didn't know what you were going to do, and you did not know what he was going to do? A. No."

Such a movement on the part of the tug was not only not directed by the master of the ship, but was directly contrary to the latter's own movement and plan, and was commenced without the slightest notice to the ship of the tug's action. In our opinion it is impossible to hold it either authorized or justified.

We agree with the court below that it was to those faults the accident was due, and that the tug was guilty of further fault in failing to pass to the ship while she was drifting a line of sufficient strength to hold her, which the tug should have been prepared to do. Nor are we able to agree with the proctors for the appellant that the master of the ship should be held in fault in failing to drop her anchors, the condition of the wind and the water, and the location of the ship with respect to the various piers being duly considered.

The judgment is affirmed.

CRANE CO. v. BUSDIEKER.*

(Circuit Court of Appeals, Eighth Circuit. January 27, 1919.)

No. 5120.

1. APPEAL AND ERROR ⟸927(7)—REVIEW—REFUSAL OF DIRECTED VERDICT.
Where defendant complains of refusal of trial court to direct verdict in its favor, *held*, that every material issue upon which there was substantial conflict in the evidence must be treated as decided in favor of plaintiff by the verdict of the jury.

2. NEGLIGENCE ⟸59—PROXIMATE CAUSE.
An injury that could not have been foreseen or reasonably anticipated by a person of ordinary prudence as the probable result of an act of alleged negligence is not actionable, nor is an injury or death that is not the actual or probable consequence of the act, and that would not have resulted from it, but for the interposition of some new and independent cause that could not have been anticipated.

3. DEATH ⟸17—ACTIONS—NEGLIGENCE—PROXIMATE CAUSE.
Where plaintiff's husband, who volunteered to guide the tongue of a wagon which another teamster was trying to draw off of an apron of a wharf boat, was, when the wagon was suddenly and unexpectedly moved, thrown under the team and wagon of defendant, whose driver, knowing the ineffectual attempts to move the wagon, which was fast, proceeded to drive onto the apron, *held*, that the act of defendant's driver was not the proximate cause of the accident, for it could not have been anticipated.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Frances J. Busdieker against the Crane Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions to grant new trial.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied April 2, 1919.

Percy Werner, of St. Louis, Mo. (George M. Block and Frank B. Coleman, both of St. Louis, Mo., on the brief), for plaintiff in error.

Arthur E. Kammerer, of St. Louis, Mo. (Leo Rassieur and Leo Rassieur, Jr., both of St. Louis, Mo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

SANBORN, Circuit Judge. The Crane Company, a corporation, complains that at the trial of an action, brought by Mrs. Frances J. Busdieker for damages for its negligence, which she asserted caused the death of her husband, the court below, at the close of the evidence, refused to instruct the jury to return a verdict in its favor, on the ground that there was no substantial evidence of its causal negligence, and the jury returned a verdict against it for $7,500.

[1] In considering this complaint, every material issue upon which there is a substantial conflict in the evidence must be and has been treated as decided in favor of Mrs. Busdieker by the verdict of the jury. On that basis the facts which conditioned the decision of the complaint of the Crane Company are these: Edward Brown, an employé of that company, was the driver of a team drawing a loaded wagon toward a boat which lay in the river by the side of the levee at St. Louis, upon which he was to unload the wagon. The negligence alleged is the negligence of this driver. In order to get his wagon onto the boat, where it was to be unloaded, it was necessary for him to drive from the levee upon and across an apron and a bridge onto the wharfboat. The levee lay on the west side of the river, sloping downward easterly to and beneath the water of the river. The west side of the apron lay on the levee while its east side was attached to the west side of the bridge several feet above the water, and the bridge extended easterly to the wharfboat, so that over the apron and the bridge loaded wagons could be drawn from the levee onto the wharfboat. Brown drove his team from the south to a point on the levee whence he could conveniently drive down upon the apron, and thence across the bridge to the wharfboat and there on the levee he stopped. Before he arrived there, the driver of a team attached to a loaded fruit wagon, in undertaking to drive onto the apron, had driven the north wheels of his wagon down the levee along the north end of the apron and the south wheels thereof onto the apron, and there the wagon stuck fast and became immovable. The driver unhitched his mules and drove them up onto the levee, leaving the forward end of the tongue of his wagon with chains attached to it pointing southeasterly and resting on the apron. Some time after this Mr. Mohrman, driving a team drawing a wagon, came off the wharfboat, and, seeing the condition of the fruit wagon, he backed up to it, after he had passed it, attached the rear axle of his wagon to the rear axle of the fruit wagon with a strong rope, and attempted, by driving up his team, to draw the fruit wagon up the levee. When Brown drove up from the south with his load, Mohrman was trying in vain to move the fruit wagon. Brown waited and watched his attempts for some time, but the fruit wagon

remained immovable. Mohrman had then been trying to pull it from its place for from 5 to 15 minutes. There was room enough on the south side of the fruit wagon for Brown's wagon to pass it and go onto the wharfboat, and the time for the boat upon which his load was to go was approaching. Mohrman drove his team to the southwest, but the fruit wagon held fast. Brown then asked Mohrman to turn his team northerly and hold them there, and told him that he thought he could drive by the fruit wagon. Mohrman replied that he did not think that Brown could do so, and that he would not pull down there. At about this time Mr. Busdieker had voluntarily gone onto the apron and taken hold of the chains attached to the tongue of the fruit wagon, to steer it in case Mohrman should succeed in moving it. Pursuant to Brown's request, Mohrman turned his team northerly. Brown drove his team down the levee onto the apron. Just as they were going onto the apron, Mohrman, as he testified, "gave another jerk, not expecting to get it loose, and jerked the wagon loose." When he thus moved the wagon, its tongue swung forcibly south and threw Busdieker under the horses and wagon of Brown as he came up the apron, and they ran over and killed him.

[2, 3] An injury or death that is the natural and probable consequence of an act of alleged negligence is actionable. But an injury that could not have been foreseen or reasonably anticipated, by a person of ordinary prudence and intelligence, as the probable result of an act of alleged negligence, is not actionable; nor is an injury or death that is not the natural or probable consequence of the act of alleged negligence, and that would not have resulted from it, but for the interposition of some new and independent cause that could not have been anticipated. Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. Elliott, 55 Fed. 949, 952, 954, 5 C. C. A. 347, 20 L. R. A. 582; Railway Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256; Hoag v. Railroad Co., 85 Pa. 298, 299, 27 Am. Rep. 653; Cole v. German Savings & Loan Society, 124 Fed. 113, 115, 117, 59 C. C. A. 593, 63 L. R. A. 416; Western Union Telegraph Co. v. Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; American Bridge Co. v. Seeds, 144 Fed. 605, 610, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041. When Brown drove his team down the levee onto the apron, Mohrman had been trying to pull the fruit wagon from its place for from 5 to 15 minutes, but had failed to move it. Apparently it was stuck so fast that he could not and would not move it by the use of his team. Its subsequent motion was not caused by Brown's act of driving his team upon the platform, and that motion, the swing of the tongue, and the death of Busdieker were not the natural or probable consequence of Brown's driving on the platform, nor would a man of reasonable prudence and intelligence in his situation, knowing the failure of the repeated futile attempts of Mohrman to move the fruit wagon, that Mohrman knew that Brown was about to drive down upon the apron, that Mohrman had turned his horses northerly at Brown's request, to let the latter drive down past the fruit wagon, have anticipated that Mohrman would drive up his horses, jerk the fruit wagon loose, and cause the tongue to throw Busdieker down on the

apron while Brown was driving his horses across it. Nor was Brown's driving his wagon upon the platform the proximate cause of Busdieker's injury and death. Neither could nor would have resulted therefrom, had not the new independent cause, the sudden and inopportune jerk of the fruit wagon by Mohrman, have caused the violent swing of its tongue at the instant when Brown was driving onto the apron, an act which could not have been foreseen or anticipated by Brown, have interrupted the natural sequence of events, turned it aside from their natural course, and produced the lamentable results. There was no substantial evidence here of causal negligence of the Crane Company or of Brown its driver.

The judgment below must therefore be reversed, and the cause must be remanded to the court below, with instructions to grant a new trial; and it is so ordered.

THE LYRA.

FEDERAL SUGAR REFINING CO. v. McDONALD.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

Nos. 3214, 3215.

1. SHIPPING ⊂⊃132(3)—SUIT FOR DAMAGE TO CARGO—BURDEN OF PROOF.
Where the charterer of a steamship furnishes the whole cargo, and loads and discharges with its own stevedores, the vessel is not a common carrier, and the burden rests upon the charterer to affirmatively prove negligence, causing damage to the cargo.

2. SHIPPING ⊂⊃132(5)—DAMAGE TO CARGO—LIABILITY OF VESSEL.
Evidence *held* to sustain a finding that damage to a cargo of sugar, by caking of the sugar in some of the sacks, was not due to negligence of the ship, but to exposure of the sacks to moisture from one to three days on barges before loading by libelant.

3. SHIPPING ⊂⊃132(1)—SUIT FOR DAMAGE TO CARGO—COSTS.
In a suit by a shipper to recover for damage to cargo, where libelant retained from freight due more than double the amount of damages proved, it was not error to dismiss the libel, with costs to respondent.

4. ADMIRALTY ⊂⊃121—COSTS—DISCRETION OF COURT.
In admiralty, the matter of costs rests in the discretion of the court.

Appeal from the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Suits in admiralty by the Federal Sugar Refining Company against the American steamship Lyra, and by J. A. McDonald, master of the Lyra, against the Federal Sugar Refining Company. From the decrees, the Sugar Refining Company appeals. Affirmed.

See, also, 231 Fed. 250.

McCutchen, Olney & Willard, of San Francisco, Cal., for appellant.

William Denman and Denman & Arnold, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. In May, 1910, the appellant shipped from the port of New York to San Francisco, by way of Cape Horn,

112,000 sacks of sugar on the steamer Lyra. The voyage occupied 71 days, and on the termination thereof, it was found that 30,000 sacks of the sugar were caked. For that and other damage to the cargo the appellant filed its libel, alleging that the caking was due to improper stowage, care, and custody of the sugar, in that it was improperly dunnaged and protected, and that the compartment of the steamship in which it was stowed was insufficiently ventilated, by reason whereof the steamship and the sugar were caused to sweat, and that the sweat moistened, hardened, and caked the sugar. It also alleged in its libel that it had paid all of the freight on the sugar, except the sum of $5,764.27, which it had retained and credited in part payment on the damage to the cargo, which it alleged to be $19,050.77, and judgment was demanded for the balance of $13,286.50.

The master of the steamship brought a libel against the appellant to recover the remainder of the freight money, $5,764.27, and interest thereon. The two libels were consolidated for trial in the court below. It was stipulated that the appellant was damaged in the sum of $2,548.40, by reason of injury to the sugar from causes other than from caking. The court below found upon the evidence that the caking of the sugar was caused, not by improper stowage or want of ventilation, but by exposure to moisture in the process of loading the same at the port of departure, and denied the liability of the appellee for damages therefor.

[1] The appellant chartered the steamship, furnished the whole cargo, and loaded and discharged her with its own stevedores. The charter party recited:

"Bills of lading to be signed without prejudice to this charter, but not less than charter rates."

The steamship was therefore not a common carrier, and the burden was cast upon the appellant to prove negligence affirmatively. The Eri, 154 Fed. 333, 83 C. C. A. 205; The Wildenfels, 161 Fed. 864, 89 C. C. A. 58; The Royal Sceptre (D. C.) 187 Fed. 224; The Rokeby (D. C.) 202 Fed. 322.

[2] We might properly dispose of the questions of fact involved on this appeal, by applying the rule that findings of fact in an admiralty case, made by a trial court on conflicting evidence for the most part taken in open court, should not be disturbed by an appellate court, except for manifest error (The Beaver, 253 Fed. 312, —— C. C. A. ——, and cases there cited); but, in view of the earnest contention of the appellant that the finding of the court below is against the decided weight of the evidence, we have given the record careful consideration. We deduce from it the following conclusions:

First. There is ample evidence to indicate that at the time of loading the cargo was exposed to conditions which would naturally account for the caking of the sugar. The sugar was conveyed to the vessel on barges, and it lay on the barges from one to three days. It was sacked while warm, having come fresh from a system of hot-air driers, and in that condition it was placed upon the barges. The evidence was that warm sugar exceptionally attracts and absorbs moisture from the air, and that above a body of water, to an altitude of from 12 to 15

feet, moisture ranges from 75 to 100 degrees, and that, when it is 80 degrees or more, it will be absorbed by sacked sugar. The weather during the period of loading was changeable, and occasional showers occurred. The appellant insists that the sugar while on the barges was protected by coverings against moisture; but the evidence is that, during the process of loading the sugar on the barges, there was no covering whatever, that the coverings which were used were on the sides, to protect the sugar against spray, with an A-shaped tent above to protect it against rain, and that through the ends of the tent covering the air was permitted to pass over the topmost layers of the sacks.

Second. The condition in which the sugar was found when unloaded from the ship can be explained on no theory other than that the moisture which caused the caking was absorbed while the sugar was on the barges. The testimony of the appellant's stevedores and others is that about 10 per cent. of the caked sacks were on the surface, that sacks of caked sugar were found alongside of others that were wholly free from caking, and that groups of caked sacks were found in the interior of the piles, surrounded by sacks that were not caked. The testimony of the master and the mate of the steamship is relied upon by the appellant as indicating that the sugar was caked only on the tops and outsides of the piles as it was stowed in the vessel. But their inspection was made before unloading, by feeling the sacks, and there they found, as they testified, a small percentage of the sacks caked. They testified nothing of the condition of the interior of the piles, and their testimony is not in real conflict with that of the stevedores. As the court below said:

"If, in the present instance, the moisture were absorbed after the sugar was stowed, you would expect to find the outer layers most affected; but, if the moisture was absorbed before the sugar was stowed, we would expect to find the conditions actually existing—that is to say, if the load or any portion of it upon any lighter absorbed moisture sufficient to produce caking, we would find the caked sugar distributed just as the moist sugar from the lighter was stowed."

[3, 4] The appellant assigns error to the form of the decree and the allowance of costs. This matter was brought to the attention of the court below, and the court held that the appellant was not entitled to a decree for any amount upon its libel, since it had withheld from the shipowner more than twice as much in freight as it had suffered in damages, and therefore was not entitled to a decree for $2,548.40 for its damages and costs; that, if that action stood alone, it would be dismissed, for the reason that the appellant retained of freight money belonging to the appellee $3,215.87 in excess of any damage for which the ship was liable; and that the appellant could not in any view be regarded as the prevailing party. The court directed a decree that the appellant's libel be dismissed, with costs to the appellee, and that upon the appellee's libel the appellee recover $3,215.87, with interest and costs. We discover no error in those rulings. The matter of costs rested in the discretion of the court below. The Maggie J. Smith, 123 U. S. 349, 356, 8 Sup. Ct. 159, 31 L. Ed. 175.

The decree is affirmed.

MOLLER v. HERRING.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1919.)

No. 3292.

1. CONTRACTS ⟸303(2)—ACTIONS FOR BREACH—DEFENSES—PERFORMANCE PREVENTED BY LAW.

A court will not impose damages for breach of a contract, if the breach was occasioned by the law, as by the appointment of a receiver at suit of a third party, who took possession of the property which was the subject-matter of the contract and thereby prevented performance.

2. APPEAL AND ERROR ⟸878(1)—DEFENDANT IN ERROR—RIGHT TO ASSIGN ERROR.

Where one party only sues out a writ of error to review a judgment, the other party may not assign error in the appellate court.

In Error to the District Court of the United States for the Southern District of Texas; J. C. Hutcheson, Judge.

Action at law by A. L. Moller against F. E. Herring. From a judgment in his favor, plaintiff brings error. Affirmed.

This case concerns a contract between the parties for the recovery and delivery by the plaintiff to the defendant of a lot of stranded cotton, carried away from the Moody & Co. compress at Galveston, Tex., by the memorable storm of August 16, 1915, and scattered along the coast on the mainland opposite Galveston. The case was once before here, where the judgment below, dismissing plaintiff's action, was reversed, 249 Fed. 602, 161 C. C. A. 528. The defendant, Herring, claimed to have lost cotton which had been stored in the compress of Moody & Co., and authorized the plaintiff, Moller, in writing, on September 2, 1915, to "collect as much as possible, agreeing to pay salvage therefor at $10 per bale for same f. o. b. cars." Plaintiff proceeded on this authority, and picked up and assembled at Alta Loma, Tex., 578 bales of stranded cotton. Sixty-eight bales were actually delivered f. o. b. cars and received by the defendant September 3d. Fifty-two bales more were loaded on cars at Alta Loma September 4th, but this lot, as well as the residue, 458 bales, which had not been loaded on cars, were not delivered to defendant, because same were impounded by a receiver of the United States District Court for the Southern District of Texas in an equity cause therein begun on the 3d day of September, 1915, in which cause, on the same day, a receiver for all the stranded and lost cotton was appointed. It is admitted that the receiver, under orders of the court, took possession of all the cotton collected by the plaintiff and his agents under the agreement, except the 68 bales admitted to have been received by the defendant. The defendant was impleaded in the equity cause for 68 bales of cotton he had received from the plaintiff, and refused to pay the plaintiff for any cotton, including the 68 bales which had been delivered by the plaintiff.

The plaintiff, also impleaded in the equity cause, answered, asserting his lien for salvage, and was awarded, in due course, by the court $2.50 per bale for 510 bales which the receiver had taken over. Subsequently plaintiff brought this action against the defendant for $4,505, claimed as a balance due him for 578 bales of the cotton salved by him at the instance of the defendant, less the salvage award of $1,020 on 510 bales seized by the receiver.

The substantial facts are not controverted, except that plaintiff claims actual delivery to the defendant of 120 bales, while the defendant insists that 52 bales of this lot were not loaded "f. o. b. cars" as required by the contract, and besides was seized by the receiver before shipment. The plaintiff's action, therefore, is based on the theory that he had a subsisting contract with defendant for the salvage of as many as 1,000 bales of cotton; that he recovered 578 bales and made delivery of the same to the defendant,

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

or to the receiver, whom plaintiff characterizes as defendant's agent. The defendant insists that the agreement was wholly abrogated by the court's intervention and rightful possession of the cotton through its receiver. The parties, by stipulation, waived a jury, and, after adducing much testimony, submitted the cause on final proofs, and the court found that the plaintiff had delivered to the defendant 120 bales of cotton under the contract, for which he was entitled to $10 per bale for that amount, less an award of $2.50 per bale for the 52 bales loaded on cars which were seized by the receiver before shipment, thereupon rendering a general judgment in favor of the plaintiff for $1,070, with interest from September 4, 1915, at 6 per cent. per annum. The plaintiff, dissatisfied with this judgment, sued out his writ of error to this court, and assigns as error, generally, the judgment in his favor for $1,070, which was less than what he claimed under the contract for the amount of cotton recovered and delivered to defendant or the receiver, to wit, 578 bales. Defendant filed cross-assignments, and cites as error the judgment against him, and particularly the sum of $7.50 per bale allowed the plaintiff for the 52 bales loaded on cars, and which the receiver seized before shipment. But these assignments cannot be considered for reasons stated hereafter.

Maco Stewart and Albert J. De Lange, both of Galveston, Tex., for plaintiff in error.

Elliott Cage, of Houston, Tex., for defendant in error

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge (after stating the facts as above). [1] The plaintiff complains by his general assignment that the court erred in giving judgment in his favor for only $1,070, and allowing him only $7.50 per bale for 52 bales loaded on cars, and disallowing his claim in toto on 458 bales delivered to the receiver.

It has been seen that plaintiff claims damages for a breach of contract, but the contract required a delivery of the cotton "f. o. b. cars," and it is plain that there was delivery of only 68 bales in the manner specified in the contract. That further delivery, as contemplated by the parties, was prevented, does not appear to have been due to any fault of the defendant. The law intervened at the instance of other parties, and the court took jurisdiction of the subject-matter, and possession, by its receiver, of the cotton collected by plaintiff. The receiver, of course, was the representative of the court, and could not be in any sense the representative of the defendant. Wiswall v. Sampson, 14 How. 64, 65, 14 L. Ed. 322; Metcalf v. Barker, 187 U. S. 175, 23 Sup. Ct. 67, 47 L. Ed. 122. The plaintiff and defendant were both impleaded in the equity cause, which sought to impound the cotton, and both were under the legal duty to attorn to the court and abide the judicial determination as to rightful claimants to the property. The lot of 52 bales, which was loaded on cars the same day as the appointment of the receiver and by him intercepted, as well as the other cotton assembled by plaintiff for shipment, from that time on was in custodia legis, and the performance of the contract rendered impossible. The appointment of the receiver was impliedly an injunction against any interference with the custody of the cotton.

A distinction, it has been said, must be taken between cases for specific performance of a contract and those in which damages are sought

for the nonperformance of a contract. The bare fact that the court can decree and enforce the specific performance of the contract shows that its performance is not impossible. But when the contract cannot be specifically performed, and the only remedy is by way of damages, the court will not inflict damages, if the breach for which damages are sought has been occasioned by the law. In such cases it appears the doctrine of damnum absque injuria applies. It is a very well settled rule of law that, if performance is rendered impossible by act of God, the law, or the other party, it is a sufficient excuse. Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; Malcomson v. Wappoo Mills et al. (C. C.) 88 Fed. 680; Kansas Union Life Insurance Co. v. Burman, 141 Fed. 848, 73 C. C. A. 69.

[2] Defendant's assignments are not predicated on a writ of error sued out at his instance. It is settled law that on a writ of error sued out on appeal taken by plaintiff to review a judgment rendered for defendant assignments by the latter in the same record cannot be considered. The rule was early announced in The Maria Martin, 12 Wall. 40, 20 L. Ed. 251.

"Both parties in a civil action may sue out a writ of error to a final judgment, but where one party only exercises the right the other cannot assign error in the appellate court." Paully Jail Building & Manufacturing Co. v. Hemphill Co., 62 Fed. 698, 10 C. C. A. 595; Building & Loan, etc., of Dakota v. Logan, 66 Fed. 827, 14 C. C. A. 133.

While the defendant's errors may not be considered, the plaintiff has no ground to complain of the judgment.

For the reasons indicated, the judgment must be affirmed; and it is so ordered.

THE TORDENSKJOLD.

THE TAGGART BROTHERS.

(Circuit Court of Appeals, Fifth Circuit. February 8, 1919.)

No. 3275.

SALVAGE ⊂=30—RESCUING STRANDED STEAMSHIP—AMOUNT OF COMPENSATION.

An award of $40,000 salvage, to a tug valued at $85,000 for releasing a steamship worth, with cargo, $1,000,000, stranded off the Florida coast, *held* excessive, and reduced to $10,000; the service, which required the most of two days, being rendered in fair weather and with little danger.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit in admiralty by Thomas S. Davis, master of the tug Taggart Brothers, against the Norwegian steamship Tordenskjold; Anders Kjole, master, claimant. Decree for libelant, and claimant appeals. Modified and affirmed.

For opinion below, see 253 Fed. 273.

This is an appeal from a decree against the claimant of the Norwegian steamship Tordenskjold and its cargo and the claimant's surety,

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

awarding $40,000 and costs to the owner and the master and crew of the tug Taggart Brothers; the decree providing for the payment of two-thirds of the amount awarded to the owner of the tug, and that the remaining one-third be distributed among the master and crew of the tug in proportion to the wages of each, as set forth in the libel. The opinion rendered by the District Judge (253 Fed. 273) contains the following statement:

"The Tordenskjold, a Norwegian steamer, left the port of Newport News, October 22, 1917, loaded with approximately 5,500 tons of coal, bound for Havana. On the evening of October 26, about 5:30 o'clock, she grounded some 14 miles south of Hillsborough Light, on the Florida coast. The American tug Taggart Brothers, bound from Brunswick to Havana, with two barges, Louis H. and Martha T., having encountered heavy weather, and running short of coal, had anchored the Louis H. in the bight south of Cape Canaverel and the Martha T. opposite Palm Beach, and gone into Miami to get coal. On October 27 a fishing boat notified the captain of the tug that the steamer was ashore and the captain had sent him for assistance. There was another tug, the Resolute, in the harbor of Miami; but she declined to go to the assistance of the stranded ship. Thereupon the Taggart Brothers, after receiving her coal, proceeded to the ship and offered to assist, arriving there between 7 and 8 o'clock in the evening and offering to assist in floating the steamer. This offer was accepted, and being informed that the tide was out, and nothing could be done until high water, the tug lay alongside until next morning, when at high water a hawser was passed to the ship and made fast to the stern bitts, and the tug pulled for something like three hours or more, but could not float her. The only effect was to swing the stern of the ship from west to east; the ship being aground at high water at about hatch No. 2, forward of amidships. About 8 o'clock in the morning of the 28th, the tug, with the consent of the captain of the ship, left to pick up her barges, promising to return for the high water next morning. Finding he could not pick up both barges and return for the morning tide, the tug picked up the Martha T. and returned the morning of the 29th at about 3 o'clock, anchoring the Martha T. a short distance from the ship, and again passed his hawser over the stern of the ship and began to pull, and the ship came off the shoal stern first; the hawser was then passed to the bow and made fast to the forward bitts, and the bow pulled around. After the ship was floated, she grounded again and was again pulled off, and finally towed into deep water, where the mate of the tug was put aboard and she proceeded to Key West. The tug then picked up the Martha T. and anchored her near Cape Florida, and proceeded herself to Miami.

"When the ship first grounded a 2,000-pound anchor was run out about 80 fathoms from the port bow. The officers of the ship claim that the ship first grounded on the 26th at the stern, and by the use of this anchor and the ship's engines, she was floated at high tide on the morning of the 27th and took the shore again. However this may be, there is no question that at the time she took the ground the first time she was proceeding at full speed, and that there was deep water to the east of the reef on which it is claimed she first grounded. The claim that she took the ground so gradually and slowly that one did not realize it, in the light of these admitted facts, seems, to say the least, highly improbable.

"There is a sharp conflict between the testimony of the libelants and claimant of what occurred. Taking all the testimony, it seems to me that the situation was about as follows: The ship was ashore upon an inner reef, there being sufficient water between to float the ship and a channel through the outer reef to deep water. There was only some 250 feet between the two, and the ship from her position did not have steering room to make this channel, had she been able to float herself by jettisoning her cargo, and using her engines. There can be no question that any ship ashore on the Florida Reefs, exposed as this one was to the full force of the sea during the months of September and October, is in great peril. It is true that during the opera-

tions the weather was fine and the seas light, so light that the tug could lay alongside the ship; but nevertheless the position of the ship was one of extreme peril, and it is proper that the court should consider this in arriving at a proper award of salvage. The assistance was promptly and efficiently rendered, and without assistance I am satisfied that she would have been unable to extricate herself. She was ashore from the evening of the 26th to the morning of the 29th, and no effective assistance tendered, except that of this tug; and going to show that she was hard aground is the condition of her plates and the repairs made necessary by this accident.

"Stress was laid on the fact that the tug left the ship for about 19 hours to go for the barges, thereby abandoning the ship; but this was done with the consent of the captain of the ship and with the promise to return the next morning, and the tug did return in time for the morning high water, at which time the ship was floated. Testimony was taken of the value of the ship and cargo, and taking the lowest of these valuations, the value of the property saved was at least $1,000,000; the value of the cargo being about $55,000, and that of the ship $945,000. The value of the tug may be stated at $85,000. * * * There were no elements of heroism or danger to life in the instant case. The only danger to the tug was such as was incident to going to the ship ashore, which in this case was slight, and no damage was suffered except such as was incidental to pulling on the tug's hawser."

G. Bowne Patterson, of Key West, Fla., and E. O. Locke, of Jacksonville, Fla., for appellant.

W. Hunt Harris, of Key West, Fla., for appellees.

Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge (after stating the facts as above). The above-quoted statement, made in the opinion rendered by the District Judge, sufficiently discloses the state of facts upon which the decree appealed from was based. The evidence does not leave it fairly open to question that a meritorious salvage service was rendered. For that service such an amount should be awarded as is enough to cover an adequate compensation for the labor and expense which the enterprise required of the tug and its officers and crew, and also a reward allowed as a bounty in pursuance of the public policy of encouraging preparation for and the making of voluntary exertions for the saving of imperiled ships and their contents; the amount of such reward depending upon the special facts and merits of the service rendered. The Craster Hall, 213 Fed. 436, 130 C. C. A. 72; The George Hawley, 242 Fed. 473, 155 C. C. A. 249. We do not think that, in view of the attending circumstances, the service rendered justified the award which was made. The value of the property saved made it proper to award more than should have been awarded if that value had been greatly less. But the award should be materially less than it properly might have been if the service rendered had involved great peril or serious loss or damage to the tug or its equipment or tows, or grave danger, heroic effort, or unusual hardships to its officers or crew. The amount of the award made indicates that undue weight was attached to the value of the property saved, and that there was a lack of due consideration of the absence of such attending circumstances as would justify the liberality evidenced by the decree. In view of the value of what was saved and of that employed in the rescue, of the time, labor,

and expense involved in the service, and of all the attending circumstances, our conclusion is that the amount that should be awarded is $10,000, instead of $40,000, the amount awarded by the decree appealed from. That decree will be here modified, as just indicated, and, as so modified, it is affirmed, with costs against the appellees.

Modified and affirmed.

THE MUSCONETCONG.

THE HERCULES.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

Nos. 42, 43.

1. COLLISION ⊂⊃98—VESSELS CROSSING—MISTAKING SIGNALS.
   A tug, with tow, passing down the Hudson on a bright day, *held* solely in fault for collision with a crossing ferryboat, which was the privileged vessel, where, although mistaking a signal of the ferryboat, she knew of the mistake in time to have resumed her proper course.
2. COLLISION ⊂⊃98—VESSELS CROSSING—RIGHT OF PRIVILEGED VESSEL TO PROCEED.
   The privileged of two crossing vessels, although knowing that the other has taken an erroneous course, which might result in collision, on giving her warning, and if there is time for her to change her course, has a right to assume that she will do so, and is not in fault for not immediately stopping and reversing.

Appeals from the District Court of the United States for the Southern District of New York.

Suits in admiralty for collision by the Cornell Steamship Company against the ferryboat Musconetcong, the Delaware, Lackawanna & Western Railroad Company, claimant, and by the named Railroad Company against the steam tug Hercules, Cornell Steamboat Company claimant, with cross-libels. From the decree, each libelant appeals. Reversed.

Kirlin, Woolsey & Hickox, of New York City (L. De Grove Potter, of New York City, of counsel), for Cornell Steamboat Co.

Ellis W. Leavenworth, of New York City, for the Musconetcong.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On June 20, 1916, at 6:20 a. m., a clear day, with an ebb tide, the ferryboat Musconetcong, of the Delaware, Lackawanna & Western Railroad Company, left her slip at Fourteenth street, Hoboken, N. J., on its voyage to Twenty-Third street, New York City. This is about directly opposite the Hoboken slip. The master saw the Cornell Steamboat Company's tug Hercules with a scow in tow on a hawser coming down the river east of the middle, between Thirtieth and Thirty-Third streets. There was no reason to expect that the Hercules would in any way interfere with the navigation of the Musconetcong, which was the privileged vessel. When

near the middle of the river, the Musconetcong blew two whistles, intended for the ferryboat Paunpeck, which, in regular trips, runs opposite, and was bound for Hoboken. These whistles were intended for the Paunpeck only. However, the Hercules answered with a signal of two whistles. The Musconetcong immediately blew the alarm, followed by one whistle, which indicated that she did not intend her signal for the Hercules, and that she did not intend to give way to her. A collision resulted by the Hercules striking the port side of the Musconetcong about 50 feet from the bow.

The District Judge, after the trial, found the Hercules solely at fault for violation of the starboard hand rule, and exonerated the Musconetcong. On a rehearing, he later held the Musconetcong was also at fault for failing to reverse or slacken her speed at once after blowing her alarm signal, and decreed that the damages be divided.

[1] The Hercules was clearly at fault. The vessels were on crossing courses, and it was her obligation to keep out of the way of the Musconetcong. Why the Hercules should assume that the two whistles blown for the Paunpeck were intended for her is not made apparent by the testimony of the Hercules. There were no reasons why there should be navigation contrary to the rule; but, even if a mistake were made by the Hercules, she was immediately notified that there would be no agreement to navigate contrary to the rule, and even after that there was ample time for her to have avoided a collision. The Hercules at the time was headed straight down the river, coming along slowly. The Paunpeck was compelled to stop and wait for a New York Central tug, which was going down west and ahead of the Hercules, and but for this she would have crossed ahead of the Hercules, and the Musconetcong could have passed between the New York Central tug and the Hercules safely, for she was going full speed, whereas the Paunpeck had not, at that time, developed much speed. The Musconetcong had almost reached the middle of the river when the two whistles were blown, and after the collision the Paunpeck passed the Musconetcong starboard to starboard. It is apparent that the two whistles were not intended for the Hercules. The burden was upon the Hercules to establish an agreement to navigate contrary to rule. The Scranton, 221 Fed. 609, 137 C. C. A. 333. This she has not done. Indeed, after the notification of the Musconetcong by signal that there would be no change in the rule of navigation, there was still time for the Hercules to have ported or reversed, and thus to have avoided the collision. At this time she was going about 5 or 6 miles, and her proximity to the Musconetcong warrants such a conclusion.

[2] The Musconetcong cannot be held at fault for failing to reverse or slacken her speed at once after the exchange of signals. If the Hercules had obeyed the signals and the rule, the collision would have been avoided; and the Musconetcong, a privileged vessel, was entitled to assume that, although it was proposed to her to give way by the exchange of the two-whistle signals, rejection thereof by her would result in navigation in conformity to the rule. The District Judge found that the Musconetcong ran about a minute and 400 or 500 feet before she started to reverse. She was justified in letting some

time elapse, in order to ascertain whether the Hercules would continue on or would port her helm, and during this lapse of time she conformed to the law in keeping her speed and course even, though the subsequent events proved that stopping and backing would have been better. The Chicago, 125 Fed. 712, 60 C. C. A. 480; The Cygnus, 142 Fed. 85.

As pointed out in The Chicago, 125 Fed. 712, 60 C. C. A. 480, the privileged vessel should not be too quick in assuming that the burdened vessel is not going to yield to it, although its behavior may be erratic. Here, apparently, the Hercules did not change her course or speed until it was too late to avoid the collision. We think the Musconetcong was not at fault, and that the District Judge was correct in his first decision holding the Hercules solely at fault.

The decree will be reversed, and the cause remanded, with instructions to dismiss the libel against the Musconetcong, and to enter a decree against the Hercules for full damages.

KNAUTH et al. v. KNIGHT et al.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1919.)

No. 3303.

1. BANKRUPTCY ⇐140(2)—EQUITABLE LIEN—TRUST ARISING FROM FRAUD.
Where bankrupts each day overdrew their bank account, which was secured by collateral, and each night made deposits to cover, the fact that money fraudulently obtained from complainants was from time to time included in such deposits *held* not to impress the surplus fund arising from the sale of the bank collateral after bankruptcy with a trust in favor of complainants.

2. BANKRUPTCY ⇐140(2)—SUBROGATION ⇐21—NATURE OF RIGHT—PAYMENT OF DEBTOR WITH MONEY OBTAINED BY FRAUD.
The fact that money fraudulently obtained from complainants by bankrupts was used in paying overdrafts at a bank did not give complainants by subrogation a lien on collaterals held by the bank as security.

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Suit in equity by Wilhelm Knauth and others against John W. Knight and others. Decree for defendants, and complainants appeal. Affirmed.

See, also, 219 Fed. 721, 135 C. C. A. 419.

Geo. T. Hogg, of New York City, and E. H. Cabaniss, of Birmingham, Ala., for appellants.

Augustus Benners and Forney Johnston, both of Birmingham, Ala., for appellees.

Before BATTS, Circuit Judge, and FOSTER, District Judge.

FOSTER, District Judge. In this case appellants filed their bill to rescind a fraud practiced on them by the bankrupts, Knight, Yancy

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

& Co., and seeking to impress certain assets of the bankrupt estate with a trust in their favor for the amount of $98,005.58. The District Court dismissed the bill on final hearing, and from that judgment this appeal is prosecuted.

[1] While the record is voluminous, the salient facts may be briefly stated. For a number of years Knight, Yancy & Co., were cotton buyers and exporters in Decatur, Ala., and in 1910 were adjudicated bankrupts. In the course of their business they executed many fictitious bills of lading and other documents, and annexed them as security to drafts which they discounted or sold. When adjudicated bankrupts, they owed nearly $5,000,000 on these fraudulent transactions, including the claim of appellants. The bankrupts did business with the First National Bank of Decatur in the following manner: In the course of the day they would overdraw their account, and at the close of business that day would make deposits to cover the overdraft. The overdrafts were secured by the pledge of certain certificates of stock and warehouse receipts for cotton. Their overdraft sometimes ran up to over $200,000. From time to time, as the drafts were disposed of to appellants, the money obtained from them found its way into the First National Bank, and there mingled with the general funds of the bankrupts, of which it was a small part, and helped to liquidate the daily overdraft.

Appellants elected to rescind the fraudulent transactions by which their money was obtained, and have not participated in the bankruptcy proceedings. After bankruptcy, the bank liquidated the security it held and turned over to the trustee a surplus of about $155,000.

It is the theory of appellants that the money obtained from them went to reduce the indebtedness of the bank secured by the collaterals pledged, and therefore the bankrupt estate was to that extent enriched and a trust created in their favor on the said property. The District Court found against this contention, holding that while appellants' money went to pay an overdraft which was secured by a lien on the property pledged, and reduced the secured indebtedness of the bankrupts to the bank, it also had the effect of enabling the bankrupts to increase their indebtedness of like character and amount on the succeeding business day; therefore the estate was not enriched for the benefit of the general creditors. This holding was correct. It is evident the money went to pay pre-existing debts, and did not increase the free assets at all. Wuerpel v. Com. Bank, 238 Fed. 269, 151 C. C. A. 285.

[2] It is also contended by appellants that, as the money obtained from them went to reduce the lien of the bank on the collaterals held by it, they are subrogated to the rights of the bank. The District Court decided this contention against appellants, and held that, when indebtedness to the bank was paid by depositing the proceeds of the drafts, the lien was satisfied and ceased to exist, so that when bankruptcy intervened the bank had no lien. Error is assigned to this.

Appellants' theory of subrogation is too far-fetched and attenuated to be tenable. In the case of Ætna Life Insurance Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537, the Supreme Court

reviews the authorities, clearly states the principles of subrogation, and quotes with approval the following rule:

"It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect."

It is clear that appellants are not subrogated to the rights of the bank. The funds obtained from appellants by the bankrupts did not come into the possession of the trustee at all, nor did any property into which these funds entered, and there was no actual enrichment of the estate for the benefit of the ordinary creditors.

We do not find the cases cited by appellants persuasive. In each of them the money or property obtained by fraud was traced and identified, and no subsequent lien was created on the fund or property into which it entered.

The judgment of the lower court is affirmed.

SOUTHERN PAC. CO. v. STEPHANY.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3189.

1. CARRIERS ⊂=104—ACTION FOR DELAY OF SHIPMENT—EVIDENCE.
   Where the bill of lading required the carrier to transport the goods with reasonable dispatch, it was not error, in an action for delay, to admit testimony of the shipper that he was told by defendant's clerk, through whom the shipment was made, when it would reach its destination.

2. APPEAL AND ERROR ⊂=248—REVIEW—NECESSITY OF EXCEPTIONS.
   Only rulings to which exceptions were duly taken can be reviewed by the appellate court.

3. EVIDENCE ⊂=155(8)—ADMISSION OF PART OF WRITING—RIGHT TO INTRODUCE ENTIRE WRITING.
   The rule that, when part of a writing is given in evidence by one party, the whole on the same subject may be introduced by the other, is subject to the limitation that no more of the remainder than concerns the same subject and is explanatory of the portion admitted is receivable.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Jeremiah Neterer, Judge.

Action at law by Hilmar Stephany against the Southern Pacific Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. A. Moore and Stanley Moore, both of San Francisco, Cal., for plaintiff in error.

Jay Monroe Latimer, of San Francisco, Cal. (J. E. Pemberton, of San Francisco, Cal., of counsel), for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

GILBERT, Circuit Judge. The defendant in error obtained a judgment against the plaintiff in error for $1,000 as damages for delay in the transportation of goods shipped from San Francisco to New York on August 29, 1916, the goods not having been delivered until October 6, 1916.

[1] Error is assigned to the admission of plaintiff's testimony that at the time of the shipment, in a conversation with the defendant's clerk, through whom the shipment was made, he said:

"I inquired how long this shipment would take to New York City from here, and he told me 15 days. In the conversation I told him I wanted these goods to arrive there for the purpose of reaching certain trade that was in New York in September, 1916, and to whom I expected to sell these goods."

It is contended that it was error to admit this testimony, for the reason that the written contract superseded any verbal agreement. The bill of lading provided:

"No carrier is bound to transport said property by any particular train or vessel or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon."

This bound the carrier to transport the goods with reasonable dispatch. The court, in submitting the case to the jury, limited their inquiry to the question whether the shipment was delivered by the defendant within a reasonable time. The written contract did not forbid the plaintiff to inquire what was a reasonable time, or what was the usual time for such a shipment, and that was what the testimony amounted to. We see no error in its admission.

Error is assigned to the admission of plaintiff's testimony that the value of the goods in New York 15 or 20 days after they were shipped from San Francisco was $6,000. In the bill of lading their value was stated to be $113. The bill of lading provided that:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid."

[2] It is urged that the bill of lading limits damages to the value as stated therein, and N. Y. & Norfolk R. R. v. Peninsula Exchange, 240 U. S. 34, 36 Sup. Ct. 230, 60 L. Ed. 511, L. R. A. 1917A, 193, is cited. But the question whether or not the amount recoverable for delay was limited by the bill of lading is not properly before us, for it was never presented to the court below. It was not involved or suggested in the objections to the admission of the testimony that the value of the goods in New York was $6,000. Those objections were that the testimony was immaterial, irrelevant, incompetent, and speculative, and that no foundation had been laid therefor. The court instructed the jury that the measure of damages would be the necessary expense incurred by plaintiff by reason of the delay and the difference between the fair market value of the goods at New York at the time they should have been delivered to the plaintiff and the time when they were delivered to the plaintiff. No exception was taken to this or any portion of the charge. We can consider only the rulings of the trial court to which exceptions were duly taken.

[3] The plaintiff introduced in evidence a portion of a letter which he had received from an agent of the defendant. The defendant assigns error to the refusal of the court to admit in evidence the remainder of the letter, and invokes the rule that, when a part of a writing is given in evidence by one party, the whole on the same subject may be given in evidence by the other. That rule is subject to the limitation that no more of the remainder of the letter than concerns the same subject and is explanatory of the portion admitted is receivable in evidence. 3 Wigmore, p. 2860; Jones on Evidence, § 294. The first part of the letter which was introduced in evidence referred to the delay between San Francisco and Galveston, and said:

"The actual handling of this shipment shows that it was about 15 days en route San Francisco to Galveston, as against a schedule for like freight during normal times of about 10 days."

The remaining portion of the letter was subject to objection as self-serving, and it related only to the delay after arrival at Galveston. It was, therefore, not erroneously excluded.

Error is assigned to the admission of testimony of certain items of the plaintiff's expenses in New York as elements of damages, but on final submission of the case to the jury those items were by the court excluded from their consideration. This cured the error.

The judgment is affirmed.

MORSE v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1646.

1. CRIMINAL LAW ⟸762(2)—INSTRUCTIONS—EXPRESSION OF OPINION BY COURT.
   Expression by a federal trial judge in his charge to the jury of his opinion that defendant was guilty is not error, where the jury were clearly told that they should exercise their own independent judgment, regardless of such opinion.
2. CRIMINAL LAW ⟸717—TRIAL—ARGUMENT OF COUNSEL.
   Refusal to permit counsel for a defendant to argue to the jury that they were not bound by an expression of opinion by the court in its charge as to the guilt or innocence of defendant *held* error.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Judge.

Criminal prosecution by the United States against Fred B. Morse. Judgment of conviction, and defendant brings error. Reversed.

Nathaniel T. Green, of Norfolk, Va. (Daniel Coleman, of Norfolk, Va., on the brief), for plaintiff in error.

Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va. (Richard H. Mann, U. S. Atty., of Petersburg, Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WOODS, Circuit Judge. [1] On conflicting testimony, the defendant was convicted of transporting whisky from Providence, R. I., to a point on Elizabeth river, Va., near Norfolk. In the following concluding instruction, it is contended, the District Judge went beyond his province in expressing his opinion of the guilt of the defendant:

"You are the sole judges of the facts of the case, and should determine the same after due consideration of all the evidence, in the light of attending circumstances, and the reasonable and fair inferences to be drawn from the testimony, and in so doing you should act upon your own independent judgment, uninfluenced by what others, including the court, may think or say. But I would be derelict in my duty if I did not say to you that, from my standpoint and viewpoint, this testimony irresistibly and irrefutably points to the absolute guilt of these defendants."

The opinion that the accused was guilty was strongly expressed, but the expression was accompanied by an equally strong statement that the jury should exercise their own independent judgment in coming to a verdict uninfluenced by the opinion of the judge. Since the ultimate conclusion was left to the jury, there was no error in the instruction. United States v. Philadelphia & Reading R. R. Co., 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138; Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; Doyle v. Union Pacific Ry. Co., 147 U. S. 413–430, 13 Sup. Ct. 333, 37 L. Ed. 223; Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91.

Breese v. United States, 108 Fed. 804, 48 C. C. A. 36, relied on by defendant, seems to be inconsistent with the doctrine laid down by the Supreme Court in the cases cited. If that case can be sustained at all as a precedent, it is on the narrow distinction that the District Judge, although clearly charging the jury that they were not bound by his opinion, and should exercise their independent judgment, yet used the words "that in his opinion it was the duty of the jury to convict the defendant." Here the jury were not told that it was their duty to convict, or that they ought to convict.

[2] The other assignment of error relied on is more serious. It is thus set out in the exceptions:

"Counsel for the defendant, F. B. Morse, was proceeding to argue to the jury to the following effect: That while the court had said in the charge that 'the testimony irresistibly and irrefutably points to the absolute guilt of the defendants,' yet the jury were not bound by the opinion of the court, but that it was their right and duty to decide this question for themselves. But the court interrupted counsel, and said that the court had charged the jury as to that subject, and refused to permit counsel to continue said argument."

Counsel may not address to the jury argument on issues of law; the jury is bound by the instructions of the trial judge on the legal questions involved, and confined to the application of the instructions on the law to the evidence. But it is the right of counsel in applying to the evidence the law laid down by the trial judge to restate, elaborate, and emphasize it, the limits of propriety in exercising this right being controlled by the discretion of the trial judge. Discretion, however, does not extend to cutting off any discussion of a point so material as that here involved. Counsel for defendant in

connection with his general argument for acquittal had the right to elaborate and emphasize the proposition that however learned and experienced the judge, and however great the weight to be attached to his opinion that accused was guilty, yet the jury were not bound by it, and that the duty of the jury was to come to their own conclusion on the issue of guilt or innocence, giving to the opinion of the trial judge only such weight as they saw fit. There was error in the denial of this right of argument.

Reversed.

UNITED STATES, for Use of NATIONAL REGULATOR CO., v. MONTGOMERY HEATING & VENTILATING CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1919.)

No. 3269.

UNITED STATES ⊂=67(1)—CONTRACTORS FOR PUBLIC WORKS—SUIT ON BONDS. A suit on the bond of a contractor for public work, in behalf of persons furnishing labor and materials, as provided in Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), cannot be maintained, where the bond does not contain the provisions for the protection of such persons prescribed by that statute.

Appeal from the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Suit by the United States, for the use of the National Regulator Company, against the Montgomery Heating & Ventilating Company and another. Decree for defendants, and the use plaintiff appeals. Affirmed.

Alex W. Smith, of Atlanta, Ga. (Smith, Hammond & Smith, of Atlanta, Ga., on the brief), for appellant.

W. D. Ellis, Jr., John D. Little, A. G. Powell, M. F. Goldstein, and Marion Smith, all of Atlanta, Ga., for appellees.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

BATTS, Circuit Judge. The action was brought under Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905 (33 Stat. 811, c. 778 [Comp. St. § 6923]). The act provides that:

"Hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs on any public building or public work, shall be required before commencing such work to execute the usual penal bond with good and sufficient securities with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and material in the prosecution of the work provided for in such contract."

The act makes provision for suit in any district in which the contract was to be performed, and without reference to the amount involved. The bond in this case was conditioned:

"Now, if said Montgomery Heating & Ventilating Company shall well and truly comply with, keep, and perform and fulfill all and singular the covenants, agreements, and conditions and stipulations made by them, or on their part, in, by, or through said contract, and all and singular the obligations whatsoever by them assumed, or on them imposed, in, by, or through said contract, and every obligation thereby imposed on them, then this obligation shall be null and void."

It will be observed that the bond did not impose "the additional obligation" to make payments to all persons supplying labor and material, as required by the act; nor did the contract mentioned in the bond obligate the contractors to make payments to laborers and materialmen.

It is insisted that the bond as given, though not expressed in the language of the statute, is conditioned upon the performance of all obligations imposed upon the contractors resulting from the contract, and is sufficient. It is evident that Congress, in the passage of the act, assumed that the provision especially providing for the protection of laborers and materialmen was more comprehensive than the ordinary penal bond. As suggested in the case of Hill v. American Surety Co., 200 U. S. 203, 26 Sup. Ct. 170 (50 L. Ed. 437):

"As against the United States, no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of the bond for the security which might otherwise be obtained by attaching a lien to the property of an individual."

In Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242, the obligations of the bond to the government and to the laborers and materialmen were treated as separate and distinct; and in Illinois Surety Co. v. Peeler, 240 U. S. 224, 36 Sup. Ct. 325 (60 L. Ed. 609), it is said that it is "an obligation for the payment of money to the persons described, which they are entitled to enforce."

All of the cases construing the original act and the amendment (the provision with reference to materialmen and laborers being substantially the same) assume that the specific provision gives to the bond an effect which would not result from the provisions of an ordinary penal bond. Whether this be true or not, Congress had the right to determine what should be the provisions of a bond, the execution of which would confer jurisdiction upon the federal courts which they might not otherwise have. The exact point involved was decided by the Circuit Court of Appeals for the Eighth Circuit in Babcock & Wilcox v. American Surety Co., 236 Fed. 340, 149 C. C. A. 472, and is in accordance with the opinion which has been reached upon a consideration of the statute itself, and of the opinions of the Supreme Court, to the effect that the statutory bond not having been executed, and the court not otherwise having jurisdiction, the case was properly dismissed.

The judgment is affirmed.

JUNG KWOK HIN v. BURNETT, Immigration Inspector.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3133.

ALIENS ⇐32(8)—CHINESE EXCLUSION—EVIDENCE TO SUSTAIN ORDER OF DEPORTATION.

Evidence *held* to sustain findings by the immigration inspector and the District Court that defendant was a Chinese alien laborer, and that he had failed to sustain the burden imposed on him by Act Feb. 5, 1917, § 19 (Comp. St. 1918, § 4289¼jj), of proving his right to remain in this country.

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Application by Jung Kwok Hin for writ of habeas corpus to Alfred E. Burnett, Inspector in Charge of Immigration Office at Tucson, Ariz. From a judgment denying the writ, petitioner appeals. Affirmed.

F. C. Struckmeyer and Joseph S. Jenckes, both of Phœnix, Ariz., for appellant.

Thomas A. Flynn, U. S. Atty., and Clifford R. McFall, Asst. U. S. Atty., both of Phœnix, Ariz., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The case is fairly stated by counsel for the appellant. The latter was arrested by the appellee pursuant to a departmental warrant issued under section 19 of the Act of Congress of February 5, 1917 (39 Stat. 874, c. 29 [Comp. St. 1918, § 4289¼jj]) as a Chinese alien unlawfully in this country. Proceedings were had before the appellee, resulting in an order of deportation being made by the Secretary of Labor, directing the appellant to be deported whence he came. A petition for a writ of habeas corpus was filed by him in the court below, upon which a rule to show cause was issued and a return thereto made, upon consideration of which the court ordered the rule discharged and the appellant remanded to the custody of the appellee. It is to reverse that judgment that the present appeal was taken.

It is conceded that the appellant is a Chinese laborer, and had not the certificate of residence required by section 6 of the Chinese Exclusion Act of May 5, 1892 (27 Stat. 25, c. 60) as amended by the Act of November 3, 1893 (28 Stat. 7, c. 14 [Comp. St. § 4320]). It is further conceded that by section 19 of the Act of Congress of February 5, 1917, the burden rested upon the appellant to show his right to remain in the United States.

An attentive examination of the record shows, we think, that we would not be justified in interfering with the findings made upon the evidence by the inspector, to the effect that the appellant is a person of Chinese descent and a laborer by occupation; that under the name Ong Hoy Suie he made application at San Francisco, Cal., December 5, 1912, for preinvestigation of his status, claiming that he was born at 210 I street, Sacramento, of a father who died in China in 1894, and

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of a mother who subsequently died in Sacramento; that in support of that application he offered testimony of witnesses who were discredited, and that the application was accordingly denied by the Commissioner of Immigration at San Francisco April 25, 1913; that on May 7, 1914, the appellant under the name Jung Kwok Hin—the name under which he appears in the present record—made application to the Commissioner of Immigration for preinvestigation of his status, filing that application with the Chinese inspector at Sacramento, and there claimed that he was born at 440 Dupont street, San Francisco, of a father who died in the Alameda county, Cal., infirmary October 7, 1912, and of a mother who died at Sacramento September 21, 1913; that the government officer at Sacramento recommended that the application be denied, on the ground of certain perjured testimony given by the applicant's supporting witnesses; that nevertheless the application was subsequently approved, and the applicant departed for China from the port of San Francisco September 19, 1914, and returned from China to San Francisco November 8, 1915, and was permitted to land November 10, 1915; that subsequently he proceeded to Mesa, Ariz., and resumed his employment in a restaurant at that place, where he formerly worked under the name Ong Hoy Suie.

Upon those facts, both the appellee and the Secretary of Labor determined that the appellant had not sustained the burden cast upon him by the law, which conclusion we are unable to hold erroneous.

The judgment is affirmed.

VENNER v. GRAVES.

(Circuit Court of Appeals, Second Circuit. December 11, 1919.)

No. 124.

COURTS ⟸351½—JURISDICTION—ANCILLARY SUIT—EFFECT OF DISMISSAL OF ORIGINAL SUIT.

A bill by defendant in an action in a federal court, with service on attorneys for plaintiff, who is a nonresident, to enjoin plaintiff from maintaining actions in other jurisdictions on the same cause of action, is ancillary, and falls with dismissal by plaintiff of the original action.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Clarence H. Venner against Edward B. Graves. From an order denying a preliminary injunction, complainant appeals. Affirmed.

E. N. Zoline, of New York City, for appellant.

Simpson, Thacher & Bartlett, of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. August 21, 1918, Graves began an action at law in the United States District Court for the Southern District

of New York against Venner, the summons being placed in the hands of the marshal, but not served. September 16, the defendant Venner voluntarily entered his appearance in the case.

August 23, Graves began another action in the superior court of New Haven county, Conn., by attaching 200 shares of stock of the New York, New Haven & Hartford Railroad Company standing in Venner's name. September 17, Graves began another action in the Supreme Court of the state of New York, the summons being served on Venner that day.

September 16, Venner filed this bill, subsequently amended by leave of the court so as to include among other things an allegation of the bringing of the action in the state court of New York. The subpœna was served upon the attorneys for Graves in the action at law in the Southern district of New York; he being a nonresident and not within the jurisdiction of the court.

The complainant alleges that the three suits are all to recover for the same cause of action, viz. professional services rendered by Graves to Venner, and the prayer for relief is that Graves be restrained from the further prosecution of the actions begun subsequent to the first action in the District Court for the Southern District of New York.

This is an appeal from the order of Judge Hough denying Venner's motion for a preliminary injunction.

Counsel for Venner very frankly concedes, though it does not appear in the record, that after appeal taken Graves discontinued the action at law in the District Court; but he contends the discontinuance of the action does not affect in any way the jurisdiction of the court over the suit in equity. He relies upon decisions under the statutes regulating suits which depend upon the citizenship of the parties, holding that jurisdiction good because the citizenship when the action was begun cannot be affected by any subsequent change of citizenship. This in no way affects the right of a plaintiff to discontinue an action after it has been brought, which the plaintiff in this case has done. The bill in equity, being ancillary to and dependent upon the action at law, does not survive, but falls with it. Such a result is particularly appropriate in the present case; the theory of the bill being that, though the plaintiff has a right to choose the forum into which he will bring the defendant, he ought not subsequently to bring him into other courts for the same cause of action. What reason is there to ask for this restraint, when the first action has been discontinued? If Graves prefers the court of Connecticut or of New York, this court has no original jurisdiction to prevent him from suing there. Other interesting questions discussed by counsel need not be considered.

The judgment is affirmed.

EWERT v. JONES.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1919.)

No. 5136.

TRUSTS ⊂=44(3)—ESTABLISHMENT—EVIDENCE.

Before a written lease or deed showing absolute title can be decreed to be a title in trust, parol evidence thereof must be clear, satisfactory, and convincing.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

Suit by Paul A. Ewert against A. L. Jones. From a decree for defendant, complainant appeals. Affirmed.

See 236 Fed. 712, 150 C. C. A. 44.

George J. Grayston and Paul A. Ewert, both of Joplin, Mo. (A. W. Thurman, of Joplin, Mo., on the brief), for appellant.

Hiram W. Currey, of Joplin, Mo. (Arthur S. Thompson, of Miami, Okl., on the brief), for appellee.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

WADE, District Judge. This case was before this court upon appeal from order upon motion to dismiss. 236 Fed. 712, 150 C. C. A. 44.

The defendant has the legal title to a certain mining lease, which plaintiff claims to own, because, as he alleges, the defendant, as his agent, procured said lease for the plaintiff. Plaintiff claims that he paid to the defendant $12.50, the cost of the lease, and also $1 for the services of the defendant. The allegations of the plaintiff being denied, evidence was introduced, and a decree entered in favor of the defendant, from which plaintiff appeals.

The evidence is in direct conflict; we have read it with care. Nothing could be gained by any attempt to include the substance thereof in this opinion. The lease to defendant is in writing, and it is of record. The plaintiff sought by parol evidence to set aside this written evidence of title. He attempted to prove that what appeared to be an absolute title was in fact a title held in trust.

It is elementary that, before a written lease or deed showing absolute title can be by parol evidence set aside, or decreed to be a title in trust, the evidence must be clear, satisfactory, and convincing. "Parol evidence to establish a resulting trust must be clear, unquestionable, and certain." Higginbotham v. Boggs, 234 Fed. 253, 257, 148 C. C. A. 155, 159. See, also, Price v. Wallace, 242 Fed. 221, 223, 155 C. C. A. 61; Teter v. Viquesney, 179 Fed. 655, 661, 103 C. C. A. 213; Pomeroy's Eq. Jurisprudence, § 1040; 13 Ency. of Evidence,

124, 125. The trial court rightly held that the evidence was insufficient.

This conclusion renders it unnecessary to consider the other defenses pleaded: (1) That the plaintiff, because of his employment under the Department of Justice, was disqualified from taking the lease; (2) that the plaintiff, because of demands and charges made in certain letters to defendant, does not come into court with clean hands, and therefore cannot recover.

Errors assigned upon exclusion of evidence, and upon refusal of the trial court to hear counsel in argument, are insufficient to warrant a reversal. If the evidence offered had been admitted, the result could not have been different, and after a trial judge has heard the evidence, and is convinced as to his duty in the case, he is under no obligation to listen to an argument by counsel.

The decree of the District Court is affirmed.

SHAPLEY v. CAHOON.

(Circuit Court of Appeals, First Circuit. February 11, 1919.)

No. 1384.

HABEAS CORPUS ⊂=53—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—PLEADING.

A petition for habeas corpus *held* not to state facts sufficient to give a federal court jurisdiction to interfere with the action of a state court, on the ground that it was in violation of the federal Constitution.

Appeal from the District Court of the United States for the District of Massachusetts.

Petition by Sarah Chandler Shapley against Elisha H. Cahoon for writ of habeas corpus. From a decree denying the writ, petitioner appeals. Remanded.

Henry C. Attwill, Atty. Gen. of Massachusetts, and Max L. Levenson, Asst. Atty. Gen. of Massachusetts, for respondent.

Before BINGHAM and ANDERSON, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. This case involves a petition for a writ of habeas corpus, which was denied in the court below and is here on appeal. The arguments before us proceeded upon broad lines, and upon the general theory that the Massachusetts statutes, and the court proceedings thereon, offend the federal Constitution in respect to the right of due process of law. We think, however, that the petition does not disclose with sufficient particularity anything which would warrant this court in interfering with the proceedings in the state court. Neither the allegations as to the state laws, nor in respect to the pro-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ceedings in the state court, are sufficiently apt to justify federal interference.

As said in King v. McLean Asylum, 64 Fed. 325, 12 C. C. A. 139, 26 L. R. A. 784, the petition does not set out in detail anything touched by the federal laws or Constitution, and does not state facts giving the federal court jurisdiction.

The District Court was therefore right in dismissing the petition. But in proceedings which concern questions of personal liberty, liberal opportunities should be given for amendment. This case, therefore, should be remanded to the District Court, where there will be freedom for the exercise of discretion in respect to any motions for amendment which may be presented.

The motion for leave to amend, presented to us since the case was submitted, is not received for the files, and the petitioner may withdraw it from the clerk without prejudice, as we have not considered its merits. Neither is the supplemental brief received.

Case remanded for proceedings not inconsistent with this opinion, without costs.

ALEXANDER v. FIDELITY TRUST CO.

(District Court, E. D. Pennsylvania. February 17, 1919.)

No. 985.

APPEAL AND ERROR ⊂⊃1214—REVERSAL—PROCEEDINGS AFTER REMAND.

A District Court, on a hearing upon an accounting directed by mandate of the Circuit Court of Appeals, cannot consider evidence which was before it on the former hearing for the purpose of drawing a legal conclusion now urged by defendant for the first time.

In Equity. Suit by John S. Alexander to the use of Archibald A. Alexander against the Fidelity Trust Company, executor and trustee of the will of John Alexander, deceased. Hearing on accounting.

See, also, 238 Fed. 938.

M. Hampton Todd, of Philadelphia, Pa., for plaintiff.

H. Gordon McCouch, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The question whether John Alexander had paid his son John S. Alexander during his lifetime the amount of his interest in the Underwood mortgage was one of the issues fought out when the case was originally in this court, and that question has been decided by the Circuit Court of Appeals (249 Fed. 1, 161 C. C. A. 61) against the defendant. The defense of the statute of limitations was also one of the issues when the case was here before. The court is now asked to draw the legal conclusion of "repudiation of any liability to account," together with notice of repudiation through John S. Alexander's knowledge of the contents of his father's will of 1891, and the bar of the statute.

The evidence of notice of the will of 1891 was before the court at the former hearings included in the record of the orphans' court pro-

ceedings then introduced in evidence. The defendant is now calling attention to evidence of notice which it did not assert as a ground of defense when it had full opportunity to do so, both in this court and in the appellate court. In fact, all of the evidence introduced by the defendant at this hearing is subject to the same criticism, with the exception of John S. Alexander's admission of indebtedness in the record of the other suit in this court, and the evidence in the deposition of Lucien H. Alexander, which have no bearing upon the question of notice of repudiation. The court, upon hearing on an accounting in accordance with the mandate of the Circuit Court of Appeals, cannot consider evidence before it on the former hearings for the purpose of drawing legal conclusions which the defendant could have urged then as well as now. Upon conclusions to be drawn from that evidence, the defendant has had its day in court.

Assuming, however, that the evidence should now be considered, does it justify the conclusion which is claimed for it by the defendant? If notice to the plaintiff of the declaration of John Alexander in his will is a defense, it must be because the plaintiff was bound to assert the contrary and take some action to establish his rights. If the declaration had been communicated by his father to him orally and he did not deny it, nor take any action, it would seem to be conclusive against him, at least as an implied admission that he had been paid. If it had been communicated by his father to him in writing, his failure to assert his rights would have less weight, varying with the circumstances under which the declaration was made. But under the evidence there was no notice given by his father to him. The copy of the will was clandestinely obtained by Mary C. Alexander and sent to him without his father's knowledge. The circumstances were not such as to prompt the son to deny the father's declaration, made in a will of which the son was supposed to have no knowledge. Moreover, John S. Alexander was not in a position to demand an accounting, or to bring a suit for an accounting, for, under the terms of the Jones trust, his father was at liberty to withhold distribution until his death, and a suit for an accounting in his lifetime would have been futile. Moreover, the terms of the declaration in the will of 1901 do not bear the construction of a repudiation of the trust, but only of a claim of payment, and the defense of payment is foreclosed by the decision of the Circuit Court of Appeals.

The admission of the plaintiff that he was indebted to his father's estate in the sum of $50,000, the statements of his individual accounts with his father, the evidence that John S. Alexander did not mention the Jones estate to Lucien H. Alexander, raise no questions that have not been previously considered, and their effect determined.

The circumstances stated in the letter of February 22, 1894, from plaintiff's counsel to Lucien H. Alexander, are claimed by the defendant to show that the plaintiff, being in difficulties which caused him to need immediate financial assistance, did not make any claim upon his father for his interest in the Underwood mortgage, and on that ground it is offered as evidence among other circumstances to show that he had no rightful interest in that fund. While dire need of money

might have prompted him to turn to his father for assistance, since it is not shown that he did not receive financial assistance from other sources, the effect of the testimony is of no consequence.

The defendant, through the deposition of Lucien H. Alexander, attempted to prove the contents of a letter written by John to his father containing a statement "As I have already received my share of my grandfather Jones' estate," or "as I have probably received." The witness failed to satisfy the court that proper effort had been made to produce the original of this letter. The witness, although in court upon the original hearing, claimed, upon the ground of having no record notice, the right of a reargument in the Circuit Court of Appeals, which was granted, and at the hearing upon the accounting he was represented by counsel as a party in interest. It appears that no search was made for the letter, and the statements regarding the difficulties of a search appear somewhat exaggerated. I am not convinced that, if the letter is in existence, its production is impossible, or so impracticable as to justify parol evidence of its contents in the absence of any effort to produce it. The testimony as to its date being between 1880 and 1890 is vague and indefinite. Under the circumstances, it is held that the contents of the alleged letter have not been satisfactorily or properly proved.

The competency of John S. Alexander as a witness was attacked upon the ground of interest. It is contended by counsel that his assignment of his interest made him competent. It does not seem necessary to pass upon that ground of removal of his incompetency. John S. Alexander was called by the defendant as for cross-examination at the hearings before the special master upon an accounting for the share of Archibald A. Alexander in the trust. In the present accounting Archibald A. Alexander is the use plaintiff, and therefore the real party in interest. John S. Alexander, having been called as for cross-examination against the interest of Archibald A. Alexander before the special master, is therefore, on account of Archibald A. Alexander's interest in the present accounting, made competent under section 7 of the act of 1887 (P. L. 160), which provides:

"And the adverse party calling such witnesses shall not be concluded by his testimony, but such person so cross-examined shall become thereby a fully competent witness for the other party as to all relevant matters, whether or not these matters were touched upon in his cross-examination."

His testimony that no settlement had taken place between him and his father for the Underwood mortgage is, therefore, entitled to consideration as evidence in aid of the presumption already held to exist that he has not been paid, but not necessary to rebut the defense now under consideration.

Rulings on Requests for Findings.

Plaintiff's Requests for Findings.

(1) That the plaintiff was entitled to a one-third interest in the Underwood mortgage of $3,000, and that neither John Alexander in his

lifetime nor the defendant since his death have paid the same or any part thereof.

It is so found.

(2) That there is due and payable by the defendant to the plaintiff the sum of $1,000, being one-third of the said Underwood mortgage, together with 6 per cent. interest thereon from March 27, 1868, to February 27, 1895, compounded annually, and amounting to the sum of $4,799.60, together with interest on this sum from February 27, 1895, to the date of decree.

It is so found.

Defendant's Requests for Findings of Fact.

(1) That on or about the 7th day of February, 1893, John S. Alexander received from his sister, Mary C. Alexander, a copy of the will, executed by their father, dated the 26th day of June, 1891, offered in evidence on behalf of complainant (see record, page 71), the fourth paragraph of which will be found in the printed record at page 116, the last words of which read:

"As my devoted son, John S., has years ago received from me the bequest from his grandfather's estate, and has also been released from certain cash liabilities by me, as stated in his account on page 132 of my Ledger A, and in view of their greater need and of his larger experience and acquirements of property, I assume his generous sonship and brotherhood to sustain me in bequeathing to my other children liberally in this item of my will."

It is so found.

(2) That the evidence fails to show that during the conferences between John S. Alexander and his father, with a view to having accounts between them settled, any claim was ever made on the part of John S. Alexander of any moneys due him by his father under the Jones trust.

It is so found.

(3) While the evidence shows that in February, 1894, John S. Alexander was in danger of criminal prosecution and his father and brother were appealed to by his counsel for help, there is no evidence of any reference being made to any moneys being due John S. Alexander from the Jones trust.

It is so found.

(4) It is a fact that by his own admission John S. Alexander was indebted to his father at the time of the latter's death in the sum of $50,000.

It is so found.

(5) The records of this court show that the suit brought by the Security Trust Company, as trustee, for an accounting on behalf of John S. Alexander against the Fidelity Trust Company, was begun on the 23d day of January, 1900 (Circuit Court of United States, Eastern District of Pennsylvania, No. 29, In Equity, of October Session, 1899).

It is so found.

(6) That there is no evidence of any other action having been brought for an accounting under said trust, until the bill filed in the present case.

It is so found.

Defendant's Requests for Conclusions of Law.

(1) That John S. Alexander having received a copy of his father's will of 1891, in which the testator declared that he had paid him in full all that he was entitled to receive from his grandfather's estate, it was incumbent upon him then to assert his claim, and not having done so within six years thereafter, it is barred by the statute of limitations (Goodno v. Hotchkiss [D. C.] 237 Fed. 686 at page 700), and therefore the bill should be dismissed.

This request is declined.

(2) Under all the evidence in the case the chancellor finds that there had been a settlement by John Alexander with his son, John S. Alexander, for the interest of the latter in the Jones trust, and therefore the bill should be dismissed.

This request is declined.

It is conceded that the amount for which the defendant as executor and trustee is liable, if the plaintiff is entitled to recover, is $1,000, with interest from March 28, 1868, to the date of John Alexander's death, February 27, 1895; that with compound interest this amount is $4,799.60 and with simple interest $2,615.

A decree will be entered in favor of the plaintiff for the sum of $4,799.60, being the one-third interest of John S. Alexander in the Underwood mortgage, $1,000, with compound interest from March 27, 1868, to February 27, 1895, together with interest upon the said sum at 6 per cent. to the date of decree.

UNITED STATES v. INTERNATIONAL SILVER CO.

(District Court, D. Connecticut. February 1, 1919.)

No. 2040.

1. ALIENS ⊂=58—ACTION FOR VIOLATION OF CONTRACT LABOR LAW—COMPLAINT.

Complaint in an action under Contract Labor Act Feb. 20, 1907, c. 1134, § 5 (Comp. St. § 4250), to recover penalties for violation of the preceding section by inducing and encouraging the immigration of contract laborers, *held* insufficient in failing to allege facts showing that the aliens were contract laborers as defined in section 2 of the act (Comp. St. § 4244).

2. ALIENS ⊂=58—VIOLATION OF CONTRACT LABOR LAW—PENALTY.

But one penalty can be imposed under Contract Labor Act Feb. 20, 1907, c. 1134, § 5 (Comp. St. § 4250), for the writing of a single letter to encourage the immigration of contract laborers, although more than one came in consequence.

At Law. Action to recover penalties by the United States against the International Silver Company. On demurrer to complaint. Demurrer sustained.

Raymond G. Lincoln, of Hartford, Conn., for the United States.
Ralph O. Wells, of Hartford, Conn., for defendant.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

THOMAS, District Judge. The United States of America sues to recover two specific penalties of $1,000 each for two alleged violations of the so-called "Contract Labor Law." Act Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (Comp. St. §§ 4248, 4250), as amended by Act March 26, 1910, c. 128, 36 Stat. 263. The defendant demurred to the complaint.

[1] The first count of the complaint, as amended, alleges that on March 1, 1916, and for some time prior thereto, the defendant operated a factory in Meriden, and that on February 29, 1916, a Mrs. George C. Pearson, by and with the consent of her husband, both then residing in Nova Scotia and subjects of Great Britain, wrote the defendant a letter asking for employment for herself as a hand burnisher, inquiring at the same time if the defendant had any positions open for men, as her husband and son also desired positions; that the defendant on the 9th day of March, 1916, in reply thereto, wrote Mrs. Pearson as follows:

"Dear Madam: Referring to yours of the 29th ult., we are in need of hand burnishers that have had experience on the general line of hollow ware, such as tea ware, waiters, meat dishes, cake baskets, sandwich trays, nut bowls, etc., made of german or nickel silver; also white enamel. We are also looking for unskilled men. Our female help in the burnishing line average from 12½ to 20 cents per hour; unskilled labor 17½ to 25 per hour. The girls' minimum wage is 12½ cents per hour. If you were in the states, and applied to us for a position, we could place you."

It is further alleged that on the 15th day of March, 1916, the husband wrote a letter to the defendant, in which he said that his wife could not leave at that time, but that he and his son would start at once, provided they were sure of securing employment from the defendant, and in reply thereto the defendant on March 20, 1916, wrote the husband the following letter:

"Dear Sir: Referring to yours of the 15th, will say the conditions stated in your letter are satisfactory, and we will keep a place open for Mrs. Pearson. Kindly advise when you will report for duty."

The complaint further alleges that, while this correspondence was passing between the parties, the husband was an alien, and was known by the defendant to be an alien, to wit, a subject of Great Britain, and that during that time, and until on or about April 4, 1916, he "was a contract laborer, and was known to the defendant corporation to be a contract laborer, to wit, an ordinary unskilled workman"; that on or about said 4th day of April, 1916, as a result of the correspondence above recited, and especially as a result of the letter of March 20, 1916, the husband entered the United States, and on April 5, 1916, went to Meriden, engaged board and lodging, and intended to make the same his permanent abode, but, hearing of a strike at the defendant's factory, returned to Nova Scotia on April 6th.

Upon these allegations it is charged that the defendant violated "An act to regulate the migration of aliens into the United States," approved February 20, 1907, as amended March 26, 1910, and that by the aforementioned acts and for violation of the statute the defendant has forfeited and made itself liable to pay the plaintiff $1,000 as a penalty.

The second count alleges the same acts respecting the son, and claims a further penalty in his case of $1,000.

The defendant demurs to each count, as well as to the relief prayed for in the second count. The grounds of demurrer are the same as to both counts of the complaint, and may be summarized as follows:

(1) Because the complaint fails to allege sufficient facts to show that the Pearsons were contract laborers within the meaning of the act.

(2) Because it is not alleged in the complaint that the defendant had knowledge that the Pearsons were contract laborers, if such were the fact.

(3) Because it is not set forth that the defendant did prepay their transportation, or in any way assist or encourage their immigration, within the meaning of the act.

(4) Because it appears from the complaint that the acts done by the defendant were not contrary to the spirit of the act, and so constituted no violation of it.

An additional ground of demurrer is alleged as to the second count, to the effect that there were no dealings of any kind with the son.

The demurrer to the relief prayed for in the second count is based on the ground that the identical letters as to the husband are made the basis for the recovery of a penalty as to the son, and that only one penalty, in any event, could be recovered, even if a violation of the law as to the husband were found to exist.

The essential parts of the act here applicable provide:

Section 2: "That the following classes of aliens shall be excluded from admission into the United States: * * * Persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled: * * * And provided further, that skilled labor may be imported if labor of like kind unemployed cannot be found in this country: And provided further, that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

Section 4: "That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section 2 of this act."

Section 5: "That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

34 Stat. 900.

The first and second reasons assigned for the demurrer may be grouped and discussed together, for they raise the question: Has the complaint alleged facts sufficient to show that the Pearsons were "contract laborers," within the intendment of the law?

The defendant claims that the facts alleged are only conclusions, and that there are no facts pleaded in the complaint sufficient to show that the Pearsons were "contract laborers" within the meaning of the act under which this suit is brought, and insists that a "contract laborer," within the meaning of the Immigration Act, "is one who has been induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements, oral, written, or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled," and is not merely one who is "an ordinary unskilled workman," and that such facts, properly pleaded, should be set forth in the complaint. The defendant further insists that it is not sufficient in law to set forth in a complaint brought under section 5 of the act that Pearson was a "contract laborer, to wit, an ordinary unskilled workman," which is the allegation found in the seventh paragraph of the complaint, and the allegation upon which the plaintiff relies.

In deciding the question thus raised, we may look for assistance to a decision of the Supreme Court of the United States in a very recent case touching the very statute under which this action was brought. In Scharrenberg v. Dollar S. S. Co., 245 U. S. 122, Mr. Justice Clarke construed sections 2, 4, and 5 of the act and on page 125 (38 Sup. Ct. 28, 29 [62 L. Ed. 189]) said:

"Section 2 of the act of 1907, as amended in 1910 (36 Stat. 263), furnishes this definition of 'contract laborers,' which must be read into sections 4 and 5 of the act of 1907: 'Persons * * * who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, expressed or implied, to perform labor in this country of any kind, skilled or unskilled.' Section 4 makes it a misdemeanor for any corporation 'in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States.' Section 5 imposes severe penalties for every violation of the act 'by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States.' Thus a contract laborer is one who under the conditions described in the first of these statutes comes 'to perform labor in this country,' and the penalties denounced by the sections of the other act are against persons who knowingly assist or induce the importation or migration of such laborer into the United States."

The plaintiff relies upon United States v. Dwight Mfg. Co. (D. C.) 210 Fed. 74, to sustain its contention that the allegation contained in the seventh paragraph of its complaint meets the requirements, and argues that under this decision the demurrer should be overruled as to the first and second reasons assigned. In order to decide whether this is true or not, it becomes necessary to ascertain what allegations were set forth in the complaint of the Dwight Case, and compare them with the allegations in the case at bar; for if the same, or substantially the same, allegations of fact are found to be here set forth as were set forth in the Dwight Case, I should feel obliged to follow Judge Dodge's decision, which in tenor is in harmony with the con-

clusion reached in Scharrenberg v. Dollar S. S. Co., supra, and overrule the demurrer so far as the first and second reasons are concerned. But, as I read the case, the allegations are not the same, nor even substantially the same. On page 75 Judge Dodge says:

"The question upon each count is whether or not such a violation, by the defendant, of section 4, as incurs the penalty imposed by section 5, is sufficiently alleged. The violation charged in each count is that the defendant knowingly and unlawfully *assisted a certain alien to migrate* from a foreign country, * * * to the United States, *by knowingly and unlawfully prepaying his transportation.* * * * Each count *further* alleges that the alien named was an alien contract laborer within the true intent and meaning of the Immigration Act, *was an unskilled laborer*, and was not a contract laborer exempted under the terms of the last two provisos in section 2 thereof."

Continuing, on page 76 he says:

"The declaration does more than allege that the aliens whose immigration was assisted as above were 'contract laborers' within the meaning of the statute. Each count is more specific upon this point. Each count begins by alleging that the defendant made to the alien named, and in the foreign country specified, 'a certain offer of employment.' Each count then describes the alleged offer as follows: 'That if said alien would migrate from said * * * to * * * said defendant would employ and pay said alien to perform for said defendant at said (place within the United States) certain manual labor; that is to say, to operate and assist in operating divers machines used by the defendant in its mill at said place * * * in the manufacture of cotton fabrics.' Having thus described the alleged offer or promise of employment made to the alien named, each count next alleges *that the defendant unlawfully assisted him to migrate by prepaying his passage to a place within the United States*, follows this by allegations that, *induced by the offer and assisted by the prepayment, he did migrate to the United States*, and concludes with allegations that he was not at the time an alien entitled to enter the country, that the defendant well knew the fact to be so, and that he owes the prescribed penalty."

The defendant there then raises the objection that the aliens were not sufficiently alleged to have been contract laborers within the act, and the same objection is raised here. But the complaint here does not contain the allegations found in the complaint which Judge Dodge was considering.

In the case at bar we have only the allegation set forth in the seventh paragraph of the complaint, and quoted in full it alleges:

"(7) That during the period covered by the correspondence mentioned in paragraphs 2, 3, 4 and 5 hereof, and for a further period of time, to wit, until on or about April 4, 1916, the said *George C. Pearson was a contract laborer and was known to the defendant corporation to be a contract laborer, to wit, an ordinary unskilled* workman."

Nowhere in the complaint is it alleged that the defendant knowingly and unlawfully assisted Pearson to migrate from Nova Scotia to the United States by knowingly and unlawfully prepaying his transportation, or inducing or soliciting him, or encouraging him, to so migrate; and nowhere in the complaint is it alleged that Pearson, whose immigration was assisted as above, was a contract laborer within the meaning of the statute; and nowhere in the complaint is it set forth that the defendant made to Pearson in Nova Scotia a "certain offer of employment"; and nowhere in the complaint does it appear,

even if any offer of employment was made, of what the offer consisted; nor is it alleged that the defendant unlawfully assisted him to migrate by doing anything prohibited by the act; nor is it alleged that, induced by the offer or assisted in any way, did he migrate to the United States; nor does it appear anywhere in fact that any of the allegations set forth in the Dwight Case, which formed the gravamen of the complaint upon which Judge Dodge overruled the demurrer, are set forth in this complaint.

But in the second Dwight Case ([D. C.] 210 Fed. 81) it appears that the allegations of the complaint were substantially the same as they are here, and in sustaining the demurrer Judge Dodge said:

"The facts alleged do not make it appear with sufficient distinctness that the alien, whose migration the defendant is charged with assisting by prepaying his passage, was a 'contract laborer' within the definition of the statute at the time of the alleged prepayment. It is not enough to allege him to have been 'a certain alien contract laborer,' without setting forth facts which clearly bring him within said definition."

It follows that the demurrer to the first and second counts of the complaint must be sustained, for the first and second reasons above set forth. It therefore is unnecessary to discuss or decide the remaining reasons of demurrer.

[2] The demurrer to the relief prayed for in the second count must be sustained upon the authority of United States v. N. Y. Central R. R. Co. (D. C.) 232 Fed. 179. There the defendant arranged for the importation of five alien laborers with whom it had made contracts of employment, and had arranged to assist their importation by furnishing them a joint free railroad pass, which the court held to be equivalent to the prepayment of their fares in cash, and decided that this was but a single act applicable to all five, and hence one penalty could be imposed. On page 184 Judge Ray said:

"As there was but one solicitation, all one act, the defendant incurred one penalty."

This ruling was affirmed by the Circuit Court of Appeals for the Second Circuit on appeal. 239 Fed. 130, 152 C. C. A. 172. So here there was but one transaction, all one act, and, even if the allegations of the second count be sufficient to state a cause of action, there could be only one recovery.

Counsel for plaintiff direct attention to U. S. v. Regan, 232 U. S. 37, 34 Sup. Ct. 213, 58 L. Ed. 494, as sustaining the contrary doctrine, but a careful reading of the case fails to disclose that the question was even raised. In stating the question presented, the court said on page 40 of 232 U. S., on page 214 of 34 Sup. Ct. (58 L. Ed. 494):

"The question now to be considered is whether it was essential to a recovery that the evidence should establish the violation beyond a reasonable doubt."

After collating and discussing the cases bearing upon that proposition at some length, the court concludes by saying on page 50 of 232 U. S., on page 218 of 34 Sup. Ct. (58 L. Ed. 494):

"That it was error [for the trial court] to apply to this case the standard of persuasion applicable to criminal prosecutions"

—and held that while the statute is penal in its nature, and may involve a penalized or criminal act, it is not essential to a recovery by the government that the evidence establish the violation beyond a reasonable doubt as in a criminal case, but a reasonable preponderance of proof is sufficient.

Demurrer sustained.

PUSEY & JONES CO. v. COMBINED LOCKS PAPER CO.

(District Court, E. D. Wisconsin. May 8, 1918.)

1. DAMAGES ⟸23—BREACH OF CONTRACT BY SELLER—LOST PROFITS.
In an action for the price of a machine built by plaintiff for defendant, a counterclaim for lost profits because of delay in delivery of the machine cannot be maintained, unless special circumstances are shown with respect to which the parties must be deemed to have contracted.

2. DAMAGES ⟸40(4)—BREACH OF CONTRACT BY SELLER—DAMAGES—LOST PROFITS.
The purchaser of a paper-making machine cannot set up, as a special circumstance entitling it to recover lost profits because of delay in delivery of the machine, a contract made by it for delivery of paper during five years, where by its terms it reserved the right to begin delivery at a date later than the actual installation of the machine.

At Law. Action by the Pusey & Jones Company against the Combined Locks Paper Company. On motion by defendant for new trial. Overruled.

Bloodgood, Kemper & Bloodgood, of Milwaukee, Wis., for plaintiff.

Bottum, Bottum, Hudnall & Lecher, of Milwaukee, Wis., for defendant.

GEIGER, District Judge. The complaint contains two causes of action, the first based upon a contract dated on or about May 15, 1916, whereby the plaintiff undertook to make for the defendant a paper machine for the agreed price of $120,000, according to the terms and specifications prescribed, and that the defendant, the plaintiff having furnished the machine, is indebted to the plaintiff in the sum of $31,215.19, with interest from March 1, 1917, as an unpaid balance of the agreed purchase price. The statement of the second cause of action recites the written undertaking on the part of the plaintiff, dated on or about July 26, 1916, to rebuild for the defendant a described paper machine in consideration of the payment of $23,750; that the plaintiff performed such contract, but defendant has defaulted upon an unpaid balance of the contract price, $4,890. On both causes of action judgment in the aggregate of $36,105.19 is asked.

The prima facie character of the plaintiff's demand was substantially admitted by the defendant upon the trial of the case, whereupon the

issues for trial were those tendered by the answer which set up counterclaims in substance:

That with respect to the first cause of action the plaintiff—

"failed to fulfill said contract by not delivering the machine therein mentioned on the 15th day of November as the contract provided, until the 3d day of April, 1917, when it was delivered to the carrier in uncompleted shape; that by reason of said delay, and the failure of the plaintiff to deliver the said machine in the time provided in said contract, and the resulting inability of the defendant to make use of said machine during the period of delay caused by the plaintiff in noncompliance with said contract, the defendant suffered great damages, namely, in the amount of thirty-four thousand four hundred ten dollars and seventy cents ($34,410.70), which damages were the direct result and entirely caused by the failure of the plaintiff to fulfill said contract as it, the plaintiff, was obligated to do, and that all of his damages necessarily resulted from default, negligence, and violation of this contract by the plaintiff."

In respect of the second cause of action the defendant alleged that the machine to be repaired was to be so repaired and delivered to transportation lines at Fitchburg, Mass., on November 1, 1916; but—

"that the plaintiff delayed the delivery of said repaired machine as provided in said contract until the 20th day of February, 1917; that by reason of said delay and the resulting deprivation of the use of said machine by the defendant, the defendant suffered great damages and losses, namely, the sum of eight thousand four hundred dollars ($8,400), all of which damages and losses were directly caused by the direct and necessary result of said plaintiff's delay in the fulfillment of said contract."

A further set-off and counterclaim, based upon alleged expenditures made by the defendant on account of supplying missing parts from the machine, traveling expenses, and the like, in the sum of $1,733.85 is offered, and the answer demands judgment for a dismissal of the complaint, and for judgment in the sum of $16,544.55, being, I assume, the excess of the damages set out in the counterclaim beyond the sum which by the answer is admitted to be due to the plaintiff.

Upon the trial of the case the defendant undertook to establish its counterclaim by evidence, most of which was tentatively received, subject to objection, but practically all of which was subsequently stricken out, whereupon a verdict was directed in favor of the plaintiff and against the defendant, and a motion for a new trial, which has been argued, presents for review the various rulings of the court upon the rejection of evidence, which led to granting the motion for a direction of verdict and a dismissal of the counterclaim.

A consideration of the motion must be addressed, first, to the general contentions of the defendant respecting the rule of recovery upon contracts such as are involved in the case, and, secondly, a consideration of the facts tendered in evidence with a view of determining whether, in any aspect, they furnish a basis for an award of damages by the jury upon the theory and the only theory offered and insisted upon by the plaintiff.

It will be observed from the pleadings that the defendant framed the counterclaims, excepting the last, solely upon the hypothesis of seeking recovery under a general rule of damages. There is no inti-

mation in the pleading, except as noted, of any claim of recovery, except the general damages sustained by the defendant through a deprivation of the use of the machine during the delay period; and this brings us at once to a consideration of the bill of particulars demanded by the plaintiff of the defendant prior to the commencement of the trial. It is as follows:

Per ton profit 22½-pound paper made on 176-inch machine, contract No. 1331		$9.78
Daily tonnage produce		30
Delay on shipment, December 1, 1916, to April 3, 1917		110 days
110 days x 30 tons		3,300 tons
3,300 tons x $9.78	$32,274.00	
Payments to Valley Iron Works, Appleton, Wis., for material to replace imperfect or unfinished parts called for in purchase contract	327.30	
Cash advanced to Pusey & Jones Company	50.00	
Total	$32,651.30	
Contract No. 1340 would have increased production from November 1 to February 20		281.7 tons
Profit on increased production	$8,119.26	
Expense L. L. Alsted to Wilmington, Del., January 13, 1917	187.48	
Service and expense Pittsburg testing laboratory at Wilmington and Pittsburg	1,292.26	
Express charges on delayed material covered by contract	254.11	
	$9,853.11	
Interest on money actually expended on contracts 1331 and 1340 and on plant and equipment from date when delivery should have been made to delivery when same was actually made		$7,500.00

In explanation of references in this bill, it may be said that the first items, under "Contract No. 1331," are pertinent to the first cause of action of the complaint and to the counterclaim averring a breach through a delay of furnishing the new machine, and that the second items, under "Contract No. 1340," are pertinent to the second cause of action of the complaint and to the counterclaim for damages for delay in repairing and shipping the old machine; whereas the last item is evidently intended to speak for itself as an interest item on purchase-money expenditures, and "on plant and equipment from date when delivery should have been made to date when delivery actually was made."

[1] It may be noted at this time that even in the bill of particulars the defendant is silent respecting a claim for profits based upon "special circumstances" subsequently sought to be introduced in evidence on the trial. This will be seen to be of importance, unless the court was wholly in error in rejecting the notion that profits as profits are recoverable only upon the basis of some special circumstances with respect to which the parties must be deemed to have contracted. Obviously, it is immaterial if, as defendant's counsel contends, profits are always recoverable as profits—as anticipated gains—in any action for breach of contract. This observation should be borne in mind in a consideration of the evidence respecting the defendant's dealings

with third persons pertaining to its paper output on the basis of its new installation and remodeled paper plant.

Giving to the defendant's evidence of oral communications by its officers to officers or agents of the plaintiff, prior to the execution of the written contracts in suit, the most favorable view, it is in brief:

That, approximately six weeks or two months before the contracts were signed, its president inquired of plaintiff concerning the latter's ability to make a paper machine, whereupon an interview was had in which the former disclosed to agents of the latter, in a general way, its interest in a new machine, contingent, however, upon further consideration of the matter of building a new, or remodeling its old, plant, and in a like general way the broad contingency of first ascertaining the likelihood or certainty of disposition or sale of its manufactured product. Evidently defendant's consideration of these matters—which, of course, was for itself—reached such a state of certainty that a further interview, or possibly two, which, in point of time, immediately preceded actual execution of the contracts, were had. Aside from negotiation pertaining to price, mechanical and structural detail of machine, the defendant's witnesses claim that at this latter interview or interviews there was communicated to the plaintiff's agents the fact that they now had contracts for the sale or disposition of the output of the proposed new machine; that such contract or contracts were referred to as the Sears-Roebuck contracts, or that the paper to be manufactured was for Sears, Roebuck & Co.; and one witness stated that he told plaintiff's agents such contract was to run for five years from January 1, 1917. The machine was intended to be used for making catalogue paper.

This testimony contained the first intimation in the case that defendant claimed the existence of specific contracts with third persons, knowledge whereof was communicated to the plaintiff as specific circumstances with reference to which the parties contracted, and as a result whereof the defendant, because of the breach, was entitled to recover as special damages the specific profit which could have been realized upon the sale of paper possible to have been manufactured during the delay period of the delivery of the machines; and the plaintiff objected to the reception of this testimony upon the specific ground that the pleadings, including the bill of particulars, did not justify its admission. The defendant, while suggesting its desire to amend, if its pleadings were not broad enough, did not in fact make an application to enlarge its pleadings. The court intimated that the objection interposed by the plaintiff seemed pretty good; but, it is believed that other considerations hereinafter presented dispense with the necessity of dealing with the merit of this specific objection.

[2] The defendant, in further effort to prove its damages, thereupon offered certain contracts, which in fact constituted the "special circumstances upon" which it sought recovery of profits. These will be considered:

First, a contract between the defendant and Bermingham & Seaman Company, of Chicago, whereby the defendant undertook to manufacture and deliver paper covered by the former's "contracts with

Sears, Roebuck & Co. as shown by copies, samples and blue prints, which are annexed hereto, to all the terms and conditions of which we hereby agree," viz.:

1—Contract dated April 11, 1916, for output of Little Chute mill, or its substitute plant, approximately 45,000 tons white catalogue paper.
2—Contract dated April 17, 1916, for approximately 15,000 tons white catalogue paper.
3—Contract order No. 4365, dated May 1, 1916, for approximately 2,500 tons yellow index paper, etc.
4—Contract order No. 4363, dated May 1, 1916, approximately 10,000 tons white catalogue paper.
5—Contract order No. 4364, dated May 1, 1916, 10,500 tons white catalogue paper.

Such contract contains further details respecting price and the adoption of the Sears-Roebuck contracts as prescribing terms of payment.

It thus appears that the defendant claims to have undertaken for Bermingham & Seaman Company the manufacture and delivery of paper claimed to have been contracted by the latter for manufacture and delivery to Sears, Roebuck & Co.

Secondly, in view of the fact that the defendant expressly adopted them, the terms of the two contracts—there being three so-called order contracts, presumably given under the principal contracts—are important as evidencing the obligations in fact assumed by Bermingham & Seaman Company toward Sears, Roebuck & Co. One of the contracts, dated April 11, 1916 (in evidence as Exhibit 5), and under which I believe the three so-called "order contracts" were given, contains, among other, the following provisions:

"We propose to furnish you the entire output of 22½-pound No. 1 white catalogue paper of the Little Chute division of the Combined Locks Paper Company, located at Little Chute, Wis., subject to the following specifications and conditions:

"(1) Duration of contract to be five years from January 1, 1917, providing we succeed in erecting plant and have the same running by that time or five years from actual date the plant starts operation, which will be not later than June 1, 1917.

"(2) Approximate annual quantity, 9,000 tons."

The second contract appears to be dated April 17, 1916, and contains the following proposal by Bermingham & Seaman to Sears, Roebuck & Co.:

"We propose to furnish you a part of the output of 22½-pound No. 1 white catalogue paper of the Combined Locks Paper Company, located at Combined Locks, Wis., subject to the following specifications and conditions:

"(1) Duration of contract to be five years from January 1, 1917.

"(2) Approximate annual quantity, 3,000 tons."

It will suffice to refer to the contracts entered into between the defendant and the plaintiff for the manufacture and repair of the machines, by noting merely their provisions respecting date of delivery—that for the manufacure and sale of the new machine being given as during the month of November, and that for the repair of the old machine being November 1st—and the further significant provision in each contract giving to the plaintiff 60 days' time for assembling, erect-

ing, and fully installing both machines from and after their shipment, such time being subject to enlargement for cause specified.

Assuming that the legal effect of this testimony must now be considered as though it were in fact before the court, it necessitates the adoption of some rule of damages upon the case as made by the pleadings or upon pleadings and the proffered evidence; and, as indicated, it is not necessary to rest the ruling upon any possible merit of the special objection made by the plaintiff to the admissibility of this testimony, because no sufficient basis was laid in the pleading. Neither is it necessary to consider the variant rules of damages arising upon contracts of sale or of manufacture and sale. It is not necessary—and, if it were attempted, it could not be done—to frame a broad general rule, negative in its character, that profits as profits can never be recovered, or that they may not indirectly be pertinent evidence under some other rule or measure of recovery.

It is, however, proper to bear in mind the necessity in every case of adopting the most certain rule of recovery. It is thus stated by Mr. Mechem, in his work on Sales (volume 2, § 1779):

"And so, as between two possible methods by which the loss might be computed, the law prefers that which leads to the more certain and least speculative results. Thus, as has been seen, the damages to be recovered for not supplying a machine or other article as agreed are usually the market value for which another may be procured, and not the profits which might have been made from its use. And for like reasons the damages to be recovered for the loss of the use of the property are to be estimated with reference to rental value or fair interest upon investment, and not upon the uncertain and speculative basis on the profit which might have been made from its use."

The principles relating to the adoption of a rule of damages to be satisfied by a calculation of profits which a machine bargained for might have made during a delay period are so fully discussed in the two cases of Howard v. Stillwell & Bierce Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, and Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171, that the ruling in the present case, unless it can be justified upon their application to the facts before us, cannot be justified at all; and it may be noted that both of these authorities, and it is believed the great weight of all adjudications, treat the recovery of profits as possible only under exceptional circumstances, unless the engagement by its very terms discloses them to have been in effect, in whole or in part, a subject-matter of the bargain. In the Globe Case, after discussing the question respecting the absence in a contract of language appropriately disclosing items of damage within the contemplation of the parties in case of breach, Mr. Justice Holmes uses this language:

"It is true that as people, when contracting, contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties *probably would have said if they had spoken about the matter.* But a man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is

likely to be within his contemplation, and whether it is or not, should be worked out *on terms which it fairly may be presumed he would have assented to if they had been presented* to his mind."

Again:

"We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made."

He proceeds:

"This point of view is taken by implication in the rule that 'a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract'" (citing cases).

And further:

"The question arises, then, what is sufficient to show that the consequences were in contemplation of the parties in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing [citing cases]. But, in the language quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages (2d Ed.) 10, in Elbinger Actien-Gesellschaft v. Armstrong, L. R. 9 Q. B. 473, 478: 'It may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to say *that he was told he would be answerable for them, and consented to undertake such liability.*' Mr. Justice Wills answered this question, so far as it was in his power, in British Columbia Sawmill Co. v. Nettleship, L. R. 3 C. P. 499, 508: 'I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. * * * If a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival, had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And, though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, *under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.*'"

The Bierce Case announced a like view. That was an action for damages occasioned through the delay in remodeling a flour mill and installing a new type of milling machinery. It was sought to recover as damages the profits which would have resulted through an operation of the mill in particular in grinding up a stock of grain which the vendee had on hand, and the court, after ruling that the loss of such profits was speculative and remote, not resulting immediately from the alleged breach of a contract which contained no stipulation that profits would be made on flour from the wheat ground up by the machinery contracted to be furnished and erected, adds this as a final statement:

"Nor were there any special circumstances attending the transaction from which an *understanding between the parties could be inferred* that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery according to the terms of the contract."

The general principle announced in these cases—and I am satisfied that it is the general principle sought to be applied in all cases—brings us to their applicability in the present situation upon testimony establishing three propositions of fact:

First. Upon their face, the contracts between the plaintiff and the defendant themselves negative the thought that the Bermingham-Sears-Roebuck contracts, whose life began January 1, 1917, were, in respect of the time of commencement, deemed to be of the essence of the machine contracts; for by the principal of the latter contracts the defendant, in any event, had until February 1, 1917, to install the machine, and the contracts prescribed the consequences which should ensue a delay in installation, namely, a postponement of the maturity of two of the purchase-money notes.

Second. The Bermingham-Sears-Roebuck memorandum (Exhibit 5), which, of course, must be read into the contract of the defendant with the Bermingham-Seaman Company, contains this provision:

"We propose [to furnish, etc.] subject to the following specifications and conditions:

"(1) Duration of contract to be five years from January 1, 1917, *providing we succeed in erecting plant and have same running by that time, or five years from actual date plant starts operation, which will be not later than July 1, 1917.*"

Third. Closely related to the last above is this: There is not a syllable or suggestion in the evidence that by reason of the delay the defendant in fact defaulted upon the contracts constituting the "special circumstances"; nor is there any proof that it was in fact disenabled from fully carrying out the terms of the contracts from and after the deferred date, July 1, 1917. In short, the second consideration above shows that the so-called special circumstance—the existence of a contract with a third person, communicated to the plaintiff—was inherently not a special circumstance because its life, while nominally beginning January 1, 1917, was made contingent in its commencement upon the very circumstance of delay which is at the foundation of the present action. In other words, the contract, while nominally dating from January 1, 1917, was ambulatory.

Upon the trial of the case some of the matters above pointed out were referred to as a basis of the court's ruling. The court said, in discussing the exceptional cases noted in the two cases cited:

"The exceptions, if they exist at all, require great particularity of evidence to support the proposition that the vendor, the manufacturer, was apprised of those [them] with such certainty that he ought not in fairness and in justice to be heard to say that he did not have in mind—that both parties did not have in mind—the contemplated loss which would ensue through a failure to regard time as of the essence of the contract. Now, there is no suggestion here that Pusey & Jones could in fairness be said to have been acquainted with the idea, which is now sought to be pressed; that a failure to have this machine in place November 1st, December 1st, January 1st, or February 1st, should entail the consequences of a guaranty or an indemnity against loss of profits upon contracts which certainly were not communicated to them except in this very general way."

Again:

"The evidence offered so far is not such that the court or this jury should be heard to say 'why Pusey & Jones understood that the Combined Locks

Company were to lose $9.78 a ton' because the talk was of a general nature. It is a talk which could be indulged in, and usually is indulged in, in negotiations for this sort of a repair or a sale, and the rule, if extended upon the strength of such general testimony as that, simply amounts to no rule at all—simply amounts to superseding the contract. Now, that the parties here had in mind anything of that kind I do not believe should be left open to inference upon the testimony offered so far."

Coming, therefore, to a direct application of the principles, and upon evidence which negatives with particularity the idea that the parties contemplated the consequences of a loss of profits, is it possible to permit a jury to infer, nevertheless, that both parties contemplated such consequences as fully as though they had really agreed thereto? It seems absurd to say that a contract containing a nominal date, January 1, 1917, even standing alone, should be made the basis or should be considered as a special circumstance justifying an award of special damage, merely because its existence was communicated to the vendor when the vendor and vendee entered into formal contracts which on their face give the vendor a leeway in performance, extending very substantially beyond the date of the special circumstance contract. But when it appears that the date, January 1, 1917, was, after all, not binding upon the vendee, that by an express proviso of the contract he had relieved himself by getting six months' leeway in order to meet the precise contingency which has arisen in the present case, namely, a delay in installing machines, it is not only idle, but it would be monstrously unjust, to permit him to impose upon the vendor consequences which might have ensued had the vendee's contract with the third person been binding as of the earlier date.

This situation impresses me as a fundamental obstacle to the application of the general principle controlling an award of special damages involving profits as such, which a machine might have earned. In other words, no matter how clearly it may have been the desire, hope, or expectation of the defendant to have the machine installed by January 1st, it very clearly and by the express terms of the Sears-Roebuck contract contemplated the possibility, if not the probability, of being unable to have it at that time. Therefore, having such contemplation from its side, can it be heard to say that the plaintiff here did not contemplate, or, upon full disclosure of the facts, would not have contemplated, the very same thing, but, on the contrary, contemplated its rigid responsibility to the defendant for loss of profits upon a contract which, by express reservation and proviso, the defendant was not obliged to perform on or begin performance until six months later. As I understand the rule, the contemplation of one of the parties is not sufficient; it must be a mutual and reciprocal contemplation produced by such particularity of attendant circumstances as should preclude both parties from saying that they were not, in effect, in law incorporated into the engagement.

We are brought to the next consideration, that the defendant did not, and could not, default upon its contract with Bermingham & Seaman, and therefore did not and could not, prior to July 1, 1917, lose any profit which it might have made upon the sale of the product to be manufactured pursuant to that contract. The most to be said is that it did not *enjoy* such profits from and after the earlier date. It

does not and cannot claim that plaintiff's delay entailed a breach of its contract with Bermingham & Seaman, resulting in a loss of profits upon that contract, because it was within its right, as already observed, to simply move the date of commencement forward, not exceeding six months, and presumably that is just what was done. In other words, the notion of special damage, because of an actual loss of profits, is wholly negatived.

It is unnecessary to consider whether the defendant might not, upon some other theory, have established a claim for damages because of the delay. The course of the trial, in connection with the offer and rejection of the testimony upon the items of defendant's bill of particulars, brought it to the position where, its testimony respecting profits as such having been rejected, it was obliged to substantiate the other items upon some variant theory of damage. But it formally declined to proceed with any offer of proof to support, for example, a claim for deprivation of the use of the machine, to be measured either by interest upon the contract price, or upon payments made, or by some other standard, and formally elected to rest its whole case upon its offer to show loss of profits. In this situation there was no alternative, except to direct the verdict in favor of the plaintiff, both upon the complaint and upon the counterclaim.

I am satisfied to adhere to the ruling upon such motion for direction, and the motion for a new trial will be denied; and an order may be entered accordingly.

THE PEMAQUID.

(District Court, D. Maine, S. D. November 21, 1918.)

No. 436.

1. COLLISION ⇐100(2)—STEAMERS MEETING IN FOG—EXCESSIVE SPEED.
A collision between two steamers meeting in a narrow channel in a dense fog *held* due to the fault of one for immoderate speed, proceeding on the wrong side of the channel, and failure to stop on hearing the whistle of the other vessel ahead, all in violation of the navigation rules.

2. COLLISION ⇐82(1)—NAVIGATION RULES—"MODERATE SPEED" IN FOG.
Under the rule requiring moderate speed in fog, vessels are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after the approaching vessel comes in sight, providing she is herself going at such moderate speed.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moderate Speed.]

3. COLLISION ⇐82(2)—STEAM VESSELS IN FOG—FAULT.
A steamer which before she came in sight, in a fog, of a meeting vessel, which she knew was approaching, had stopped and reversed, and was actually going astern at the time of collision, cannot be held in fault because of her previous speed.

4. COLLISION ⇐80—NAVIGATION IN FOG—CONSTRUCTION OF RULE.
Under the rule requiring a vessel in a fog on hearing another, apparently forward of her beam, "the position of which is not ascertained," to stop, ascertaining of the position of the other vessel need not necessarily be by sight, and when she knows such vessel, the locality, and her usual and proper course, she is justified in navigating accordingly.

In Admiralty. Suit for collision by Calvin Austin, receiver, owner of the steamer J. T. Morse, against the steamer Pemaquid. Decree for libelant.

Edward S. Dodge, of Boston, Mass., and Benjamin Thompson, of Portland, Me., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

HALE, District Judge. The libelant seeks to recover damages sustained by his steamer, J. T. Morse, in consequence of a collision with the steamer Pemaquid, which took place, in a thick fog, on September 8, 1915, at about 8 o'clock in the morning, near Field Ledge Buoy No. 15, at the western entrance of Deer Island Thoroughfare.

The Pemaquid is a single screw steamer of a burden of 409 gross tons; she is 132.5 feet long, 28 feet beam, and capable of a speed of about 11 or 12 knots. At the time of the collision she was drawing about 9 feet. She was owned and operated by the Maine Central Railroad, and was engaged in carrying passengers and freight between the ports of Sargentville and Rockland.

[1] At about 7:48 o'clock on the morning of the 8th of September, 1915, the Pemaquid left her landing at Stonington with the intention of proceeding westward, out through the western entrance of Deer Island Thoroughfare, running by schedule, on her regular passage, to make the train at Rockland. After leaving the Stonington wharf, she proceeded on her usual course, west, ¾ south, to pass between the buoys on Allen's Bar. She was then put on a course, west ⅞ south, for Field Ledge Buoy, which is about a mile and a quarter from the Stonington wharf.

Capt. Wescott, master of the Pemaquid, testifies:

That, after they left Stonington at 7:48, they proceeded at full speed ahead; they made Allen's Bar in four minutes; from there the run to Field Ledge Buoy is three and three-quarter minutes; from Field Ledge Buoy to Mark Island is about the same; they usually slow down at Allen's Bar for forty seconds to get a departure; here they heard the three whistles of the Morse at Mark Island; he knew she was coming on through the Thoroughfare, and that the vessels would meet and pass at about Field Ledge Buoy; after slowing down, he came ahead at full speed of ten and one-half or eleven knots; he continued at full speed for a minute and a half or two minutes, before he gave the order to slow; then he gave one bell, and that was possibly two and one-half minutes before the collision, though he kept no record at the time; he was steering for Field Ledge Buoy, and he should not consider it safe to go on his voyage without making it; he had never done so; he did not think he could have safely laid his course farther to starboard; if he had gone too far to starboard, he would not see the buoy in the fog; he thinks the channel is two hundred to three hundred feet wide; the buoy is a black, spar buoy, and sticks up out of the water probably twelve feet, and is eight inches in diameter; they have to navigate sixty to seventy feet from the buoy; he had heard the Morse's whistle forward of the Pemaquid's beam, and knew she was coming for the buoy, and that she would be well over on the starboard side of the channel; he was not in the habit of slowing his ship for the Morse to pass, and of course he did not do it; he sighted the Morse very nearly ahead, and perhaps two hundred feet away; immediately upon the Morse breaking out of the fog, he gave three bells, and stepped back and told the quartermaster to put the wheel hard aport; he had just got it hard aport before the collision; he does not know at what speed the Pemaquid was proceed-

ing at the time of the collision, but his best estimate is two or three or four knots.

Eaton, the lookout, testifies:

That he went on watch at Stonington on the bow of the Pemaquid; he was the only man on the bow; the captain and quartermaster were in the pilot house; he reported the position of the Morse once, but made no report of the change in its bearing; he was not the regularly employed bow watchman; he had been on steam vessels three days at the time; before he left his home at Sargentville he had been a farmer, and had run a 21-foot private naphtha boat for summer people; at the time of the collision he had been on the Pemaquid three days; he had been lookout once before on the Pemaquid, namely, the day before the injury; on that day he remained on duty from Brooklin to Stonington, or an hour and a half, and he was on duty possibly ten minutes the day of the collision; he had no other experience as a lookout on a steam vessel; up to the time he sighted the Morse, the Pemaquid's engines had not been moving astern so far as he knew; the only thing that indicated any change was the change in the vibration, and the lessening of the wave at the Pemaquid's bow.

From other officers of the Pemaquid it appears that at the time of the collision the steamer seemed to be going about six or seven knots; that the engine was not stopped until they saw the Morse ahead a second or two before the steamers came together; that the course the Pemaquid was on took them over close to the buoy; that they were then on regular running time, and were pretty nearly over to the buoy when Captain Wescott gave the bell to slow down; that the bow lookout did not report the buoy; that it is uncertain whether the look out saw the Morse and reported her before any one in the pilot house saw her.

Article 16 of the Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 99 [Comp. St. 1916, § 7889]) provides:

"Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel, hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Article 25 is as follows:

"Art. 25. In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel." Comp. St. 1916, § 7899.

The General Prudential Rule (article 27) is as follows:

"Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." Comp. St. 1916, § 7901.

On examination of the whole testimony from those aboard the Pemaquid, I can have no doubt that the steamer was proceeding in violation of the statute governing the speed of vessels in a fog. Her immoderate speed is shown, also, by the nature of the blow which she inflicted; for although the Pemaquid had much less weight than the Morse, her speed was such that, when she struck the Morse, she cut into her a distance of 27 feet. The force of this blow can be accounted

for only by the fact that she must have been moving at a rapid rate through the water at the time of the collision.

It is clear from the testimony of the officers of the Pemaquid that, after slowing down at Allen's Bar, and hearing the whistle of the Morse, the steamer continued at full speed on her course for Field Ledge Buoy, and that she kept well over on the port side of the channel, when, as her captain admits, he knew the Morse would keep over on her starboard side of the channel, and would be at Field Ledge Buoy at about the time the Pemaquid would arrive there. No necessity is shown for keeping on the port side of the channel; for the testimony is convincing that at Field Ledge Buoy the channel is two or three hundred feet wide, and there was nothing to prevent the steamer from seeing the buoy at a sufficient distance across the channel to avoid all danger of collision with the Morse.

[2] We must apply the test of the courts that moderate speed implies the ability of a vessel to stop her headway in the presence of danger; that vessels in a fog are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after the approaching vessel comes in sight, providing such approaching vessel is herself going at the moderate speed required by law. The Chatahouchee, 173 U. S. 540, 548, 19 Sup. Ct. 491, 43 L. Ed. 801; The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Sagamore, 247 Fed. 743, 746, 750, 159 C. C. A. 601; The Lepanto, 21 Fed. 651, 659. It is clear, from the proofs, that the Pemaquid was proceeding at an immoderate speed in a fog, and that there were no special circumstances making it necessary for her to depart from the rule relating to speed; that she was navigating on the port, instead of on the starboard, side of the channel; that when she heard the whistle, and knew that the Morse was approaching, she did not reverse until the vessels were practically in collision. She was being navigated, then, in direct violation of at least three requirements of law.

I cannot exonerate her from fault, also, in respect to her lookout. She was navigating at a place and under conditions where an experienced lookout was required. The lookout is the "eyes and ears" of the ship. At the entrance of Deer Island Thoroughfare a ship would not have too many eyes and ears if she had a competent lookout stationed well forward on each of her bows. Eaton, the only man forward, was a man with less than two hours experience as a lookout. He did not promptly notify the navigating officer of the bearing of the Morse when she broke out of the fog. There is no fixed rule as to what constitutes an efficient lookout; but, under all the conditions, I cannot find that the Pemaquid complied with the law in this respect.

Upon the proofs, then, the Pemaquid was acting in flagrant disregard of the safety of the approaching steamer; she was guilty of obvious and inexcusable faults.

The J. T. Morse is a side-wheel passenger steamer, of the burden of 780 gross tons, 199 feet long, 31 feet beam, and 12.1 feet in depth, capable of a speed of from 12 to 14 knots. She was running on her route between Rockland and Bar Harbor. On the morning of September 8, 1915, she sailed from Rockland for Bar Harbor on her regular passage, intending to touch at various intermediate points. She con-

tinued on her voyage until about 8 o'clock, when she entered the western entrance of Deer Island Thoroughfare at Mark Island. Just before this her engine was slowed while passing the steamer Vinalhaven. With this exception she was making her regular full speed. At this point she heard the Pemaquid's whistle and recognized it, and knew that the approaching steamer was bound out through the western entrance of the Thoroughfare, that being the only passage for vessels bound west. She was expecting to meet the Pemaquid there. The fog was thick; the wind a light breeze from the south; the tide about one-half flood; Field Ledge Buoy was five-eighths of a mile ahead, a distance usually run by the Morse in 2½ minutes. The officers of the Morse estimated that the whistle of the Pemaquid indicated her position in Deer Island Thoroughfare "this side" of Stonington Landing. They put their steamer upon her course, E. by N. ⅞ N., to Field Ledge Buoy. No fault is found with her seamanship up to the buoy. She appears to have had two lookouts on her bow; she had a master of experience; a competent pilot; a competent quartermaster at her wheel. Her officers testify that she continued to run, at the same full speed at which she had come across from North Haven to Mark Island, for about two minutes, when her engines were slowed, stopped, and reversed at full speed; that, while she was backing, Field Ledge Buoy came in sight, slowly, on the starboard bow; that when the buoy was about abreast of the Morse, and the steamer was moving astern, the shadow of the steamer Pemaquid was seen in the fog, about half a point on the port bow, and about 400 feet away, and was reported by the port bow lookout; that, when the Pemaquid came in sight, the wheel of the Morse was put hard aport; that the Pemaquid at this time appeared to be swinging toward the Morse on the starboard wheel, and so continued until she struck the Morse at the port gangway, and cut into her two and one-half feet below the water line. Those in control of the Morse insist that, at the time she was struck, she was actually moving astern, and that therefore her speed could not have been a fault contributing to the collision. Much depends upon the determination of this question of fact.

Capt. Addison W. Shute, the master of the Morse, died suddenly in November, 1917, before his deposition could be taken. He testified, however, before the local inspectors soon after the collision:

> That about two minutes after he first heard the whistle of the Pemaquid, then about three and one-half miles away; he slowed the Morse and put her in the back gear; his reason for doing this was, "I said I am going to stop and back her; I don't know which way we are going to take her when we find him coming;" that the course of the Pemaquid was "changed before we got to going astern. We got to the buoy, and swung from E. by N. 7/8 N. to E. by N. at the buoy, and we was going astern, and the buoy come right abreast of the pilot house. When we sighted the Pemaquid, she (the Morse) was still heading E. by N. The Morse had gone astern from the time she lost her headway until the collision close on to 400 feet." That his object in going astern was "because I didn't know how we might meet this fellow, and when going astern we could keep out of his way, if we could. The Morse did not swing at all. She backed straight astern." All signals to the engine room were promptly answered. While the Morse was backing, the whistle of the Pemaquid was sounded "a little on the port bow"; and when he first saw her she was a "good half point" on the port bow of the Morse, and appeared to be heading "right straight out by, and would have

gone all right if she had kept on." That he blew three short blasts of the whistle of the Morse, indicating "going astern full speed by the engines." "At the time of the collision the Morse not only lost her headway, but was going astern about two miles an hour."

Harry D. Shute, the pilot of the Morse, testifies:

That the course of the Morse was changed, when abreast of Mark Island, from E. by S. to E. by N. 7/8 N. to run to Field Ledge Buoy, five-eighths of a mile away; the usual running time of the Morse from Mark Island to Field Ledge Buoy, in fair weather, is two and one-half minutes; that the Morse continued on that course for two minutes, and then slowed down under "one bell to slow and one to stop, and two to reverse full speed astern"; that these bells were rung half a minute before he saw Field Ledge Buoy; that the reason for ringing them was "to have the boat under control at that time. * * * We knew the Pemaquid was coming, and I imagine that was why he (Captain Shute) put the bells in, to have his boat under control at that point in the channel; * * * to be ready to stop so as to give the Pemaquid a safe chance to go by." The bell signals to the engine room were obeyed and executed promptly. He knows this by hearing the bells over the return tubes from the engine room, and he could tell from the vibration of the boat, and also by Field Ledge Buoy. Just after the two bells for full speed astern were given, he saw Field Ledge Buoy about two points off the starboard bow, and seventy-five to eighty feet away; the Morse ranged ahead until the buoy was about abreast of the pilot house, and then she went back; they got sternway on the Morse; "just as we were backing, I saw the Pemaquid half a point on the port bow, three or four hundred feet away."

Warren, the port lookout of the Morse, testifies:

That he reported the Pemaquid; Field Ledge Buoy was then bearing just abreast of the pilot house, sixty or seventy feet away; Capt. Addison W. Shute blew the passing signal of one blast of the Morse's whistle, as soon as he saw the Pemaquid, signifying that the Morse would leave the Pemaquid on the port side of the Morse; and the Pemaquid assented by blowing one blast of her whistle. The Morse also blew several blasts to indicate that she (the Morse) was going full speed astern. The course of the Morse had been changed at, or just before, leaving Field Ledge Buoy from E. by N. 7/8 N. to E. by N. to run in over Allen's Bar; but, when the Pemaquid was finally seen, the wheel of the Morse was put hard aport. He thinks that neither the port nor hard aport wheel had any effect on the Morse at that time, but the Pemaquid "appeared to be swinging toward us," on a starboard wheel, and so continued until she struck the Morse at the port gangway and cut into her to two and one-half feet below the water line. The Morse herself was actually moving astern at the time the Pemaquid struck her.

Addison L. Shute, the son of Capt. Addison W. Shute, testifies:

That he was the quartermaster of the Morse, and in her pilot house with his father and the pilot. Before the Morse reached Field Ledge Buoy, signals were rung by Capt. Shute to the engine room; one, then a second, then another bell with a second, and two bells repeated, making a total of four bells, which meant to back; "I heard the response to the bells in the return tube back of me on the partition;" that these orders were promptly executed; the engines of the Morse were reversed; he knew this by the vibration of the boat, and the white backwater rushing by the bow of the Morse; at the time when the Morse was ranging by Field Ledge Buoy, the engines were moving astern; he was steering, which required pretty close attention to the wheel; it was not until after he had sighted Field Ledge Buoy that he first saw anything of the Pemaquid, and she was then about one-half a point on the port bow of the Morse, and about four hundred feet off. At this time the engines of the Morse were moving astern, and he should say the Morse had stopped and was ranging back at the time "we first saw the Pemaquid come in sight." Capt. Shute blew a passing signal to the Pemaquid, and blew three whistles, meaning that he was backing full speed astern; when

the Pemaquid struck her, the Morse was heading about E. ½ N., and "she was moving back;" there was abundance of room for the Pemaquid to pass without collision when she was first sighted, if she had been properly steered, but she made a "quick turn towards us," and the collision resulted.

The testimony from the engine room is to the effect that the orders to reverse were received and promptly executed, and that the steamer was going full speed astern at the time of the collision. It is not necessary to refer in detail to the other corroborating evidence.

On the other hand, the captain of the Pemaquid, and three others who were aboard the Pemaquid, testify that the Morse was going ahead at the time of the collision. Three of these witnesses did not so testify when they were before the local inspectors. A passenger on the Pemaquid, who thought the Morse was going ahead, bases his testimony upon the fact that he saw white water coming up on the Morse's bow when she first came out of the fog; he feels sure that at that time the Morse was coming ahead and throwing the water up; and there is some other testimony to this effect. This sort of evidence is not of great value, in view of the fact that the Morse was a side-wheel steamer, and that the waves, rolled up in front of her paddle wheels, might readily be taken for a wave upon her bow.

The learned proctors for the claimant base their contention that the Morse was going ahead at the time of the collision, largely upon statements, alleged to be inconsistent, made by the pilot and other witnesses on behalf of the Morse in cross-examination. They also urge that the testimony of the lookout Eaton is important, that when he saw the Morse "she seemed to be moving quite quickly towards us." I am not able to give much weight to the testimony of the lookout, who was a man entirely without experience, and whose whole statements are vague and uncertain. Great stress is laid by the claimant upon the testimony of the pilot, Robinson, who says that, in his opinion, the Morse must have been going ahead at the time the vessels came in collision. His testimony from what he saw is not convincing; his theory that the Pemaquid could not have struck the Morse at the angle she did, if the Morse had not been going ahead, is not, I think, sustained by the testimony. The substance of the claimant's contention is that the Pemaquid had been proceeding under one bell for several minutes prior to the time the Morse had been sighted, at which time her engines were reversed at full speed; and that, while this was not in strict compliance with the pilot rules, it nevertheless was not so contributory a factor to the collision as the movements of the Morse; that the Morse reached the narrow channel at Field Ledge Buoy, in its most dangerous part, while under full speed, 14 knots; and that she had been slowed, stopped, and reversed practically at the same moment. From a careful examination of the testimony on this point, I cannot sustain the position of the claimant. The evidence, taken as a whole, seems to me to sustain the libelant's contention that the Morse had stopped before she saw the Pemaquid, and that she was going astern at the time of the collision. The evidence upon this issue is gathered from 14 witnesses who were aboard the steamer. Their testimony is convincing, and is not materially shaken, in my opinion, by the rigid cross-examination by the learned proctors for the claimant. I cannot escape

the conclusion that the Morse had stopped and reversed before she saw the Pemaquid; that her engines were then running full speed astern; that her hull was moving astern; that she gave to the Pemaquid more than her share of the distance separating the vessels, and enlarged the Pemaquid's space for proceeding down the channel; and that there was room enough in the channel for the Pemaquid to pass, if she had kept upon the starboard side of the channel. Some of the witnesses in behalf of the Morse testify that, when the approaching vessel was first seen, she appeared to suddenly swing toward the Morse instead of away from the Morse. Whether this movement is accounted for by the captain of the Pemaquid, in his confusion, putting the wheel the wrong way, or the Pemaquid failed to answer to her wheel, when reversed, is not made clear and it is not necessary to decide. It is made clear by the proofs that those in control of the Pemaquid were seeking to avoid the starboard side of the channel, fearing that they should lose sight of the buoy at Field Ledge.

[3] Having determined from the evidence that the Morse had stopped and reversed, and was going astern at the time of the collision, it is important to consider at this point, of what, if any, fault the Morse was guilty in reference to speed. She maintained her full speed from North Haven to Mark Island. She could not, however, have contributed to the collision by her speed before she reached Mark Island. If, when she met the approaching vessel, she had already stopped her speed, and was going backward, she ought not to be held in fault for whatever her previous speed may have been. In the Ludvig Holberg, 157 U. S. 60, 67, 15 Sup. Ct. 477, 39 L. Ed. 620, in speaking for the Supreme Court, Mr. Justice Brown held that if a steamer had run at high speed an hour before, and was running dead slow at the time when she first heard the whistle of the approaching steamer, fault could not be imputed to her for her previous speed. In the Lepanto, 21 Fed. 651, 659, Judge Addison Brown held that, where a whistle is distant, and no danger can be incurred by delay, immediate stopping is not necessary; that it is always safe to stop and reverse; and, if a steamer does not stop and reverse when it is shown by events that collision might have been avoided, she must establish clear justification for her course. New York and Liverpool, etc., Co. v. Rumball, 21 How. 372, 384, 16 L. Ed. 144; The Khedive, etc., 5 App. Cas. 876, 890, 908.

It cannot be said that the Morse was at fault because if she had stopped, or had reduced her speed at Mark Island, she would not have reached the point where the two steamers intersected. In The Umbria, 166 U. S. 404, 422, 17 Sup. Ct. 610, 41 L. Ed. 1053, Mr. Justice Brown points out the fallacy of this argument, and shows it is equally true that if a vessel had been going at greater speed she would have passed the point of intersection. Clearly, this test cannot be applied on the question of speed. The propriety of seamanship cannot be judged by the chance that two vessels may or may not reach a point of intersection at the same time, but rather by the question whether their speed can be stopped before they arrive at the point where their courses intersect. In the case before me, I have found that the Morse was not only stopped before arrival at the point of intersection, but that she was actually going astern.

[4] An important question is raised in reference to the duty of the Morse on her arrival at the entrance of the Thoroughfare at Mark Island. She there heard the whistle of the Pemaquid. Her officers decided that the whistle showed the approaching steamer to be in the Thoroughfare, about at a point not far distant to the westward of Stonington, and, on this supposition, they assumed that they had time to reach Field Ledge Buoy before the Pemaquid could arrive there. It is evident that at this point the Morse was in the position of a "steam vessel hearing, apparently forward of her beam, the fog signal of a vessel." The contention of the libelant is that the whistle of the vessel, apparently forward of her beam, was the whistle of a vessel the position of which was then and there "ascertained" by those on board the Morse, and that therefore the steamer was justified in proceeding, as she did, to Field Ledge Buoy. Article 16 is predicated upon a condition of fog, upon a condition in which it is impossible to see at any considerable distance. The rule cannot mean, then, that it is necessary for those upon a steamer to see an approaching steamer in order to "ascertain" her position. Such ascertainment must be by other means than by sight. When the whistle of the Pemaquid was first heard, the officers of the Morse recognized the whistle, and judged that it was approximately one and one-half or two miles distant, in Deer Island Thoroughfare, and "this side" of Stonington. The proofs show that the officers of the Morse were correct in their conclusion as to the Pemaquid's location. In fixing that location, they appear to have been governed by their familiarity with the locality, their knowledge of the approaching steamer, of her landing places, and habits of navigation. Some of the witnesses have assumed that, within the meaning of the rule, the bringing of an approaching vessel in sight is necessary to "ascertaining" her position. I cannot think so. Under all the circumstances shown by the proofs, and under a fair interpretation of the rule, I think it must be held that those in charge of the Morse had "ascertained" the position of the Pemaquid. Before proceeding upon their course, they estimated her situation with sufficient accuracy to conform their own navigation to it. They knew, too, that she was required to come down on the side of the channel opposite to that which the Morse was using; and they had a right to assume that she would do this. What, then, was the duty of the Morse? She had 60 or 70 passengers aboard. She was in an open seaway, near Mark Island, in a thick fog. The island could not be seen at a distance of more than three or four hundred feet; the steamer had nothing by which to fix her own location, or from which to take her departure, except Mark Island. To remain there and await the Pemaquid might mean "immediate danger" of losing her reckoning and getting upon the ledges; her officers considered it was the part of prudence to proceed to Field Ledge Buoy. I think they ought not to be held at fault for this decision.

As bearing on the duty of the Morse when she arrived at Mark Island, the learned proctors for the claimant bring to my attention the case of the Selja Lie v. San Francisco & Portland Steamship Co., 243 U. S. 291, 298, 37 Sup. Ct. 270, 61 L. Ed. 726. The collision between the steamers Selja and Beaver occurred on the high seas near Point

Reyes, on the California Coast, a few miles off the entrance to San Francisco Harbor. The facts in that case, as found by the court, were substantially these: At 3 o'clock the Selja was proceeding at half speed of six knots; at 3:05 this was reduced to three knots; at 3:10 she stopped her engines; at 3:14 she was still making headway; at 3:15 she executed full speed astern; the collision occurred at 3:16. Holding that the duty to stop her engines was imperative when she heard the signal from the other steamer forward of her beam, considering the well-known difficulty exactly to ascertain the position, course, and distance of a vessel in a fog, speaking for the court, Mr. Justice Clarke says:

"It is of no avail for this master to say that at the instant of the accident he thinks the momentum of his ship had been overcome, and that she was commencing to move backward in response to the 'full speed astern' order, which had been given during the instant that had elapsed between the appearance of the Beaver through the fog and the coming of the ships together, for the evil had been done and the collision rendered inevitable."

In the case of the Selja the vessels were in the open sea; there were no such circumstances and conditions as those which were presented to the master of the steamer Morse, in maintaining his speed from Mark Island to Field Ledge Buoy. The master of the Selja was mistaken as to the course and distance of the oncoming vessel; in the open sea he had few reliable data from which to fix her location. On the other hand, the master of the Morse had an intimate and daily knowledge of the locality; he knew the landing places which the Pemaquid would make; he decided correctly as to the position and distance of the Pemaquid from the moment when he first heard her whistle. In the case of the Selja, it was not until her master heard the whistle of the Beaver three times that he recognized it as the whistle of the approaching steamer, and that he began to take definite observation of it. But the officers of the Morse were expecting the Pemaquid; they recognized the whistle as her whistle, and at once made their navigation conform to their ascertainment of her location. They estimated correctly in deciding that they could reach a place of safety for the Morse, and could give the Pemaquid an opportunity to pass safely if she were prudently navigated. They could not have reached such a conclusion in the open sea in a fog, but they could readily reach it in Deer Island Thoroughfare. It is important to note in this connection, that the error of the Pemaquid when she left Allen's Bar did not arise from her improper ascertainment of the Morse's position, but from her own navigation, after she had located the Morse.

I think the case of the Selja is not in point, and cannot influence the determination of this case.

Among other charges of fault, it is alleged that the Morse changed her course in such a way that she blocked the channel; and it is in evidence that the local inspectors found that, at the time of the collision, the Morse was backing partly across the channel and across the course of the other steamer. I can find no testimony, now before the court, which warrants such a conclusion.

The other charges of fault made by the Pemaquid against the Morse are not sustained by the proofs.

The court finds that the Morse was not at fault, and that the Pemaquid was solely at fault, for the collision. A decree may be presented accordingly. The libelant recovers costs.

Fritz H. Jordan, Esq., is appointed assessor. Upon the coming in of his report, the court will pass upon such further questions as may arise.

UNITED STATES v. DISCHER et al.

(District Court, S. D. New York. January 22, 1919.)

1. MONOPOLIES ⟸24(2)—DISSOLUTION OF COMBINATION—MODIFICATION OF DECREE.

Evidence *held* insufficient to warrant modification of an injunction decree in a suit to dissolve a combination of manufacturers as illegal under the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830).

2. MONOPOLIES ⟸24(2)—DISSOLUTION—INJUNCTION—MODIFICATION OF DECREE.

Where a decree has been granted by consent, in effect enjoining the defendants, who were engaged in the combination, from granting joint licenses of patents covering parts of automobile bumpers, the injunction will not be modified upon affidavits that the patents are not competitive, but that one dominates the other, in the absence of the most convincing proof.

In Equity. Suit by the United States against Grant F. Discher and others. On motion by certain defendants for modification of decree. Denied.

Francis G. Caffey, U. S. Atty., of New York City (Henry A. Guiler, of New York City, Ryland W. Joyce, of Washington, D. C., and Rush H. Williamson, Sp. Assts. U. S. Atty., of New York City, of counsel), for the United States.

E. H. Bottum, of Milwaukee, Wis., and Phillip W. Haberman and Edwin P. Grosvenor, both of New York City, for defendants.

AUGUSTUS N. HAND, District Judge. The defendants Grant F. Discher and Central Brass & Fixture Company petition for an amendment of the decree which will allow them, together with the Gemco Manufacturing Company, jointly to grant licenses to manufacture and sell automobile bumpers embodying patent No. 974,212 issued to Turner and Crabill, and patent No. 1,052,224, issued to Discher. The royalties are fixed in the proposed license for structures embodying either or both of the patents. The decree granted by consent in a suit to dissolve an association to which these defendants, among other persons, belonged, as illegal under the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]), enjoined them from continuing a license under those patents and provided as follows:

"No defendant who was the owner of a patent or patents involved in this cause prior to January 31, 1917, so long as he acts separately and independently is enjoined by this decree from issuing to one or more of the defendants

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

acting separately and independently of each other any lawful license under such patent or patents."

The decree provided that the court retain jurisdiction to enable the parties to apply for modification of it, if it be thereafter shown that the provisions have become inadequate to maintain competition, or have become unduly oppressive to the defendants.

[1, 2] The government says that this case is not like that of Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, but like the so-called bathtub case, Standard Sanitary Mfg. Co. v. United States, 226 U. S. 47, 33 Sup. Ct. 9, 57 L. Ed. 107; that it is in effect an attempt by a combination of manufacturers either to fix prices on unpatented articles or to stifle competition between manufacturers under competitive patents. The petitions, on the other hand, contend that the patent to Discher is broad enough to dominate the Turner and Crabill patent, that any device manufactured under the latter will infringe the former, and that those patents are therefore not competitive.

To establish this proposition they refer to the decision of Geiger, J., whereby the Discher patent was held valid and allowed a certain range of equivalents. Not only does the decision of Judge Geiger, by reason of his reputation, have great prima facie weight, but it seems convincing with such information as to the record before him as I have available. It is by no means, however, a decision that the Discher patent is a broad patent. Brackets for fenders, both for automobiles and other traction mechanisms, were old in the art, and the idea of a fender having a bearing which gave a direct thrust was equally old. In view of the state of the art, this patent must, I think, be limited pretty strictly to the precise structure disclosed. The Turner and Crabill patent was, if valid, so different from that of Discher that I am most doubtful whether it infringes. Certainly Judge Geiger never so held. It shows a different kind of bracket from the two side plates which Discher uses. Brackets and bearings which would create a direct thrust were too old in the art to give Discher valid claims for a broad invention.

At all events such a matter as this should hardly be determined in a case where the petitioners, instead of being antagonists interested in holding either patent invalid, are consenting to have the patents both regarded as valid and noncompetitive. I could at best reach a superficial conclusion without the aid of testimony as to the practicability of either the Discher or Turner and Crabill devices, or the commercial success of such mechanisms as substantially followed their drawings. To modify the decree to which the defendants consented with their eyes open, I should have convincing proof that it is unjust and burdensome. While a different conclusion might perhaps be reached if the Turner and Crabill patent were held valid and to infringe the Discher patent after litigation against infringers conducted in good faith, where full testimony was before the court, I have been unable, after careful perusal of the matters submitted to me, to regard the present proof as justifying relief.

The application is denied.

THE AKI MARU. *

NIPPON YUSEN KAISHA v. LUMBERMEN'S NAT. BANK OF PORTLAND.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1919.)

No. 3121.

1. SHIPPING ⟸132(5)—DAMAGE TO CARGO—LIABILITY OF VESSEL—IMPROPER STOWAGE.
Evidence *held* not to sustain the burden of proof resting upon a steamship to show that the bad condition of a shipment of eggs from Shanghai to Seattle, when delivered, existed before shipment, but to show that it resulted from improper stowage for such cargo.

2. SHIPPING ⟸132(3)—SUIT FOR DAMAGE TO CARGO—BURDEN OF PROOF.
A bill of lading issued by a ship for goods "apparently in good order and condition" is prima facie evidence that they were in such good condition as to anything visible or discoverable by inspection, and the ship has the burden of overcoming such evidence.

3. SHIPPING ⟸132(1)—SUIT FOR DAMAGE TO CARGO—MEASURE OF DAMAGES.
Where libelant has proceeded on the theory that damages for injury to cargo are to be computed on its market value at place and time of shipment, as provided in the bill of lading, the court is justified in awarding damages on that basis, although under the facts libelant may have been entitled to a larger award.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in admiralty by Lumbermen's National Bank of Portland against Steamship Aki Maru, Nippon Yusen Kaisha, claimant. Decree for libelant, and claimant appeals. Affirmed.

Oliver C. McGilvra and F. G. Dorety, both of Seattle, Wash., for appellant.

Platt & Platt and Hugh Montgomery, all of Portland, Or., and Corwin S. Shank and H. C. Belt, both of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The Lumbermen's National Bank, appellee, filed a libel against the steamship Aki Maru, respondent, and set forth that in November, 1914, a shipment of 1,500 cases of eggs was delivered to the ship in good order at Shanghai, China, but was in bad order at the time of discharge, December, 1914, at Seattle, Wash., and was receipted for by the appellee as being in bad order; that the shipment was damaged because improperly stowed in the lower after hold of No. 5 hatch in the warmest place on the steamship, which place by reason of temperature and lack of ventilation and excessive vibration was an improper place to stow eggs.

[1] The appellant, owner of the steamship, denied improper stowage, and alleged that any damage sustained was due to the inherent defect and bad condition of the cargo of eggs at the time of shipment, or to the extremely rough weather, or other causes within the exceptions of the bill of lading.

Section 3 of the act of Congress called the Harter Act, approved February 13, 1893 (27 Stat. 445, c. 105 [U. S. Comp. Stat. 1901, p. 2946; Comp. St. § 8031]), is as follows:

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The District Court held that the eggs involved were fresh and in good condition at the time of their delivery to the steamship at Shanghai, China; that upon arrival at Seattle 575 out of a total of 1,510 cases were in marketable condition and were permitted entry, while 925 cases were condemned; that the steamship company had failed to show that the eggs were not in good condition at the time of their delivery to the steamship, and failed to establish the existence of any other cause whereby the steamship company would be relieved from liability for the damaged condition of the eggs at the time of their arrival. A decree was entered against appellant for $5,496.18, and the steamship company appealed.

Counsel for appellant confine their discussion of the evidence principally to the contention that the District Court erred in holding that the lower hold No. 5 hatch of the ship was not a proper or a suitable place for stowage of the cargo, and that the eggs were fresh and in good condition when delivered. Taking up the latter question first, the testimony introduced by the libelant was in substance that prior to the shipment of the eggs at Shanghai they were candled one by one before placed in the cases, and that every egg not strictly fresh was rejected; that the eggs were brought from the country collecting districts to Shanghai and sent to the candling warehouse, where experienced men judged of their freshness as soon as the eggs were received; that if a lot did not seem to be very fresh it was rejected before the candling test; that the eggs were received three or four days before the departure of the ship, and candled night and day in order to be shipped; that prior to shipment they were kept in a high-roofed cool building; that they were packed in the usual manner in egg fillers, each egg being put in a small compartment; that the instructions to the steamship company were to store the eggs in a cool place in the fore part of the ship; that the candling was done with an electric light, with a sheet of green covering the light and a hole in each sheet about the size of an egg; that these eggs belonged to the best class of eggs graded in Shanghai. Persons of special experience in dealing with eggs explained the process of candling and said that it enabled one to determine accurately the approximate age and condition of the contents of the egg.

For the respondents several egg merchants in China testified that from long experience in the business of shipping Chinese eggs they believed October and November were bad times to export them to America, because the heat in those months affected the eggs, which were generally carried over rough roads to Shanghai from the neighboring country by means of primitively made carts and baskets on the backs of coolies, and that some of these eggs came from 200 miles away, and others from about 33 miles from Shanghai. Much of the evidence of such persons, however, was of a general nature, not based upon direct knowledge as to where the eggs involved in the shipment came from. But in a deposition taken at appellant's instance by permission given since the case has been in this court, the Chinese merchant in Shanghai who sold 1,300 cases of the eggs to the shipper testified that they were brought from Woo Foo and other points about two days by steamer from Shanghai; that he knew nothing of the other 200 cases, but that the eggs he sold were good.

[2] The bill of lading contained a provision to the effect that the eggs were shipped in "apparent good order and condition, * * * to be carried upon said steamer to the port of Seattle, * * * and there in like apparent good order and condition to be delivered unto order or his or their assigns." The principles which govern are well established. In Nelson v. Woodruff, 66 U. S. (1 Black.) 156, 17 L. Ed. 97, it was held that the signing of a bill of lading acknowledging to have received the goods in question in good order and well conditioned is prima facie evidence that as to all circumstances which were open to inspection and visible the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. "But," said the court, "in case of such loss or damage the presumption of law is that it was occasioned by the act or default of the carrier, and of course the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible." Argo Steamship Co. v. Seago et al., 101 Fed. 999, 42 C. C. A. 128; The Medea, 179 Fed. 781, 103 C. C. A. 273. The provisions of the Harter Act would not relieve the carrier from liability for damage to the eggs carried by improper stowage. Our judgment, therefore, is that, when all the evidence is considered and tried under the rule of law as stated, it must be held that appellant has not shown that the eggs were in bad condition before received for carriage.

The carrier having accepted the eggs, and it being plain that eggs are a kind of freight which requires special care in stowage, we inquire whether the lower hold No. 5 hatch was a proper place to stow the eggs. It appears that the ship is 460 feet long; that No. 5 hold is the aftermost one in the ship; that the eggs were all stowed between the floor or bottom of the ship, and in the forward part of the hold; that No. 4 hold is forward of No. 5, and between the engines and No. 5; that No. 5 hold is 72 feet long and 49 feet wide; that the driving shaft goes right through the No. 4 and No. 5 in the shaft alley, and

that there is more or less vibration made by the propeller; that No. 4 hold is 40 feet from the forward to the after bulkhead; that the vertical distance from the top of the after ventilator to the lower hold, where the eggs were stored, was about 30 feet.

A witness named Henningson, who had been in the business of handling eggs for many years, testified that he had examined the eggs contained in the 1,500 cases in controversy, and also examined other cases not here involved, but which were stowed in the same hold with the 1,500 cases, and that many of the cases in lots other than that in controversy were rotted. We quote part of the examination of this witness:

"Q. Did you determine, or have you any means of determining, the comparative temperature of the eggs in the 1,500 cases involved in this controversy at the time of your first examination of those eggs to which you testified yesterday? A. In handling eggs we, of course, open and examine immediately, or as soon as we can, every one of these shipments. I have met all of these shippers personally. The eggs on arrival on the Aki Maru were warm to the touch when I reached the dock and examined them. I could feel the heat in my hand.

"Q. What was the atmospheric condition at the dock as to temperature at that time? A. Here in Seattle?

"Q. Yes. A. I should say it was somewhere around 40°."

Another witness of experience testified that he examined the eggs before they were discharged from the ship, and that upon leaning over the hatch he found heat coming out of the hold and a foul smell; that if the eggs had been bad at the time of the original shipment there would have been a foul odor, and such condition would have been easily observed, and that upon the assumption that the eggs were strictly fresh when shipped, and had been candled before shipment, the condition in which they were in when they arrived at Seattle was due to excessive temperature, lack of ventilation, and too much vibration; that the vibration, with slight temperature, would be very injurious. It also appeared, from the evidence of men who had frequently shipped eggs from Shanghai to Pacific Coast ports, that such shipments had been received in good condition in every instance, except one, where the eggs had been stowed in the forward part of the carrying ships, and that it was customary to stow eggs in the forward hatches, above the water line and away from the boilers.

We do not think it necessary to state more of the evidence. We have examined it with care, and conclude that the learned judge of the District Court correctly held that the disturbance or vibration due to the stowage of the eggs in No. 5 hold, through which the propellor shaft passes, together with the heat in the hold and lack of better ventilation, caused the damage to the eggs, and that, the eggs having been delivered to the carrier in good condition, the carrier failed to show that it was free from negligence in stowage.

[3] The appellee asked this court to award a larger sum in damages than was fixed by the District Court. The amount awarded by the decree, $5,496.18, appears to have been made up in this way: Market value of 1,500 cases of eggs at $4 per case, $6,000; net amount received for the sale of 575 cases salvaged, after deducting expenses of

rehandling and recandling, $1,552.87. When this last amount is deducted from the $6,000, it leaves a balance of $4,447.13, upon which amount the District Court allowed interest from November 7, 1914, the date of shipment, and costs. The point made by the appellee is that the market value of the cargo ought to have been computed on the basis of such value at the place of destination, and not at the point of shipment. The testimony of qualified witnesses was that the value of the eggs in Shanghai at the time of shipment was $4. The libelant offered to prove that the market value of the eggs at Seattle was $6 per case. Counsel for the steamship company objected on the ground that by agreement of the parties in the bill of lading the measure of damages was the market value at the point of shipment and not at the place of destination. The clause of the bill of lading to which reference is made is as follows:

"In all cases of loss of any portion or the whole of said goods or merchandise the amount of claim shall be restricted to the cash value of such goods or merchandise at the original port of shipment, at the time of shipment, and that all claims for either partial or total loss or damage shall be ascertained and adjusted upon this basis of value."

The appellee makes the contention that such provision is not broad enough to protect the carrier where the damage has been the result of the carrier's own negligence, and cites in support of the argument Lowenstein v. Lombard, Ayers & Co., 164 N. Y. 324, 58 N. E. 44. The Court of Appeals of New York there held that a bill of lading which provided that all liability under it "shall be estimated on the basis of the actual market value of the goods at the place and time of shipment," was not broad enough to relieve the carrier, where the loss had occurred through its negligence or that of its servants.

But in the present case the appellee after some months had elapsed from the time of the arrival of the eggs in Seattle made up a detailed statement in support of its claim for damaged and destroyed eggs, and put the value of the 1,500 cases involved at $4.07½ per case. Moreover, in its libel it proceeded on the theory that damages should be awarded with relation to the value of the eggs at Shanghai, China.

Considering these circumstances, we believe that the District Court was justified in making the award with relation to the value of the eggs at Shanghai, China.

The decree is affirmed, with costs in favor of the appellee.

EVANS, County Judge, v. YOST.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1919.)

No. 5185.

1. MANDAMUS ⊂=183—PEREMPTORY WRIT—"SUMMONS"—SERVICE.
Under Rev. St. Mo. 1909, § 1759, defining a summons as the original writ, where not otherwise provided, and section 1760, authorizing service of process by leaving a copy of the petition and writ at the usual place of defendant's abode with some member of his family over 15, *held*, that a peremptory writ of mandamus need not be served personally, but on a member of defendant's family as authorized.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Summons.]

2. COURTS ⊂=334—FEDERAL COURTS—CONFORMITY ACT—ISSUANCE OF WRIT OF MANDAMUS.
Under Rev. St. § 918 (Comp. St. § 1544), equity rule 13 (198 Fed. xxii, 115 C. C. A. xxii), and Judicial Code, § 262 (Comp. St. § 1239), *held* that, notwithstanding section 914 (Comp. St. § 1537), known as the conformity act, a federal court, in issuing a writ of mandamus as ancillary to a judgment previously rendered by it, need not conform to the state practice; the issuance of such writ being governed by the same principle as in case of a writ of scire facias.

3. MANDAMUS ⊂=141—JURISDICTION—FEDERAL COURTS.
The federal courts have no jurisdiction to issue writs of mandamus, except as ancillary to judgments rendered by them.

4. COUNTIES ⊂=192—TAXATION—STOCK SUBSCRIPTION.
Laws Mo. 1859-60, p. 438, § 14, authorizing county courts to subscribe to the stock of a railroad company, necessarily carried with it the authority to levy taxes to pay such subscription.

5. MANDAMUS ⊂=112(1)—TAXES—LIMITATIONS.
Though Gen. St. Mo. 1865, c. 63, § 18, limited the tax which a county might impose on account of subscriptions to stock of a railroad company, *held* that, where county court did not levy assessments to defray such liability, notwithstanding judgment against the county, the limitation cannot be invoked to defeat a writ of mandamus to compel judges of the county court to levy taxes to satisfy the judgment on the ground that the tax exceeded the statutory limitation, for the inhabitants of the county had escaped previous taxes which they should have paid, and the accumulation of the debt was caused by neglect of their own officers.

6. JUDGMENT ⊂=501—COLLATERAL ATTACK—MANDAMUS.
Error in judgment in proceedings by mandamus against judge of county court, which required levying of taxes to pay judgment against the county, can only be corrected by writ of error, and not by a collateral attack on the judgment in contempt proceedings for refusal to comply therewith.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

On petition by David Yost, assignee of John B. Henderson, Jr., who had recovered a judgment against the County of Dallas, an alternative writ of mandamus was issued against J. S. Evans, one of the county judges of the County of Dallas. Thereafter a peremptory writ was issued, and J. S. Evans was committed for contempt, and he brings error. Judgment affirmed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The plaintiff in error, respondent in the court below, seeks by writ of error to reverse a judgment, finding him guilty of contempt of court. The undisputed facts are:

That on October 7, 1908, John B. Henderson, Jr., recovered in the District Court of the United States for the Western District of Missouri a judgment against the county of Dallas, Mo., for $1,023,020.19, with interest specified in the judgment, which judgment was duly assigned by Mr. Henderson to the defendant in error. The judgment was on bonds issued by the county of Dallas in 1870–1871, under the provisions of a special act of the General Assembly of the state of Missouri, entitled "An act to incorporate the Laclede & Ft. Scott Railroad Company," approved January 11, 1860. Laws 1859–60, p. 434. Section 14 of that act provided: "It shall be lawful for the county court of any county in the state to subscribe to the stock of said company, or invest its three per cent. fund or any other internal improvement fund belonging to the county, as stock in said road; and for the stock subscribed in behalf of the county, may issue the bonds of the county to raise the funds to pay for same, and to take proper steps to protect the interests of the county, may appoint an agent to represent the county, vote for it, and receive dividends. Any incorporated city, town, or company may subscribe to the stock in said railroad company, and appoint an agent to represent its interests, give its votes, and receive dividends, and may take proper steps to guard and protect the interest of the said city, town or company." This act was silent as to tax levies for the payment of the bonds or interest. At the time these bonds were issued, there was a general statute relating to such subscriptions, which provided: (section 18, page 338, General Statutes of Mo. 1865): "But the total amount of tax levied for railroad purposes in any one year, in any county, city or town, shall not exceed thirty per centum of the subscription made by such county, city or town."

On the petition of the judgment creditor an alternative writ of mandamus was issued by the court requiring the judges of the county court of the county, which under the laws of the state levies all county taxes, to show cause why they should not be compelled to levy and cause to be collected a tax to pay the judgment of the relator. A return was made to the writ, and on May 1, 1912, after a hearing, the court granted a peremptory writ of mandamus, directing the county judges to levy, for the current fiscal year, 1912, a special tax to realize the sum of $70,500 upon the taxable property of the county, and when collected to be paid on the judgment. This writ was disobeyed, and no tax whatever levied, although duly served on the respondents. At the April term, 1913, of the court, the relator filed another petition for mandamus, in which it was alleged that at the October term, 1912, writs of attachment for contempt had been issued by the court against the county judges and placed in the hands of the United States marshal for the district, but could not be served, as they evaded arrest by concealing themselves. The prayer was to the effect that they be required to levy a tax to raise the said sum of $70,500 for the year 1912, and a tax to collect a similar sum for the year 1913, or in the aggregate sum of $141,000. The petition further prayed that the marshal should serve the alternative writ, when issued, on each of the respondents in person, if they be found by diligent search, and, if either of them cannot be found by diligent search, the delivery of a copy thereof to be delivered to a member of the family of such defendant over the age of 15 years at the usual place of abode of such defendant. The court granted the petition for the alternative writ at the April term, 1913, and that it be served as prayed in the petition. Nothing was accomplished under this order.

At the April term, 1917, another petition, reciting the facts as set out in the petition of 1913, that no tax has ever been levied to pay this judgment, prayed that they be required to levy a tax to net $70,500 for each of the years 1912, 1913, and 1917, a total sum of $211,500, to be served in the same manner as provided by the judgment entered in 1913. The court made an order in conformity with the prayer of the petition. The marshal's return shows that being unable, after diligent search, to serve the plaintiff in error with the writ, he "delivered a certified copy of it to Ruby Evans, a member of the family of J. S. Evans, associate judge of the county court of said county, over the age of 15 years, in the absence of J. S. Evans, whom I was unable to

locate after diligent search." At the October term, 1917, the cause came on for hearing, whereupon the court found that the respondent had been properly served with the alternative writ, and granted the peremptory writ as prayed in the petition, directing service thereof on the defendants in person, "if they can by diligent search be found, and, if they cannot be found by the marshal after diligent search, then by delivering a copy of said writ to a member of the family of said defendant who cannot be found over the age of 15 years at the usual place of abode of such defendant."

The marshal's return shows the service on the defendant Evans was made by delivering a certified copy of the writ to Ruby Evans, in the same manner as shown by his return of service of the alternative writ hereinbefore set forth.

On March 27, 1918, the defendant in error filed a petition for attachment against the three county judges, including the plaintiff in error, setting out the proceedings hereinbefore recited, and that with full knowledge and due notice of the order of the court, and of the peremptory writ, and of all the proceedings prior thereto, but with the intent to attempt to defeat the ends of justice, and to hinder and delay the enforcement of the order of the court, they have entirely failed to comply with the commands of the peremptory writ of mandamus, and have failed and refused to make the levy as directed to be made by said writ, and in all things have failed to comply therewith, and have by their actions defied this court, and disobeyed the writ and mandate of this court, and are now in open, palpable, and flagrant contempt of this court. Upon presentation of this petition the court ordered an attachment of the bodies of the defendants. The writs were duly issued and the plaintiff in error arrested by the marshal. The plaintiff in error thereupon filed a motion to quash the peremptory writ of mandamus and the attachment issued and founded thereon, assigning as grounds therefor:

"First. There is no authority under the law for the levying of $211,500 for the purpose stated and required by said writ of mandamus, and the petitions upon which said writ is founded so state and declare.

"Second. There was no service of said writ of mandamus on this defendant as required by law, and the marshal's return so shows.

"Third. The writ of mandamus was not properly served by the delivery of a copy thereof to a member of this defendant's family over the age of 15 years at his usual place of abode.

"Fourth. The writ of mandamus was not issued and served in the manner required by law, and no writ of attachment could issue thereon."

Upon a hearing the motion was overruled by the court, and the plaintiff in error, resting on the motion, was adjudged by the court to be guilty of contempt and sentenced to imprisonment.

The assignments of error are:

"First. The court erred in overruling the motion filed by this defendant, J. S. Evans, on April 1, 1918, to vacate, set aside, and quash the writ of mandamus, issued herein on the 8th day of October, 1917, the return of the marshal thereon, and the attachment issued and founded on said writ of mandamus, and dated on the 22d day of January, 1918, and to discharge this defendant from said attachment.

"Second. The court erred in sentencing this defendant, to the jail of Jackson county, Missouri, under the records and showing in this cause."

W. C. Hawkins and John S. Haymes, both of Buffalo, Mo., for plaintiff in error.

W. D. Tatlow and E. Y. Mitchell, both of Springfield, Mo., for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). [1] It is contended that a peremptory writ of mandamus must be served personally, and as the writ in this case was not served on the plaintiff

in error in person, but only on a member of his family, as authorized by the order of the court, he need not obey it.

There is no statute of the state of Missouri regulating the service of writs of mandamus, but section 1759, art. 4, c. 21, Mo. Rev. St. 1909, defines the summons as the original writ where not otherwise provided. Section 1760 of that chapter authorizes service of process:

"Third. By leaving a copy of the petition and writ at his usual place of abode, with some person of his family over the age of fifteen years."

[2, 3] There is no reason why this provision of the statute is not broad enough to authorize service of a writ of mandamus in the manner prescribed. But, even were it otherwise, we are of the opinion that the national courts are not controlled by state statutes, but may prescribe such rules and orders, as may be necessary. Section 918, Rev. St. (Comp. St. § 1544), provides:

"The several Circuit and District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Section 262, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. § 1239]), provides:

"The Supreme Court and the District Courts shall have power to issue writs of scire facias. The Supreme Court, the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In Collin County National Bank v. Hughes, 152 Fed. 414, 81 C. C. A. 556, and on rehearing 155 Fed. 389, 394, 83 C. C. A. 661, this court passed on the question of the issuance of a writ of scire facias. After a careful review of the authorities it was held under section 716, Rev. St. (now section 262 of the Judicial Code), the national courts are not restricted by the methods prescribed by the state practice, and may order writs of scire facias to revive judgments to be served outside the state. In Hills & Co. v. Hoover, 220 U. S. 329, 336, 31 Sup. Ct. 402, 405 (55 L. Ed. 485, Ann. Cas. 1912C, 562), it was held:

"It follows that where the state statute, or practice, is not adequate to afford the relief which Congress has provided in a given statute, resort must be had to the power of the federal court to adapt its practice and issue its writs and administer its remedies so as to enforce the federal law."

As the writ in this case was issued, not in an original action, the national courts having no jurisdiction to issue writs of mandamus, except as ancillary to its judgments rendered by it, the writ cannot be distinguished from a writ of scire facias to revive a judgment. In Memphis v. Brown, 97 U. S. 300, 302 (24 L. Ed. 924), it was held that:

"A mandamus to collect a tax for the payment of a judgment, or a mandamus to pay a judgment, is process in execution, and nobody heretofore has ever questioned the power of a court to control its own final process."

As the court found that, owing to the willful acts of the respondents in the mandamus proceedings, by concealing themselves to evade service of process, the court below, for the purpose of preventing a failure of justice, prescribed for a service which is in effect the same as is authorized by the statutes of Missouri. Equity rule 13 (198 Fed. xxii, 115 C. C. A. xxii) authorizes such service of subpœnas in equity, even if there is not willful evasion of the service of process. Therefore, even if the state statutes had required a personal service, and none other, it would not be binding on the national courts.

In construing section 918, Rev. St., it has been held that a summons made returnable according to a rule of the federal court, and not in conformity with a changed state statute, is proper. Shepard v. Adams, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602; Boston & Maine R. R. v. Gokey, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002. In Van Doren v. Pennsylvania R. R., 93 Fed. 260, 269, 35 C. C. A. 282, 290, the court, in reply to a contention that the national courts must, under section 914, Rev. St. (the Conformity Act, Comp. St. § 1537) follow the practice of the state courts in which it is held, said:

"The Circuit Courts are not bound to conform to state practice or pleadings in subordinate details where such conformity would result in gross or substantial injustice to litigants."

It is not even claimed that he had no notice of the granting, issuance, and service of the writ in conformity with the order of the court.

In view of these facts, we are of the opinion that the order of the District Court for the service of the writs was authorized by the laws of the United States, and the service was sufficient.

[4] It is next claimed that the judgment awarding the peremptory writ is absolutely void, as the general law of the state, in force when the bonds, upon which the relator's judgment was based, hereinbefore quoted from General Statutes of Mo. 1865, limited the tax, which may be levied for railroad purposes in any one year, to 30 per centum of the subscription made by a county, and the writ, which the plaintiff in error was charged to have disobeyed, commanded a greater levy than 30 per cent. of the subscription.

Although there was no express provision in the act, by authority of which the bonds upon which relator's judgment is based were issued, to levy a special tax for their payment, it has been conclusively determined by the Supreme Court in actions arising under acts of the state of Missouri, containing the identical provision found in this act, that the power to tax is necessarily an ingredient of such power to contract. Ralls County Court v. United States, 105 U. S. 733, 736, 26 L. Ed. 1220; Scotland County Court v. United States, 140 U. S. 41, 45, 11 Sup. Ct. 697, 35 L. Ed. 351. The fourteenth section of the act provided:

"It shall be lawful for the county court of any county in the state to subscribe to the stock of said company, * * * and for the stock subscribed in behalf of the county may issue the bonds of the county to raise the funds to pay for same, and to take proper steps to protect the interests of the county."

In the cases cited it was held that such a provision carried with it the power to levy a tax to pay bonds issued thereunder.

[5] Assuming that the special act, under which the bonds were issued, is subject to this general act (but see Bunch v. United States, 252 Fed. 673, 679, — C. C. A. —, decided by this court, Sept. 2, 1918) the contention is untenable.

When the first peremptory writ of mandamus was issued in 1912, it only commanded a tax levy to produce $70,500. The county court disobeyed this mandate. Thereupon another petition for a mandamus was filed in 1913, alleging that fact, and asking for a peremptory writ to compel the levy of a tax for the two years, for $70,500 each, or a total of $141,000. This was granted, but again the county court refused to levy any tax, as commanded. When in 1917 the relator filed the third petition for a mandamus, he set out the failure and refusal of the county court to levy the taxes as commanded for the years 1912 and 1913, and prayed for a mandamus, commanding the county court to levy in the aggregate sum of $211,500, to make up the amounts, which should have been levied and collected in obedience to the writs issued in 1912 and 1913, and to be levied for the year 1917, and the court granted this prayer of the petition.

In East St. Louis v. Amy, 120 U. S. 600, 604, 7 Sup. Ct. 739, 741 (30 L. Ed. 798), the same question was involved, except that no writs of mandamus had been issued therefor, and the court held:

"The law required a tax to be levied annually sufficient to pay all interest as it accrued, and the principal when due. This was neglected, and consequently there is now a large accumulation of a debt which ought to have been paid in installments. Thus far the inhabitants have been allowed to escape taxation at the times it ought to have been laid, and to which they were under constitutional obligations to submit. The accumulation of the debt was caused by their own neglect as members of the political community which had incurred the obligation. Such being the case, we see no reason why it was not in the power of the court to order a single levy to meet the entire judgment, which was all for past-due obligations. Whether such a tax would be so oppressive as to make it proper not to have it all collected at one time was a question resting in the sound discretion of the court in ordering the collection. There is nothing here to show that there ought to have been a division."

To the same effect are Hicks v. Cleveland, 106 Fed. 459, 465, 45 C. C. A. 429; Padgett v. Post, 106 Fed. 600, 603, 45 C. C. A. 488.

[6] Again, if the court erred in requiring too large a tax levy, the error could only be corrected by writ of error, and not by a collateral attack on the judgment, as is attempted in this proceeding. Bunch v. United States, supra, where the authorities are collected.

The judgment is affirmed.

KINNEY v. OAHU SUGAR CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3042.

1. WILLS ⟸605—CONSTRUCTION—ESTATE TAKEN BY DEVISEE—FAILURE OF ESTATE TAIL.

A devise of land in Hawaii to a woman and her husband, "and to the heirs of the body of either, * * * upon default of issue the same to go to my trustees upon the trust below expressed," *held* to use apt words to create an estate tail, but, since such estate cannot exist under the law of Hawaii, to vest the devisees with an estate in fee simple.

2. COURTS ⟸405(3)—RULE OF DECISION—HAWAII.

A settled rule of construction of conveyances and devises in the territory of Hawaii must be accepted by the appellate court, in a case coming from that district, as persuasive, if not of binding force.

Ross, Circuit Judge, dissenting.

In Error to the Supreme Court of the Territory of Hawaii.

Action at law by Helen K. Kinney against the Oahu Sugar Company, Limited. Judgment for defendant, and plaintiff brings error. Affirmed.

David L. Withington, of Honolulu, T. H. (Castle & Withington and W. C. Achi, all of Honolulu, T. H., of counsel), for plaintiff in error.

Frear, Prosser, Anderson & Marx and Thompson & Cathcart, all of Honolulu, T. H., and Frederick W. Milverton, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error brought ejectment to recover the possession of certain land in the island of Hawaii, claiming title as one of the heirs of the body of Kahakuakoi and Kealohapauole, who were devisees under the will of Bernice Pauahi Bishop, who died October 16, 1884, and also as the heir of a deceased brother. The devisees so named had three children, Niulii, George, and Lydia. Niulii died in 1900, leaving two children, John Paalua and Helen, the plaintiff. Kahakuakoi and Kealohapauole died, respectively, in 1910 and 1914, and John Paalua died in 1915. The defendant claimed title through the foreclosure of a mortgage executed by Kahakuakoi and Kealohapauole, under which the land was sold on January 28, 1893, and also under a deed from Kahakuakoi and Kealohapauole and their children George and Lydia.

[1] The rights of the parties to the action depend upon the proper construction of the following provisions of the will:

"I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of thirty dollars ($30) per month (not $30 each), so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called 'Mauna Kamala,' situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed."

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In a codicil the testatrix provided as follows:

"I revoke so much of my said will as devises the land known as 'Mauna Kamala' to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto the said Kahakuakoi (w) and Kealohapauole (k) all of that tract of land known as Hanohano situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will."

The defendant contended that the words "heirs of the body of either" are words of inheritance and not of purchase, and at common law would vest an estate in fee tail; that, since in Hawaii there can be no estate in tail, the estate so devised, in the absence of words to indicate a contrary intention, was a fee simple; that it was the intention of the testatrix to create by the devise an estate of inheritance and not a life estate and remainders; and that the words of the will and the codicil, together with the legal presumptions, tend to support the view that it was her intention that the devisees named should take title in fee simple rather than for life only. The plaintiff denied that at common law the devise would create a fee tail; that, even if the words of the devise were such as to create a fee tail at common law, they are in Hawaii to be construed as creating a fee simple or an estate for life, with a remainder over, according to which of the two constructions will carry out more nearly the intention of the testatrix as drawn from the will and the surrounding circumstances; that the use of the words "of either," and the devise over in default of issue, show the intention of the testatrix that the heirs of the body of either were to take an interest; and that, as they cannot take by descent, they must take by purchase, and that the estate created by the devise is a life estate by the entirety to the devisees named therein, with the remainder over to the heirs of the body of either; the presumption being that the testatrix intended to create a legal estate rather than an illegal one, a devise for the children of the devisees rather than a fee tail, which cannot exist in Hawaii, and that this construction is assisted by the use of the word "limited" in the codicil. In the Circuit Court a jury trial was waived, and the court found for the defendant, holding that the devise created a fee-simple title in the devisees named therein. On writ of error from the Supreme Court of the territory the judgment was affirmed. Kinney v. Oahu Sugar Co., 23 Hawaii, 747. That judgment is by writ of error brought before this court for review.

From a careful consideration of the terms of the will we deduce the following conclusions:

First, the devise in question uses apt words to create an estate tail. It contains the requisite words of inheritance "heirs of the body." "That these words, if alone considered, created an estate tail, is hornbook law." Pearsol v. Maxwell, 76 Fed. 428, 22 C. C. A. 262. The presumption is that technical words used in a will have been used in their technical sense, unless a contrary intention clearly appears from the context. 40 Cyc. 1398; Pearsol v. Maxwell, supra; Nightingale v. Sheldon, 5 Mason, 336, Fed. Cas. No. 10,265; Shuttle & Weaver Land & Imp. Co. v. Barker, 178 Ala. 366, 60 South. 157. "Any ex-

pressions in the will denoting an intention to give the devisee an estate of inheritance descendable to his, or some of his, lineal, but not collateral, heirs have always been regarded as a sufficient devise of a fee tail." 10 R. C. L. 658; Smith v. Pendell, 19 Conn. 107, 48 Am. Dec. 146; Hudson v. Wadsworth, 8 Conn. 348; Hill v. Hill, 74 Pa. 173, 15 Am. Rep. 545; Doty v. Teller, 54 N. J. Law, 163, 23 Atl. 944, 33 Am. St. Rep. 670. We find no ground to sustain the plaintiff's contention that the word "either" in the clause, "and I also devise unto them and to the heirs of the body of either," has the effect to convert the estate of the first takers into a life estate. These are words of limitation defining the estate given to the devisees. The word "either" relates to the inheritance only. It does not affect the estate of the devisees. It does not impose a superadded limitation, nor does it cause a change in the course of descent. It has to do only with the source from which the heirs of the body shall spring. Its effect is to create a fee tail general instead of a fee tail special. There is entire absence of words of separation or futurity to sever the estate of the first takers from that of their heirs. A case in point is Wright v. Scott, 4 Wash. C. C. 16, Fed. Cas. No. 18,092.

A testator had devised lands to his daughter and to her husband, "to * * * their heirs begotten of their bodies, or assigns forever; or for want of such heirs or assigns, then to the heirs begotten by or of either of them." Mr. Justice Washington said:

"Can it admit of a doubt that the testator intended, in the first instance, to give to his daughter and to his son-in-law a joint estate in fee tail? * * * The words are, 'to his well beloved daughter, and to her husband, J. W., and their heirs begotten of their bodies.' The most unlettered man, however ignorant he may be of the difference between a fee simple and a fee tail, knows that the heirs of the body of the devisee cannot include general heirs, who are not of his body. Again, can it be doubted that the testator intended, in the event of the death of his daughter, or of her husband, without issue of their bodies, to give the estate to the heirs of the body of the survivor of them? * * * The expressions, 'heirs begotten by or of either of them,' have precisely the same meaning here that they have in the devise of the particular estate."

Second, it was the intention of the testatrix to create an estate tail. The will and the codicils are drawn with meticulous care. The sole office of the codicil was to substitute one parcel of land for another, and it does not add to or take away from or explain the nature of the estate which had been devised, or make more clear the intention of the testatrix. The words, "to have and to hold as limited," express only what had already been provided, that the estate should remain, the same as before defined, a limited estate, intended to be limited as an estate tail, an estate which is defined as a limited estate. " 'Heirs of the body' are strictly and technically words of limitation." Pearsol v. Maxwell (C. C.) 68 Fed. 513; Linn v. Alexander, 59 Pa. 43, 46. The testatrix knew how to express her intention. In appropriate and accurate language she made several devises of land to devisees during the term of his or her natural life, with remainder over. She also devised land in fee simple, "to have and to hold, with the appurtenances

to him, his heirs and assigns, forever." A significant fact is that the first codicil gives power to "all of the beneficiaries named in my said will and in this codicil to whom I have given a life interest in any lands, to make good and valid leases of said lands for the term of ten years; which leases shall hold good for the remainder of the several terms thereof, after the decease of said devisees, the rent, however, after such decease to be paid to my executors or trustees." If the devise in question was intended to create a life estate in the devisees named, and they had made the lease which the codicil authorized them to make, the trustees, and not the children, would, under the will, have received the ensuing rentals. It is evident that the testatrix and Judge Hatch, formerly a Justice of the Supreme Court of Hawaii, who drew the will, were of the opinion that an estate tail could be created in Hawaii. In the opinion of the court below it is said that this impression seems formerly to have prevailed. That such was the impression is further shown by the discussion in Rooke v. Queen's Hospital, presently to be considered. The devisees also understood that they were tenants in tail. In 1890, six years after the death of the testatrix, they leased the land for a term of 50 years. They thought also that the entail could be barred by their deed, for in mortgaging the land in 1890 they described it as the premises "devised to us by will of B. Pauahi Bishop," and they conveyed the same "freed and discharged from any estate tail of us, and all remainder estates and powers to take effect after the determination or in defeasance of such estate tail."

In nearly all the states of the Union estates tail have been either abolished or greatly modified by statute, being usually converted into estates in fee simple, in the hands of the first taker, or into life estates with remainders in fee. In two of the states estates tail have never been recognized, they having been deemed to be out of harmony with the genius, spirit, and objects of the state institutions. Pierson v. Lane, 60 Iowa, 60, 14 N. W. 90; Jordan v. Roach, 32 Miss. 481. On similar ground the existence of estates tail was denied in Hawaii, in Rooke v. Queen's Hospital, 12 Hawaii, 375, decided in May, 1900. In that case the court gave exhaustive consideration to the question, and held that estates tail were never a part of the system of Hawaiian land tenures, and that the English system was never imported into the islands. Said the court: "We have no hesitation in holding that estates tail have no place under the laws of Hawaii." It appears from the opinion that the question was stoutly contested, that six briefs were filed by the twelve counsel engaged, together with opinions by six persons noted for their learning in real estate law in England and in the United States, one of which was by Professor Gray of the Harvard Law School, and another was by Sir Howard W. Elphinstone, one of the conveyancing counsel to the Chancery Division of the High Court of England. "These," said the court, "arrive at diametrically opposite conclusions." It appears, therefore, that at that time the belief was widely entertained that estates tail could be created in Hawaii.

The question of the effect of a deed which at common law would have conveyed an estate tail arose in the subsequent case of Nahaolelua v. Heen, 20 Hawaii, 372. A woman about to marry had conveyed to trustees land for her use until her marriage, and thereafter to pay the net income to her during her coverture, and, in case of her death leaving issue, to apply the net income to the maintenance of such issue during minority, and upon the issue reaching majority to convey the land to them. After the birth of issue the trustees, in 1873, by a deed which recited the trust and the birth of issue, reconveyed to her, and "to the heirs of her body," the said real estate, to have and to hold to her "and the heirs of her body forever. In special trust for the use and benefit of her said son, * * * and such other child or children as may hereafter be born to her." As the court could not declare the estate to be an estate tail, there were but two alternatives, either to hold it a fee simple or an estate for life in the grantee with remainder to her children. In arriving at the intention of the parties to that conveyance the court considered "all the provisions of the deed, as well as the situation of the parties," and said that the intent of the parties "would be most nearly carried out" by holding that the grantee therein took a life estate with a remainder in fee simple to the heirs of her body, and observed that the trust clause which followed must be disregarded as repugnant and contradictory to the formal parts of the deed. It is clear that the court, while denying effect to the trust clause as creating a trust, recognized its value as evidence of the intention of the parties, which very obviously was to make special provision for the welfare of the issue of the marriage, an intention that would have been thwarted had the deed been so construed as to create a title in fee simple in the grantee. The two deeds manifest two purposes of the woman who owned the land, first, to place the land beyond the control of the man whom she was about to marry, and, second, to provide for the welfare of her children. In construing the second deed there was in fact but one intention to seek, that of the grantee, the grantors being her trustees and bound to do her bidding. In the present case the court below, referring to Nahaolelua v. Heen, said:

"We reaffirm the rule made in that case that in this jurisdiction, when a futile attempt has been made to create an estate in fee tail, it will take effect either as a fee-simple or a life estate, and remainder according to which appears to more nearly effect the intention of the grantor or testator, and hold, further, that ordinarily it will be held to take effect as a fee simple unless something appears which should send it the other way."

[2] We take that utterance of the court to be an expression of the settled rule of construction of conveyances and devises in the territory of Hawaii, and that rule we must accept as persuasive, if not of binding force in a case which comes to us from that territory. Boeynaems, Bishop of Zeugma, v. Ah Leong, 242 U. S. 612, 37 Sup. Ct. 20, 61 L. Ed. 527; Lewers & Cooke v. Atcherly, 222 U. S. 285, 32 Sup. Ct. 94, 56 L. Ed. 202; John Ii Estate v. Brown, 235 U. S. 342, 35 Sup. Ct. 106, 59 L. Ed. 259; Kapiolani Estate v. Atcherley, 238 U. S. 119, 35 Sup. Ct. 832, 59 L. Ed. 1229, Ann. Cas. 1916E, 142; and Cardona v. Quinones, 240 U. S. 83, 36 Sup. Ct. 346, 60 L. Ed.

538. Following that rule, we agree with the Supreme Court of the territory that in the present case nothing appears that "should send it the other way."

The judgment is affirmed.

ROSS, Circuit Judge (dissenting). This writ of error to the Supreme Court of the Territory of Hawaii was sued out to review the judgment of that court affirming the judgment of the Circuit Court of the First Circuit of Hawaii in favor of the defendant to an action of ejectment there brought by the present plaintiff in error for the recovery of a tract of land situated at Hanohano, district of Ewa, city and county of Honolulu—the plaintiff claiming title to an undivided one-third of the land as one of the heirs of the bodies of Kahakuakoi and Kealohapauole, devisees under the will of Bernice Pauahi Bishop, deceased, and as heir of a deceased brother. The will of the testatrix, who was a married woman, and who died October 16, 1884, made a number of bequests, and to which will were added a number of codicils. Kealohapauole was the husband of Kahakuakoi, and the fifth clause of the will of Mrs. Bishop made this bequest:

"Fifth. I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of thirty dollars ($30) per month (not $30 each), so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called 'Mauna Kamala' situated at Kapalama, Honolulu; upon default of issue to go to my trustees upon the trusts below expressed."

The eleventh paragraph of the first codicil of the will is as follows:

"11. I revoke so much of the fifth article of my said will as devises the land known as 'Mauna Kamala' to Kahakuakoi (w) and Kealohapauole, her husband, and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k), all of that tract of land known as Hanohano, situated at Ewa, island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will."

As the case is presented here, we must accept the facts to be that the land sued for was mortgaged December 15, 1890, by Kahakuakoi and Kealohapauole, her husband, to Bishop & Co., who were bankers, and was sold under foreclosure of the mortgage January 28, 1893. Under that foreclosure sale the defendant to the action, defendant in error here, claimed, through mesne conveyances as well as by adverse possession, ownership of the property. Three children, namely, Niulii, George, and Lydia, were born to Kahakuakoi and Kealohapauole. Niulii died in 1890, leaving two children, one of whom was the plaintiff in the action, and the other a boy named John Paalua. Subsequent to the sale under the foreclosure proceedings, to wit, on October 22, 1894, Kahakuakoi and Kealohapauole and George and Lydia Kealohapauole executed a deed of all of their right, title and interest in the land in question to the grantor of the present defendant in error.

Kahakuakoi died in 1910, the husband, Kealohapauole died in 1914, and John Paalua died in 1915, leaving alive his sister Helen, the plaintiff in error. The sole question, therefore, with which we have to deal is whether she took any estate in the land in controversy by virtue of the provisions of the will which have been set out.

Reading its fifth clause and the eleventh paragraph of the first codicil thereto together, which of course must be done, I regard it as clear that the legal effect as well as the manifest intent of the testatrix was to substitute for the lot of land called "Mauna Kamala, situated at Kapalama, Honolulu," described in the fifth clause, "all of that tract of land known as Hanohano, situated at Ewa, island of Oahu, formerly the property of Puhalahua," and that only; so that the devise in question must be taken to read as follows:

"Fifth. I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the survivor of them, the sum of thirty dollars ($30) per month (not $30 each), so long as either of them may live. And I also devise unto them and to the heirs of the body of either, all of that tract of land known as Hanohano, situated at Ewa, island of Oahu, formerly the property of Puhalahua; upon default of issue to go to my trustees upon the trusts below expressed."

The money bequest of $30 a month, as will be readily seen, was to continue as long as either of the beneficiaries lived, and the devise of the Hanohano tract of land was to Kahakuakoi and Kealohapauole, her husband, "and to the heirs of the body of either" of them, coupled with the express declaration that upon default of such issue the land should go to the trustees named by the testatrix upon the trusts expressed in the will.

It is undoubtedly true that the devise to Kahakuakoi and Kealohapauole, "and to the heirs of the body of either" of them, considered alone, created an estate in tail; for, as said by Judge Dallas, in speaking of similar words, in the Circuit Court of Appeals of the Third Circuit, in the case of Pearsol et al. v. Maxwell et al., 76 Fed. 428, 22 C. C. A. 262, "that is hornbook law." But as an estate tail, general or special, cannot be created or exist in the territory of Hawaii (Rooke v. Queen's Hospital, 12 Hawaii, 375, 391), what is the result? In Nahaolelua v. Heen, 20 Hawaii, 372, the Supreme Court of the territory quoted with approval this from its previous decision in the Rooke Case:

"In some of the states in which fees tail do not exist, the estate is considered a fee simple in the first taker; in others, a life estate in the first taker and a remainder in fee simple in the issue; while in others, it is considered one or the other according to which appears to most nearly carry out the intention of the testator." "The first two classes of cases mentioned in the quotation," continued the court in the Heen Case, "depend upon statutes, while the third class, to which the case at bar belongs, is governed by the established rules of construction. 'The intent of the parties to a deed, when it can be obtained from the instrument, will prevail, unless counteracted by some rule of law. * * * The intention of the parties is to be ascertained by considering all the provisions of the deed as well as the situation of the parties, and then to give effect to such intention, if practicable, when not contrary to law.' 2 Devlin on Deeds, §§ 836, 837. Applying this rule, it is apparent that the intent of the parties to the deed of September 13, 1873, will be most nearly carried out by holding that Elizabeth should take a life estate, with remainder in fee simple to the plaintiffs, 'the heirs of her body.'"

Those observations manifestly apply with equal force to the construction of a will, the paramount purpose in each instance being to arrive at the true intent of the maker of the instrument.

The court below, in its opinion in the present case, reaffirmed the decision in the Heen Case, saying:

"We reaffirm the ruling made in that case, that in this jurisdiction, when a futile attempt has been made to create an estate in fee tail, it will take effect either as a fee-simple or a life estate and remainder, according to which appears to more nearly effect the intention of the grantor or testator, and hold, further, that ordinarily it will be held to take effect as a fee simple unless something appears which should send it the other way. Whether the court could go beyond the language of the will and consider the extrinsic testimony as to surrounding circumstances need not be decided, as, in our opinion, the testimony referred to in this connection throws no light on the subject. What the testatrix might have done had she been advised that she could not create an estate tail is left to conjecture. There is nothing tending to show a preference for a life estate and remainder."

And the court concluded its opinion as follows:

"We take the view that where it does not appear that in the particular case a life estate and remainder would more nearly comply with the ultimate disposition of the property and the direct benefits to be conferred thereby which the grantor or testator had in mind, the attempted fee tail should take effect as a fee simple in the first taker. This, because both are estates of inheritance and belong to the same genus; both, at common law, were subject to the incidents of dower and curtesy, and were without impeachment of waste; the tenant in tail could bar the entail; an estate tail, in point of law, bears little resemblance to a life estate and remainder, and the law generally favors the first taker. In short, in such a case as this, a holding that the first taker shall have an estate in fee simple will go as near as may be under the law toward effectuating the futile intent to create an estate tail."

If, as the defendant in error contends and the court below held, the devise should be construed as a fee-simple grant to Kahakuakoi and Kealohapauole, and passed to the defendant in error by virtue of the mortgage thereof by them to Bishop & Co. and the foreclosure proceedings and subsequent mesne conveyances that have been referred to, it is perfectly obvious that, had there been default of issue of Kahakuakoi and Kealohapauole or either of them, it would have been impossible for the land to have passed to the trustees of the testatrix upon the trusts expressed in her will, as the testatrix in express terms declared it should. I do not think it possible that such construction of the devise can be sound, for it clearly violates the express limitation imposed by the testatrix on her devise to Kahakuakoi and Kealohapauole. So far from giving the land to them in fee, the bequest was to them, *and to the heirs of the body of either* of them, coupled with the express declaration that *upon default of such issue the land should go to the trustees named by the testatrix upon the trusts expressed in her will.*

Surely, to hold, as I do, that the devise should be so construed as to give to Kahakuakoi and Kealohapauole a life estate in the property, with the remainder to the heirs of the body of either of them, in default of which, then to the trustees named in the will upon the trusts therein declared, would more nearly comply with the true intent of the testatrix than to give to it the effect of passing the fee simple title to the first takers of the devised interest. Indeed, as above said, I think the latter view in clear violation of the express limitation imposed by the testatrix on her devise to Kahakuakoi and Kea-

lohapauole, whereas the former is in substantial accord with the true meaning of the express language of the will.

I think the judgment should be reversed and the cause remanded, with directions to the court below to vacate the judgment of the trial court, and for further proceedings therein in accordance with the views here expressed.

SILVER KING COALITION MINES CO. v. CONKLING MINING CO.*

CONKLING MINING CO. v. SILVER KING COALITION MINES CO.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1919.)

Nos. 5188, 5190.

1. TENANCY IN COMMON ⊕=22—MINING CLAIM—MINING BY ONE COTENANT—ACCOUNTING.
   A tenant in common of a mining claim, which extracts and sells ore therefrom, holds the share of its cotenant in trust, and it is its duty to notify the cotenant, to keep the ore separate, and to keep an account of its proceeds, and where, because of its violation of such duty, the amount and value of the ore cannot be accurately ascertained, all doubtful question should be resolved against it on an accounting.
2. APPEAL AND ERROR ⊕=1011(1)—REVIEW—FINDINGS OF FACT.
   Findings of the trial court on an accounting by a tenant in common of a mining claim to its cotenant for ore extracted and sold from the claim, as to quantity and value of the ore, made on conflicting evidence, sustained.
3. TENANCY IN COMMON ⊕=22—MINING CLAIM—MINING BY ONE COTENANT—ACCOUNTING.
   A cotenant of a mining claim, which secretly extracted and sold ore therefrom, on an accounting to its cotenant, *held* not entitled to an allowance, as an expense of extraction, of the cost of cleaning and extending a tunnel, which, although indirectly the means of discovering the ore, was used by it for other purposes, and produced an income exceeding such cost.
4. TENANCY IN COMMON ⊕=22—MINING CLAIM—MINING BY ONE COTENANT—ACCOUNTING.
   A cotenant in exclusive possession of mining property, who extracts and sells the ore, may charge against its proceeds the reasonable and necessary expense of its extraction and marketing.

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Suit in equity by the Conkling Mining Company against the Silver King Coalition Mines Company. Decree for complainant, and both parties appeal. Modified and affirmed.

See, also, 230 Fed. 553, 144 C. C. A. 607.

T. Marioneaux and W. H. Dickson, both of Salt Lake City, Utah (A. C. Ellis, Jr., and R. G. Lucas, both of Salt Lake City, Utah, on the brief), for Silver King Coalition Mines Co.

Edward B. Critchlow, of Salt Lake City, Utah (William W. Ray, of Salt Lake City, Utah, William D. McHugh, of Omaha, Neb., and William J. Barrette and William H. King, both of Salt Lake City, Utah, on the brief), for Conkling Mining Co.

⊕=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 29, 1919.

Before SANBORN and STONE, Circuit Judges, and ELLIOTT, District Judge.

SANBORN, Circuit Judge. The decree assailed by these appeals is that the plaintiff below, the Conkling Company, a corporation, recover of the defendant below, the Silver King Coalition Mines Company, a corporation, $542,222.58, on account of the latter's extraction and appropriation to its own use, of the plaintiff's share of the ore in the Conkling lode mining claim, which the two corporations owned as tenants in common. Prior to the year 1907 Nicholas Treweek and J. Leonard Burch were the owners of an undivided three-fourths, and the Kearns-Keith Company, a corporation, was the owner of the undivided one-fourth, of this lode mining claim. In that year Treweek and Burch conveyed their three-fourths and their causes of action against the Kearns-Keith Company and the King Company to the Conkling Company, and the King Company succeeded to the ownership of the Kearns-Keith Company's one-fourth and assumed its liabilities, so that the Conkling Company and the King Company stand in the same relation to each other as if each had owned the interest, and had committed the acts of omission and commission of their predecessors or predecessor in interest. For the sake of brevity, therefore, the acts of omission and commission of their respective predecessors will in this discussion be called their acts respectively.

The King Company first discovered ore in this claim in October or November, 1906. It had then long been in exclusive possession of that claim. It had run the Alliance Tunnel and numerous drifts and crosscuts therefrom through its own land through the Conkling and other claims to enable it to reach and work ores wherever it might find them. As it was driving one of these crosscuts through the ground of the Conkling claim it discovered in that ground the ore in controversy. It did not notify its cotenant of its discovery, but during the year 1907 it took out from Conkling ground and stored in drifts underground many thousand tons of ore. In the latter part of 1907 the Conkling Company learned something of this operation and in December of that year and January, 1908, it demanded access to and an opportunity to examine the defendant's workings in Conkling ground, that the ore taken therefrom should be kept separate from ores from other sources, and that the King Company should account to it for three-fourths of that ore. The King Company did not grant these requests. This suit was commenced on January 8, 1908, and after an application was made herein therefor, an order was made by the court on June 30, 1908, with the consent of the King Company, that the Conkling Company should have access to the workings of the latter in Conkling ground and an opportunity to examine and survey them. The King Company, however, continued to extract the ore from this mine, a part of which proved to be within, and a part of which proved to be without the Conkling ground. From May, 1907, to August, 1910, and during the years 1913, 1914, 1915, and 1916 it did not keep the ore from Conkling ground separate from that outside that ground, but mingled the ores together. After April, 1909,

the ore from the Conkling ground and from adjacent ground was hoisted by the King Company from the 500-foot level through the Silver Hill shaft, and the shift bosses kept a record of the number of cars of first class ore and of the number of cars of second class ore that were hoisted through that shaft. But no account of the amount of the ore taken from the Conkling ground, or of its value or of its proceeds, was kept by the King Company. The result was that when, under the interlocutory decree, it became necessary to determine the the amount and value of this ore in 1917, the Conkling Company was dependent for its information on the testimony of officers and employés and the scant records of a corporation which had not informed it of the discovery of the ore, had not permitted it to examine its workings in Conkling ground until induced to do so by a suit and an application for an order, had refused to keep an account of the volume of ore it took from Conkling ground, or of its value or proceeds, and had never rendered any account thereof until it presented one showing the amount due the Conkling Company to be $78,638.61 in obedience to the interlocutory decree in the spring of 1917 preparatory to the final hearing. The claim of the Conkling Company was for about $900,000. The decree of the court was for $542,222.58, and the question raised by the assignments of error of the respective parties is the correctness of this amount which the King Company contends is too large and the Conkling Company insists is too small. The title and the respective rights of the parties to the Conkling lode mining claim, especially to the 135-foot strip across its westerly end were adjudged by this court in 1916 in this suit (Conkling Mining Co. v. Silver King Mines Co., 230 Fed. 553, 144 C. C. A. 607), a motion for rehearing was considered and denied, an application to the Supreme Court for a writ of certiorari failed (242 U. S. 629, 37 Sup. Ct. 14, 61 L. Ed. 536), and this court is unwilling now, if it might lawfully do so, to disturb that adjudication.

[1] Turning, then, to the finding of the court below relative to the amount of the recovery, the indisputable fact is that many of the issues that conditioned the bases of the accounting were determinable only from conflicting testimony, or from indirect evidence and the rational deductions therefrom, or from scant and unsatisfactory proof, so that after a study of the record the truth of the statement of the court below in opening its opinion on the accounting that "the record in this matter is voluminous, but in many respects unsatisfactory, and the best that can be hoped for is an approximation of a true account between the parties," is conclusively demonstrated.

In this state of the case the rules and legal presumptions, by which this court should be guided in its consideration of the evidence and its review of the findings below, are of more than ordinary importance. Counsel have recognized this fact, and their forcible and exhaustive arguments upon this subject have been thoughtfully considered with this result. As this court stated in Silver King Coalition Mines Co. of Nevada v. Silver King Consolidated Mining Co. of Utah, 204 Fed. 166, 180, 122 C. C. A. 402, 416, the King Company—

"was a trustee for the complainant of its share of the ore it took, and of the proceeds thereof. As such trustee it violated its duty to notify its cotenant of its entry and taking of the ore, its duty to keep the ore separate, its duty to keep an account of it and of its proceeds, and its duty promptly to account for and pay to its cotenant its just share of the proceeds of the ore."

If the King Company had discharged these duties, the amount that should be recovered could have been readily ascertained and clearly proved. So uncertain did its failure so to do render the amount it ought to pay in its own estimation that it filed four accounts in this suit, in which the amounts it stated its indebtedness to the Conkling Company varied from $72,750.76 to $262,161.22. In a suit of this nature the burden is upon the plaintiff to prove that the defendant took the plaintiff's ore, or the proceeds of it, and mingled it with the ore in which the plaintiff had no interest, and those facts were admitted or conclusively proved in this case. Then the burden of proof and the duty rested upon the defendant to prove the amount of the ore it took from Conkling ground and its proceeds or value, and to account and pay therefor, and if by reason of the failure of the defendant to keep the Conkling ore separate from other ore, and to keep an account of the ore taken and of its proceeds or value, the proof of the amount, the proceeds or value, or of any other facts requisite to make such proof, remained at the close of the hearing evenly balanced, uncertain, or doubtful, the doubt should have been and should now be so resolved, in accordance with the basic principle of the accounting of a negligent or reckless trustee or agent, that the latter shall receive no profits from his wrongful treatment of the property of his cestui que trust, and the latter shall receive the just value of his property and its income. The King Company should not profit in this case by its own wrong, and issues rendered uncertain or doubtful by reason of its failure to discharge its recited duties, or by its confusion of the ores from Conkling ground with those from other sources, must be resolved against it. By that rule, therefore, and by the familiar rule that, where a court has considered conflicting evidence and made a finding or decree, the presumption is that it is correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand (Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 94, 15 L. R. A. [N. S.] 372), this court must be guided in its review of the findings and decree below in this case.

[2] As, when this case came to a hearing, there was no account or record of the volume of ore taken from Conkling ground between May, 1907, and May, 1909, and as the only account or record of the ore taken therefrom after April, 1909, was the shift bosses' record of the amount of ore coming both from within and without Conkling ground that was hoisted from the 500-foot level through the Silver Hill shaft, and as that record failed to show what part of that ore came from within or from without the Conkling claim, the most available method of finding the volume of ore taken from that ground was to ascertain the extent of the cavity therein made by the King Company, and then to estimate from such facts as could be proved from the recollection

and testimony of witnesses and from surveys, the number of tons of first-class or shipping ore and the number of tons of second-class or milling ore the cavity originally contained, for every part of the cavity contained ore of each class, and there was a difference of several dollars per ton in the value of the two classes.

Mr. C. P. Brooks, a mining engineer, had been the engineer of the King Company during its workings, and had made surveys from time to time as the work in the Conkling progressed through the various stopes, drifts, and crosscuts therein, some of which were partly within and partly without the Conkling claim. The King Company, to support the account it had rendered, called and examined Mr. Brooks at length. His testimony was that the total cavity within Conkling ground was 302,173 cubic feet, and on that basis the accounting has been taken by counsel and the court. Mr. Brooks also testified to the number of cubic feet in the various cavities in the numerous stopes, drifts, levels, etc., which formed parts of the entire cavity. Having the cubic feet in the cavity or any part of it, it was necessary, in order to estimate the number of tons of each class of ore that had been taken therefrom, to ascertain or estimate what part of the material therein was ore, and what part, if any was waste, how many cubic feet of the first-class ore that had been in that cavity made a ton, and how many cubic feet of the second-class ore from that cavity made a ton, and also the proportion of the first-class ore to the second-class ore therein. The evidence in answer to each of these questions was in hopeless conflict. Upon a consideration of all of it, the court reached the conclusion that it required 6 cubic feet of first-class ore taken from the Conkling ground to make a ton, and 7.62 cubic feet of the second-class ore to make a ton, and upon that basis the decree rests.

The King Company earnestly contends that this finding was erroneous, and that the decree should be reformed upon the basis of 7.275 cubic feet per ton of first-class ore and 9.315 cubic feet per ton of second-class ore. The evidence upon this issue is so voluminous that only a bare outline of its nature is permissible here. The King Company made its first and second accounts in this case on the basis of 9 cubic feet per ton of first-class ore and 11 cubic feet per ton of second-class ore. It made its third and fourth accounts on the basis of 7.275 cubic feet per ton of first-class ore, and its fifth account on the basis of 7.275 cubic feet per ton of first-class ore and 9.315 cubic feet per ton of second-class ore. Mr. Brooks was its chief witness. He testified that he took from the sides of the cavity, after the ore in question was removed, five samples that he thought fairly represented the extracted ore, that he had them assayed by Mr. Hansen, who had been the assayer of the Silver King Company since 1914, that he put his sample No. 1, which weighed 74½ pounds, in a box, packed wheat around and over it, leveled the wheat with the top of the box, then took the sample out and measured the space between the top of the box and the wheat remaining to obtain the cubic contents of the sample; that he treated his samples 2, 3, 4, and 5 in the same way; that he weighed each of the samples; that all the samples except No. 5 proved, when assayed, to be first-class ore, although he

picked one of the four for second-class ore; that he ascertained from the data he had thus obtained and the cubic feet in the various cavities, that sample No. 1 ran 7.07 cubic feet of first-class ore per ton, sample No. 2, 8.37 cubic feet per ton, sample No. 3, 8.58 cubic feet per ton, and sample No. 4, 9.72 cubic feet per ton; that the average number of cubic feet required to make a ton of first-class ore according to these samples was 8.44; and that it required 11.17 cubic feet of second-class ore like sample No. 5 to make a ton. Two scientific experts, took these samples and a sample called No. 6, taken from the cavity by one of the defendant's witnesses, or suitable specimens of them, pursuant to the agreement of the parties, and ascertained and reported to the court the specific gravity of each and the number of cubic feet of ore requisite to make a ton of each. They reported it required 6.5 cubic feet of first-class ore to make a ton like sample No. 1, 7.7 cubic feet to make a ton like sample No. 2, 7.1 cubic feet to make a ton like sample No. 3, 7.8 cubic feet to make a ton like sample No. 4, and 5.2 cubic feet to make a ton of ore like sample No. 6, an average of 6.86 cubic feet of first-class ore to a ton, and that it would require 10.3 cubic feet of second-class ore to make a ton like sample No. 5.

After the King Company had introduced the testimony of Mr. Brooks and its other witnesses, Harry D. Taylor was called as a witness by the Conkling Company. He testified that he was a mining engineer, a graduate of the Colorado State School of Mines in 1900, that he had so thoroughly examined the testimony and figures of Mr. Brooks, Mr. Humes, and other evidence introduced by the King Company that he could arrive at the cubical contents of a ton of first-class ore taken from the Conkling claim and at the cubical contents of a ton of second-class ore taken therefrom, and that he had estimated to his entire satisfaction that the number of cubic feet of first-class ore extracted by the King Company required to make a ton was 6, and that the number of cubic feet of second-class ore was 7.62; that he reached this conclusion by a process of elimination and calculation detailed in his testimony, founded upon the testimony of Mr. Brooks that the total number of cubic feet of material extracted from the 600 stopes in 1914, 1915, and 1916 was 183,523, and upon the number of tons extracted given in the cost analysis sheet, which was, generally speaking, treated by both parties upon the trial as correct. By this method he found that 1,777.10 tons of first-class ore and 19,238.51 tons of second-class ore were taken from the Alliance side of the 600 stopes in 1914, 1915, and 1916. He then subtracted from the 183,523 cubic feet one-seventh, the average of the figures of Mr. O'Neill, a witness for the King Company, for waste, leaving 157,305 cubic feet in the cavity of the 600 stopes that must have been occupied by ore, and found that by allowing 6 cubic feet of first-class ore to the ton, and 7.62 cubic feet of second-class ore to the ton, the 1,777.10 tons of first-class ore and the 19,238.51 tons of second-class ore would fill 157,295 of the 157,305 cubic feet therein.

Counsel for the King Company, after describing Mr. Taylor's method, write in their brief, "There is nothing faulty about Mr. Taylor's

mathematics here, but the 600 stopes must be taken to mean all the stopes on the Alliance side below the 500-foot level," and they insist that his conclusions are not only inaccurate, but without probative force, because neither he nor Mr. Brooks included in the 183,523 cubic feet of cavity the space in the 700-foot drift stope, 3,402 cubic feet, in the 704-foot drift through ore, 3,430 cubic feet, in the 700-foot level drift through ore, 9.030 cubic feet, or in the 707-raise stope, 1,090 feet. In support of this contention counsel present a persuasive array of evidence and argument. It is, however, difficult to believe that Mr. Brooks was either ignorant of the facts or in error in his testimony on this subject. He was the engineer of the King Company, familiar with its doings and with the mining property, more familiar than any other witness in the case. He testified in much detail regarding the 600 stopes—that is to say, the stopes below the 500-foot level from which ore came out of the Conkling through the place where the tonnage was recorded in 1914, 1915, and 1916; that the total cavity therein contained 183,523 cubic feet, and that there were no other stopes the material of which came out through the 600 level during those years. This testimony of Mr. Taylor and Mr. Brooks formed a substantial basis, if true, as counsel conceded, for clear proof of the number of cubic feet of ore of each class in the Conkling claim required to make a ton. There was no suggestion by that company in the examination of Brooks or Taylor that the testimony as to the number of tons or as to the number of cubic feet in the 600 stope was either false or inaccurate. Taylor took the number given by Brooks, made his proof on that basis, and now the King Company insists it is no proof, because its witness was mistaken and the testimony he gave was erroneous.

The evidence shows that some of the stopes below the 500 level were called by different names at different times, but that the term "600 stopes" was often, but not always, used to denote all the stopes on the Alliance side below the 500 level; that the King Company and Mr. Brooks probably knew more of the facts in this case than Mr. Taylor and the Conkling Company; and that the latter had reason to rely upon his evidence. Each party has been able to present evidence that its opponent's basis, when applied under assumptions it makes to a specific stope it selects, demonstrates its erroneous character. There is much evidence on the subject under consideration that has not been recited. The evidence for 9.315 cubic feet per ton of second-class ore is not convincing. Perhaps its best support is the single sample of second-class ore taken from the exhausted cavity by Brooks, which according to his testimony required 11.17 cubic feet per ton, and according to the two selected experts 10.3 cubic feet per ton. Brooks himself testified that the taking of this single sample of second-class ore and inferring from it that all the second-class ore in the mine required the same number of cubic feet as this sample to make a ton was not the proper way of arriving at the desired result, and that he had intended to get and thought he had taken more samples of the second-class ore, but when they were assayed all he had taken, except this one, proved to be first-class. This mistake in his selection rather in-

dicates that consciously or unconsciously he underestimated the grade and value of the Conkling ore. So improbable was his deduction from his sample and from his experiments on this subject that the second-class ore ran 11.17 cubic feet per ton, that the court and both parties to the suit refused before the final argument below to follow it.

His conclusion from the samples of first-class ore that 8.44 cubic feet of the first-class ore were required to make a ton was also discarded by all parties. The King Company now claims only 7.275 cubic feet. The average derived from the number of cubic feet found by the two experts from the five samples submitted to them was 6.86 feet, and the court below found 6. There was a large amount of evidence as to the class and character of this ore from witnesses who had seen it or seen the samples of it remaining in the cavity. Some of this testimony persuasively indicates that there was much ore in the cavity of a high grade that was not adequately represented by the samples, and after much deliberation our conclusion is that the record is insufficient to warrant a decision that the court below made any mistake in its finding that the number of cubic feet required to make a ton of first-class ore taken from the Conkling claim was 6, and that the number of cubic feet required to make a ton of the second-class ore taken from the Conkling claim was 7.62.

The court below found that there was no waste in the material extracted in 1907 and 1908, and that the waste in the material taken out in 1909, 1910, 1913, 1914, 1915, and 1916, wherever the matter of waste was important, was one-seventh. The King Company insists that the court should have found that one-seventh of the material taken in 1908 was waste, but the facts that there is no claim that there was any waste in the material extracted in 1907, that the marial extracted in 1907 and 1908 was adjoining and similar, that the King company made no claim of waste in 1908 in its first two accounts, and a consideration of all the other evidence on this subject failed to convince that there was any error in the finding of the court in this regard.

The court concluded that one half of the ore extracted in 1907 was first-class, and that the other half was second-class, and that, in the ore extracted in 1908 the proportion of first-class to second-class was 1 to 2. Counsel for the King company argue that the evidence proves that not more than 40 per cent. of the ore extracted in 1907, and not more than one-eighth of that taken in 1908, was first-class ore. A review of the testimony on this subject has satisfied that there is more probability that the court found the proportion of first-class ore for these two years too small than there is that it found it too large. The evidence, however, does not make clear or convincing proof that any other proportion than that found by the court would be likely to be nearer the actual fact than its finding, and that finding is accordingly left undisturbed.

After May 1, 1909, the number of cars of first-class and of second-class ore was recorded in the shift bosses' records and the court below adopted the proportion of first-class to second-class deduced

from that record and applied it, not only to the ore taken after May 1, 1909, but also to the ore extracted during the first four months of that year. The evidence discloses no method more likely to produce a correct result. Many less important objections to the findings of the court as to the volume of the ore and many alleged discrepancies between the evidence and the findings have been argued and considered. It was impossible in the nature of the case to prove or to find the true value of this ore, the true amount of each class, or the exact proportion of the classes. The duty nevertheless was imposed upon the court below to make findings upon these subjects as near to the facts as it could. This court, upon a review of all the evidence upon these subjects, despairs of making findings or reaching a conclusion thereon more nearly correct than those of the court below, and they must therefore stand.

In determining the value of the ore taken by the King Company, the court divided the time of the taking into yearly periods, and, with one or two exceptions, found the value per ton of the ore extracted from the Conkling ground to be the same as the average yearly price per ton received by the King Company from the mixed ore of its class sold by the King Company during that year. Prior to April, 1907, the Kearns-Keith Company extracted and stored in drifts and levels 659.15 tons of crude or shipping ore and 252.06 tons of concentrates. This ore was shipped, assayed, and sold by the King Company after April, 1907, and its metallic contents were proved. The King Company insists that the metallic contents of all the ore taken from the Conkling mine should have been found to be the same as those of the K-K shipments, and that on that basis its value should have been estimated. This contention presents the question, Did the value per ton of the K-K shipments mined in 1906 probably more nearly represent the value per ton of the shipments mined from Conkling ground in the years 1907, 1908, 1909, 1910, 1913, 1914, 1915, and 1916, respectively, than the average value per ton of the mixed ore taken from the Conkling and adjoining ground in the same mine during those years respectively? A thoughtful review of all the evidence upon this subject has led the court to believe that this question must be answered in the negative.

The Conkling Company is discontented with the value of the ore found by the court, and insists that it is too low, and that its finding should have been based, not upon the yearly average price per ton obtained for the mixed ore, but upon the highest price per ton received by the King Company during each yearly period from any of the ore taken from the mine during such period pursuant to the rule that where one knowingly mixes the goods of another with his own or fails in his duty to keep them separate, so that the value of the former cannot be ascertained, he should suffer all the possible loss and inconvenience from his breach of duty. The existence and beneficence of this rule is conceded, but like other equitable principles and rules it must be so applied to the particular facts of each case, if possible, as to work out substantial justice to each of the parties to the litigation. If all the ore in controversy had been taken from

that part of Conkling ground easterly of the 135-foot strip, without the knowledge of the Conkling Company and without opportunity for it to examine the ore and measure the work or the cavity during the process of the extraction, it might have been just and necessary to charge the King Company the highest price it received from any of the mixed ore in each year. But the great bulk of the ore came from the 135-foot strip. The King Company claimed the exclusive ownership of that strip, and its officers testified that they believed that the claim was well founded. In view of the facts that the District Court sustained that claim, that the nature of the controversy was such that the King Company and its officers cannot be held to have been without probable cause to believe that its claim might be sound until it was otherwise adjudged by this court, and that from July, 1908, under the order of the court below, the Conkling Company had the privilege and opportunity of examining the ore as it was removed, and of surveying the cavities from which it was taken, this court is of the opinion that the use of the average yearly prices of the mixed ore sold as the basis of the estimated value of that taken from the Conkling claim is more likely to produce a just and equitable finding of its value than the use of the highest price of any of the mixed ore sold during each year. It is therefore unwilling to change the basis of the estimate of the value of the ore which the court below adopted.

Counsel for the Conkling Company also complain that the prices received by the King Company for the mixed ore it sold after January, 1909, were at least $3 per ton less than it could and should have obtained, and that on that account this court should increase the value found below of the Conkling ore taken during that time at least $3 per ton. The King Company proved without objection that it sold the mixed ore it mined after January 1, 1909, under the Heinze contract, which was made May 21, 1907, and ran for 10 years after January 21, 1909. It introduced in evidence without objection that contract, and two preceding contracts dated respectively September 1, 1903, and June 14, 1907, under which the King Company and its predecessor in interest had sold and delivered their ore to the American Smelting & Refining Company. Over the objection of the King Company the Conkling Company introduced in evidence two contracts of the American Smelting & Refining Company, one with Little Bell Consolidated Mining Company dated May 2, 1906, Exhibit No. 110, and one with the King Company dated May 25, 1911, Exhibit No. 111, and a contract between Wilbert Mining Company and Knight & Warnock, dated February 17, 1915, Exhibit No. 115, but neither of these three exhibits is found in the record in hand. The King Company also introduced in evidence the testimony of Mr. Howard to the effect that he had compared the Wilbert contract with the Heinze contract, and that, although there was some difference in the penalties imposed by the two contracts, the Wilbert contract yielded $4 or $4.50 per ton more to the vendor of the ore than did the Heinze contract on the sale of lots of ore described in Exhibits No. 113 and 114, but these exhibits are not in the record. The Wilbert contract was dated February 17, 1915. The Heinze contract was dated in 1907, more than 7 years

earlier. It covered a period of 10 years. There is no evidence before this court to show that the market value of the ore was the same or approximately the same in 1915 that it was in 1907. There is no evidence to show the time the Wilbert contract was to run. The record, however, contains two time contracts, under which the King Company or its predecessor sold its ore prior to the term of the Heinze contract, and the latter does not appear to be less favorable to the vendor than were the two contracts that preceded it.

Counsel for the Conkling Company argue that the King Company made the Heinze contract to sell its ore for less than its value from the fact that it contains an agreement for the sale to Heinze of a large amount of the stock of the King Company. But there is no evidence that he was buying the stock at a price greater than its value in order to get the ore at a price less than its value, and the legal presumption is that he agreed to pay a fair price for both. There is, therefore, no evidence here that the prices obtained under the Heinze contract were less than they should have been, except the testimony of Mr. Howard that Wilbert's contract of 1915 was more favorable to the vendor than the Heinze contract of 1907. This is insufficient to warrant an appellate court in changing the finding of the court below, in view of the facts that the Heinze contract of 1907 was more favorable to the vendor than its prior contracts, that more than 7 years intervened between the Heinze contract and the contract of Wilbert, that the court below had before it for examination and comparison the Little Bell contract, the King contract of May 25, 1911, and the Wilbert contract, neither of which is presented to this court, and that the court below upon a view of all this evidence concluded that the price fixed by the Heinze contract represented the fair value of the ore.

[3] In the accounting, the court below allowed to the King Company, as a part of its expense of extracting, preparing and marketing the ore, $22,283.14, which it found to be one-half of the King Company's predecessor's expense, and of the interest thereon to May 1, 1907, in cleaning and extending the Alliance Tunnel and the crosscuts and drifts therefrom in Conkling ground. The King Company complains that the court did not allow it the whole of that expense and interest thereon, and that it did not also allow it $10,853.12 more on account of the expense and interest thereon of driving certain crosscuts and drifts from the tunnel on account of which no allowance was made. On the other hand, the Conkling Company contends that nothing should have been allowed on account of any of these expenses.

[4] The general rule is that a cotenant in the exclusive possession of mining property, who extracts and sells the ore, may charge against its proceeds the reasonable and necessary expenses of its extraction and marketing. The ore was all extracted and marketed between September, 1906, and the year 1917. The expenses of cleaning and extending the Alliance tunnel were incurred beween 1901 and 1906. The Arthur lode mining claim lies easterly of the Conkling claim, and the parties hereto and their predecessors in interest have owned the former in the same proportions as they have owned the latter from a time anterior to 1902. The portal of the Alliance Tunnel is more than

a mile and a half easterly of the east line of the Arthur claim, and more than 10,000 feet distant from the stopes in the westerly end of the Conkling mine from which the ore in dispute was taken, and none of it was ever taken out through that portal. The King Company (in fact, its predecessor in interest) was, and it now is, the exclusive owner of the land east of the Arthur claim, and prior to the year 1892 it or its predecessor ran this tunnel until it reached a point about 90 feet east of the easterly line of the Conkling claim near its northeast corner. By the year 1902 this tunnel had become caved in places and badly out of repair. Thereupon the King Company cleaned it out and drove it westerly along near the northerly line of the Conkling claim, part of the way without, but most of the way within, that claim, until it passed out of the westerly end thereof whence it was connected by a drift from the tunnel to the Silver Hill shaft and station which are located a short distance northwest of the southwest corner of the Conkling claim. On January, 1905, this tunnel had reached a point about 135 feet east of the west line of the Conkling ground.

The King Company during the year 1906 drove the McKay crosscut from that point, which was a few feet south of the north line of the Conkling, southerly, nearly at right angles to the course of the tunnel, and while so doing it discovered the ore in controversy, in November or December, 1906, near the south line of the Conkling ground. Inspired by this discovery, it concealed the ore and the fact, and bought for $125,000, in April or May, 1907, the Belmont mining claims, some of which adjoin the Conkling on the west and contained a part of the body of the ore the King Company had discovered, and on one of which the Silver Hill shaft and station is located. It has used the tunnel to approach and to aid it in working the Belmont group of mines, and has used some parts of it to take out some of the Conkling ore. There is some ore remaining in the Conkling, but as part of the tunnel is in ground owned by the King Company exclusively, the Conkling Company has no right to use the tunnel to take that ore out. A large quantity of water gathers in and flows in a ditch repaired and extended during the cleaning and extension of the tunnel, and the King Company has had and still has the use of this water for its boilers and for household and culinary purposes, and has received for the surplus above its needs, between 1900 and 1907, $18,391.55, and between June 1, 1907, and December 31, 1916, $23,000, in all $41,391.55; but no credit for any of this income has been taken into consideration or allowed to the Conkling as an offset against the expense of cleaning and extending the tunnel charged against it. The court below allowed to the King Company the entire amount of the expense of driving the McKay crosscut and the interest thereon. Should it also have allowed to it the expense of cleaning and driving the tunnel and the opening of the many drifts and crosscuts along its course in Conkling ground, from which some, how much we know not, ore was extracted, and which expense the King Company claims amounted, with interest, to $62,842.43?

It argues that this allowance should be made because this expenditure resulted in the discovery and the extraction of the Conkling

ore. By the same mark it caused the discovery, the purchase, and the extraction by the King Company of the ore from the Belmont group; and if the Conkling Company is to pay for the tunnel on the ground here urged, why should not the King Company account to it for the Belmont ores? It is the reasonable proximate causative, not the remote and inconsequential, expense of discovering, extracting, and marketing ore that is allowable to the tenant who secretly takes the common property and appropriates to himself his cotenant's share of its proceeds. There is testimony in the record that, if the Conkling Company had known where the ore was, it would have cost it $82,000 to have sunk the requisite shaft to reach it; but this is no reason why the Conkling Company should pay to its cotenant, who discovered and appropriated its share of the ore, any more than the reasonable approximate expenses of the discovery, extraction, and marketing thereof.

The tunnel, before it was cleaned and extended, did not produce and conduct the volume of water and produce the revenue from that source which it has since brought; nor was it useful to the King Company as an adit to the ores in the Belmont group or in the removal thereof. If the Conkling Company were to pay for this cleaning and driving, then it should have credit for at least some of the proceeds and benefit derived from it by the King Company. The revenue the latter has derived from the sale of the surplus water alone, with interest thereon to May 1, 1907, exceeds all the expenses of cleaning and extending the tunnel and the interest thereon, to say nothing of the value of the use of all the water the King Company needed and the benefit of its use of the tunnel for transportation purposes. In the opinion of this court none of the expense of cleaning and extending the Alliance Tunnel and the drifts, chutes, and crosscuts therefrom should have been allowed to the King Company in this accounting.

The King Company urges that it should be allowed what it would have cost the Conkling Company to have sunk a winze from the 500 to the 700 level, $50 per foot, or $10,750, because the King Company took its ore up from the 600 and 700 levels through its Silver King shaft, which it had sunk to the 900 level at the expense of $125 per foot; but the King Company sunk that shaft on its own ground for its own purpose, and in the accounting it was allowed the agreed cost of mining and tramming the Conkling ores which the King Company took out through that shaft. The Conkling Company has no right to the use of that shaft, it owns no interest in it, and there was no error in the refusal of the court below to make an additional charge against it for the expense of sinking a winze that never was sunk.

The King Company also insists that, in addition to the stipulated cost of mining, milling, etc., the Conkling ore, which was allowed to it in the accounting, it should be allowed $18,304.69, which it claims is the proportion of the interest from May 1, 1907, to April 1, 1916, on the amount it invested in mine buildings and machinery, that the Conkling ore bore to all the first-class ore the King Company took from that mine during that period, and $14,463.24, which it claims is the proportion of the interest from May 1, 1907, to April 1, 1916, on

the amount it had invested in mill buildings, etc., that the number of tons of Conkling concentrates bore to the number of tons of concentrates derived from the entire mine. But there is no proof that these investments in mine buildings, mill buildings, and machinery were made for the purpose of handling the ore from the Conkling claim, nor that they would not have been made, if there had been no discovery of ore in the Conkling claim. The Conkling Company has never had, and has not now, any title or right of use of these buildings or machinery, or of any of them. The King Company took the Conkling ore without the request or consent of the Conkling Company, it failed to keep it separate or to account for it, it has been allowed in the accounting the stipulated cost of mining, tramming, and milling, and its claim to be allowed a part of the interest upon its investments in addition does not appeal to the conscience of a chancellor.

The conclusion of the whole matter is that the $542,222.58 named in the decree should be increased to $570,076.50, by the addition to the former amount of the sum of $27,853.92, which is three-fourths of $22,283.14, the expense of cleaning and extending the Alliance tunnel, plus the interest on that three-fourths from May 1, 1907, to March 1, 1918.

Let the decree be so modified, and, thus modified, let it be affirmed.

GULF, C. & S. F. RY. CO. v. UNITED STATES.*

(Circuit Court of Appeals, Fifth Circuit. February 6, 1919.)

No. 3185.

MASTER AND SERVANT ⊂=13—HOURS OF SERVICE—VIOLATIONS.

Where a railroad company detained train crews in service more than 16 hours, it cannot excuse the violation of the Hours of Service Act, on the ground of unavoidable casualty, because an accident occurred at a point some distance from division points, where it could have sent relief crews, for Hours of Service Act, § 3 (Comp. St. § 8679), relieving the carriers in case of casualty, does not relieve from the duty to exercise diligence to comply with the act.

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action at law by the United States against the Gulf, Colorado & Santa Fé Railway Company for penalties for violation of the Hours of Service Act. There was a judgment for the United States, and defendant brings error. Affirmed.

J. W. Terry and Ballinger Mills, both of Galveston, Tex. (Terry, Cavin & Mills, John G. Gregg, and Frank J. Wren, all of Galveston, Tex., on the brief), for plaintiff in error.

John E. Green, U. S. Atty., of Houston, Tex., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (Roscoe F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C., on the brief), for the United States.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

 *Certiorari denied 249 U. S. —, 39 Sup. Ct. 493, 63 L. Ed. —.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Suit for penalties was instituted by the United States against the Gulf, Colorado & Santa Fé Railway Company for violation of Act March 4, 1907 (34 Stat. 1415, c. 2939 [Comp. St. §§ 8677–8680]), "to promote the safety of employés and travelers upon railroads, by limiting the hours of service of employés thereon." That 12 employés, constituting two crews, were detained in service more than 16 hours is admitted. The defense was that the delays of the trains from which the excessive service resulted were caused by casualties and unavoidable accidents, under circumstances to make applicable section 3 of the act. The defendant also alleged that the employés were relieved as soon as the trains reached terminal points, and as soon as it was possible to do so.

Appellee contends that the accident causing the delay of one of the trains was not of a character contemplated by section 3 of the act. Determination of this issue is unnecessary. It is evident from the telegrams of the train dispatcher to the crews that it was understood that the time lost as the result of the accidents could be added to the 16 hours, and that if the crews were not kept in service beyond this augmented time, no violation of the law would result. Railroad employés were doubtless warranted, at the time, by the rulings of the Interstate Commerce Commission in assuming this to be the law.

Section 3 of the act, to the effect "that the provisions of this act shall not apply in any case of casualty or unavoidable accident," etc., construed in connection with the other terms of the act, has been held in cases in which it applies "not to relieve the carrier from the exercise of diligence to comply with the general provisions of the act." "It is still the duty of the carrier to do all reasonably within its power to limit the hours of service, in accordance with the requirements of the law." Atchison, Topeka & Santa Fé Ry. Co. v. United States, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175, Ann. Cas. 1918C, 794.

In the case from which the quotations are made the train was permitted to run through a point at which a relief crew could have been secured, and it is therefore to be differentiated from the instant case. But the construction of the statute is unequivocal. It does not appear that appellant did all that could reasonably have been done to relieve the crew. While there were no terminals between Bellville and Galveston (the division upon which the delays occurred), it is not made to appear that crews could not have been sent from one of those points to take charge of the trains. During the delays passenger trains from both terminals passed the points at which the trains were held. The facts do not negative other means of relief.

Defendant not only fails to show that all was done that could possibly have been done, but the record makes it clear that it was understood at the time that this was not required by the law. If the facts warrant any character of equitable relief from the penalty, the issue is not made by the pleadings. As the case is presented to us, each of the train employés was kept in service longer than was permitted by

the general provisions of the law, and the evidence furnishes no basis for a finding that plaintiff in error did all that was reasonably practicable to prevent this result.

The judgment is affirmed.

UNITED STATES v. GALVESTON, H. & H. R. CO.

(Circuit Court of Appeals, Fifth Circuit. February 8, 1919.)

No. 3196.

RAILROADS ⊂=229—SAFETY APPLIANCE ACT—USE OF AIR BRAKES—RUNNING OF TRAIN.

The movement by a switch engine of 30 to 50 cars, coupled together, some containing interstate shipments, for several miles, crossing main line tracks of several railroads and streets at grade, and for parts of the distance over main line track, although in a network of tracks commonly called the city yards, was not a switching operation, but the running of a train and the failure to connect up the air brakes so it could be controlled by the engineer constitutes a violation of Safety Appliance Act, § 2 (Comp. St. § 8614).

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by the United States against the Galveston, Houston & Henderson Railroad Company. Judgment for defendant, and the United States brings error. Reversed.

John E. Green, Jr., U. S. Atty., of Houston, Tex., and Roscoe F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C., for the United States.

S. W. McMeans and Claude Pollard, both of Houston, Tex. (Baker, Botts, Parker & Garwood, of Houston, Tex., John L. Darrouzet, of Galveston, Tex., and McMeans, Garrison & Pollard, of Houston, Tex., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. This was an action for the recovery of penalties for alleged violations of the air brake provision of the Safety Appliance Act. Act March 2, 1903, c. 976, § 2, 32 Stat. 943 (Comp. St. § 8614). The petition contained four counts, the first of which, after setting out the order of the Interstate Commerce Commission, promulgated June 6, 1910, and becoming effective September 1st following, which had the effect of increasing the minimum number of cars whose train brakes must be under the engineer's control to 85 per cent., alleged that the defendant (defendant in error here)—

"on March 28, 1917, operated on its line of railroad one train, to wit, its own transfer consisting of 57 cars, drawn by locomotive engine G., H. & H. No. 13, said train being one operated with power or train brakes over a part of a highway of interstate commerce. * * *

"Plaintiff further alleges that on said date defendant operated said train as aforesaid over its line of railroad, in and about Galveston, in the state of Texas,

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

within the jurisdiction of this court, when none of said cars in said train had their brakes used and operated by the engineer of the locomotive drawing said train, and when less than 85 per cent. of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer of said locomotive engine drawing said train."

The averments of each of the other counts were the same, except that they averred the operation on March 29, 1917, March 30, 1917, and March 31, 1917, respectively, of trains consisting of 43, 31, and 49 cars respectively. The evidence adduced showed that each of the movements testified to of an engine with the alleged number of cars attached was within the area of the strip of land on the northern side of Galveston Island, extending eastwardly a distance of about 5 miles from a station a short distance east of a bridge connecting the western end of the island with the mainland, over which the trains of several railroads pass in going to or from Galveston. That area is traversed by a number of city streets and by a multitude of tracks belonging to and used by different railroads and the Galveston Wharf Company, a connecting carrier between the railroads entering Galveston and the wharves along the city's water front. Evidence offered in support of the first count showed the following state of facts:

Defendant's locomotive No. 13, having 57 cars attached, pushed them in an easterly direction from what is known as defendant's old west yard to the east yard of the Galveston Wharf Company, a distance of 4 miles. In so doing it crossed at grade a number of the city's streets which were open for traffic and were in use, also the main line tracks of several other railroads, over which a number of trains pass daily, and used about 400 feet of a track which is the passenger main track in daily use for interstate trains of the defendant and two other railroad companies. At another place it used about 100 feet of the defendant's main line. It passed through two interlocking plants, one at Fifty-First street and the other farther east at Thirty-Sixth street, the former of which is so constructed that, when a train is using one of the tracks within the plant, another train cannot use such track, being prevented from doing so by a derailing device, while the latter is not equipped with the device mentioned. In the movement the east-bound main track of the Galveston Wharf Company was used for a distance of about 1½ miles. In making the movement cars were set out at two places, 8 cars at one place and 16 cars at another.

Evidence offered in support of the other counts showed similar states of fact, the principal differences being in the number of cars moved, and that the evidence offered to support the second count showed that the distance moved was about 3.4 miles, and no cars were set out before the movement ended; that the evidence offered to support the third count did not show the exact distance, but disclosed that it was several miles, and showed that all the cars were pushed to where the movement stopped, except one, which became defective en route and was set out at what was called the middle yard; and that the evidence offered to support the fourth count showed that the distance moved was about 3.8 miles, and that cars were set out at two places, 15 cars

at the middle yard and 22 cars on a track of the Galveston Wharf Company.

Each movement was made without having the air coupled up between the engine and the cars moved, and none of the cars moved had their brakes used and operated by the engineer of the locomotive to which the cars were attached. At the times of the movements in question the defendant was a common carrier engaged in interstate commerce by railroad. Each of the transfers contained interstate freight. The engine was known as a switch or yard engine. Its crew was known as a yard crew. The movements and the tracks used in them were under the control of the yardmaster. The speed of each of the movements was 6 to 8 or 9 miles an hour. There was judgment in favor of the defendant pursuant to a verdict which the court directed.

The record discloses that the action of the court in directing a verdict in favor of the defendant was the result of the conclusion that the movements in question were switching movements, and were not within the meaning of the provision of the statute making it unlawful for a common carrier engaged in interstate commerce by railroad to "run any train" in such traffic without having a sufficient number of the cars so equipped with power or train brakes that the engineer on the locomotive can control the speed of the train "without requiring brakemen to use the common hand brake for that purpose." We do not think that in any material respect the movements in question were different from those which in two recent cases were held by the Supreme Court to have been such train movements as are prohibited and penalized by the statute. United States v. Erie Railroad Co., 237 U. S. 402, 35 Sup. Ct. 621, 59 L. Ed. 1019; United States v. Chicago, Burlington & Quincy Railroad Co., 237 U. S. 410, 35 Sup. Ct. 634, 59 L. Ed. 1023. In the opinion rendered in the first-cited case, the court, in the statement of the grounds relied on to support the conclusion that the movements there in question of transfer trains from Jersey City and Weehawken to Bergen, and vice versa, over tracks of the defendant, were not mere switching operations, but were train movements within the meaning of the statute in question, said:

"As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air brake provision." United States v. Erie R. Co., supra, 237 U. S. 407, 35 Sup. Ct. 624, 59 L. Ed. 1019.

In speaking in the last-cited case of movements which were held to be within the prohibition of the statute, the court said:

"According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but moving traffic over a considerable stretch of main line track—one that was a busy thoroughfare for interstate passengers and freight traffic. Every condition suggested by the letter and spirit of the air brake provision was present. And not only were these trains exposed to the hazards which that

provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect. That they carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done rather than in the names applied to those engaged in it." United States v. Chicago, Burlington & Quincy R. Co., supra, 237 U. S. page 412, 35 Sup. Ct. 635, 59 L. Ed. 1023.

The engine and cars, the movements of which are in question in the instant case, were assembled and coupled together for runs or trips, each of a distance of several miles. In those trips they crossed main line tracks of several railroads and streets at grade, and moved over stretches of main line track. The movements made were not kept from being runs or trips along the road by the circumstances that the tracks used were part of the network of tracks referred to generally as the Galveston yards and that main line tracks were used in only parts of the runs. There was no material difference between the unit formed by the assembling and coupling together of the engine and cars before each of the movements began and a train made up for a run to another station. It cannot properly be said that the movement throughout consisted of operations whereby the previously formed unit was broken up. Nothing occurred while either of the movements was in progress which was materially different from what might have occurred if the movements had been to points beyond the yard limits. A result of each of the movements was that interstate freight was carried over an interstate railway thoroughfare to a point several miles nearer to its ultimate destination. The fact that there are switching operations before such a movement is completed does not have the effect of making the entire movement one which does not come within the prohibition of the statute. What was done included more than such shifting of cars while not controlled by the engineer by power or train brakes as properly may be regarded as not forbidden by the statute.

For the reasons above indicated, the conclusion is that the court erred in directing a verdict for the defendant. Because of that error the judgment is reversed.

UNITED STATES v. GULF, C. & S. F. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. February 8, 1919.)

No. 3197.

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by the United States against the Gulf, Colorado & Santa Fé Railway Company. Judgment for defendant, and the United States brings error. Reversed.

John E. Green, Jr., U. S. Atty., of Houston, Tex., and Roscoe F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C., for the United States.

J. W. Terry and Ballinger Mills, both of Galveston, Tex. (Terry, Cavin &

Mills, of Galveston, Tex., John G. Gregg, of Ft. Worth, Tex., and Frank J. Wren, of Galveston, Tex., on the brief), for defendant in error.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

WALKER, Circuit Judge. There is no material difference between the facts of this case and those of the case of United States v. Galveston, Houston & Henderson Railroad Co., 255 Fed. 755, — C. C. A. —, in the United States Circuit Court of Appeals, Fifth Circuit, present term.

For reasons stated in the opinion rendered in the case cited, the judgment in this case is reversed.

McGREW v. BYRD.*

(Circuit Court of Appeals, Eighth Circuit. January 15, 1919.)

No. 5105.

1. EJECTMENT ⟸9(3)—NECESSITY OF PROVING TITLE.
   It is the settled law of Missouri that in an action of ejectment plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's title.

2. EVIDENCE ⟸342—RECORDS—COPY—COMPETENCY.
   Under Missouri statutes relating to sale of swamp lands by a county, providing for issuance in triplicate of certificate of purchase by the register, one to be filed by him, that on presentation of a copy to the receiver and payment he should issue a receipt, on which patent should be issued by the county court, a certified copy of a record of a certificate from the books of the register is not admissible to prove title in the purchaser; there being no provision for such record, nor authority to convey title, except on the receiver's receipt.

3. EJECTMENT ⟸109—TRIAL—DIRECTION OF VERDICT.
   Where by the laws of the state a patent of land to a deceased person is absolutely void, and there was substantial evidence that the patentee under whom plaintiff claimed was dead when the patent issued, it was error to direct a verdict for plaintiff.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Abraham R. Byrd against Elias Vincent McGrew. Judgment for plaintiff, and defendant brings error. Reversed.

John T. McKay, of Kennett, Mo., for plaintiff in error.

Robert Burett Oliver, of Cape Girardeau, Mo. (Robert Burett Oliver, Jr., and Allen Laws Oliver, both of Cape Girardeau, Mo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. The defendant in error instituted an action of ejectment against the plaintiff in error for the possession of 160 acres of land, claiming to be the owner thereof. The answer, in addition to a general denial, claimed title to the lands in controversy as a bona fide purchaser by mesne conveyances, under a patent issued by the county of Dunklin, state of Missouri, dated June 22, 1870, to William S. Sugg. There was a trial to a jury, and by direction of the

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied 257 Fed. 66, 168 C. C. A. 278.

court a verdict for the plaintiff was returned. Proper exceptions were saved to the action of the court in directing a verdict.

As the verdict was by direction of the court, the evidence must be given the strongest probative effect in favor of the unsuccessful party. Evidence was introduced tending to establish the following facts:

It was agreed that Dunklin county was the common source of title; its title emanating from a grant by the United States to the state of Missouri, under the Swamp Land Act of Congress of September 28, 1850 (9 Stat. 519, c. 84 [Comp. St. §§ 4958–4960]), and the act of the General Assembly of the state of Missouri, entitled "An act in relation to swamp lands in the counties of New Madrid, Pemiscot, Mississippi, Scott, Cape Girardeau, Stoddard, Wayne, Ripley, Butler and Dunklin," approved March 1, 1855 (Laws Mo. 1855, p. 154), and amendments thereto enacted in 1857 (Laws Mo. 1856–57, p. 271). By the act of 1855 the clerks of the county courts of those counties, in which the swamp lands granted to the state were lying, were made ex officio registers of swamp lands in their respective counties, and the county treasurers ex officio receivers of public moneys arising from the proceeds of the sales of such swamp lands. When any of said lands were sold, the register was to execute triplicate certificates of the sale, one of which he was to deliver to the purchaser, file one in his office, and transmit the other to the state register of lands at Jefferson City. When the certificate of purchase was presented to the receiver of public moneys and the purchase money paid, he was to issue triplicate receipts, one to be given to the purchaser, one filed in his office, and the other to be transmitted to the state register of lands at Jefferson City, whereupon the Governor was to cause a patent for the lands to be issued to the purchaser. In the county of Dunklin and two other counties named in the act, the county clerks and treasurers were not to act as registers and receivers, respectively, but these officials were to be elected by the qualified voters of each county. By the amendatory act of 1857, the county court of Dunklin county, when satisfied that full payment had been made, was authorized to issue the patent to the purchaser, such patent to be recorded, before delivery, in the office of the clerk of the court issuing it, and copies of such records, duly authenticated were to be received as evidence in all courts as fully as deeds duly proven and acknowledged and recorded in conformity with the recording laws of the state.

[1] It is the settled law of the state of Missouri, as in practically all other states, that in an action of ejectment the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's title. Large v. Fisher, 49 Mo. 307; Parker v. Cassingham, 130 Mo. 348, 32 S. W. 487; Creech v. Childers, 156 Mo. 338, 56 S. W. 1106; Carter v. Macy, 239 Mo. loc. cit. 524, 144 S. W. 107; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780.

[2] To establish his title, the plaintiff introduced a certified copy of a certificate from the register of lands of Dunklin county, dated December 27, 1860, which certified that William Pruett had purchased certain lands described, among which the lands in controversy are included, and had made full payment therefor. It was certified

as being a true copy, "as the same appears in Patent Register No. 2, page 20." Objection to the introduction of this certified copy was made by the defendant, and, the objection having been overruled, an exception was saved, and this is assigned as one of the errors.

The plaintiff then introduced in evidence the original patent to William Pruett, executed by the presiding judge of the county court of Dunklin county on August 20, 1867. This patent was recorded, before delivery in the office of the county clerk, as required by the act of 1857, but was never recorded in the office of the recorder of deeds, as required by the general statute of the state. Objection to the introduction of this deed was made, and, the objection being overruled, an exception was saved. The plaintiff also introduced evidence tending to establish his claim of title by mesne conveyances from the owners of the William Pruett title.

The defendant introduced evidence of a deed by Dunklin county for these lands, to one William S. Sugg, dated June 22, 1870, and a chain of conveyances of that title to him. He also introduced substantial evidence, tending to prove that William Pruett, under whom plaintiff claims, had died some time before the patent was issued to him. The plaintiff, in rebuttal, introduced evidence tending to show that Pruett was living at that time.

The certified copy of the register's certificate of purchase by William Pruett was clearly inadmissible, as there is no statute of the state requiring such a record to be kept. The statute provided that one of the original certificates of purchase was to be kept in the register's office, but no provision is made by this or any other statute of the state of Missouri, to which our attention has been called, requiring such certificates to be recorded in a book or record. Nall v. Conover, 223 Mo. 477, 122 S. W. 1039; Whitman v. Giesing, 224 Mo. 600, 123 S. W. 1052; Chamberlayne on Modern Law of Evidence, § 1693.

Another ground upon which the objection to the introduction of this certificate should have been sustained is that, under the statute, the certificate of the register merely establishes that application for the purchase has been made. The purchase money could only be paid to and received by the receiver. A person may apply to the register to purchase the lands, but until the purchase money had been paid to the receiver, and receipts therefor issued in triplicate, no patent could be issued by the county court. The objection to the introduction of this certified copy of the register's certificate should have been sustained.

[3] Did the court err in directing a verdict for the plaintiff? Under the laws of Missouri, as construed by its Supreme Court, a deed or patent to a deceased person is absolutely void. Collins v. Brannin, 1 Mo. 540; Thomas v. Wyatt, 25 Mo. 24, 69 Am. Dec. 446; Norfleet v. Russell, 64 Mo. 176; Bartlett v. Brown, 121 Mo. 353, 25 S. W. 1108; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780; Carter v. Macy, 239 Mo. 518, 144 S. W. 107. And this is the rule recognized generally. Galt v. Galloway, 29 U. S. (4 Pet.) 345, 7 L. Ed. 876; McDonald v. Smalley, 31 U. S. (6 Pet.) 261, 8 L. Ed. 391; Galloway

v. Finley, 37 U. S. (12 Pet.) 264, 297, 9 L. Ed. 1079; Neal v. Nelson, 117 N. C. 393, 23 S. E. 428, 53 Am. St. Rep. 590. As there was substantial evidence to warrant a finding by the jury that William Pruett the grantee of the plaintiff, and under whom plaintiff claims title, was, at the time the patent was issued by the county court, dead, the court erred in refusing to submit the case to the jury under proper instructions on that issue.

Other errors have been assigned; but, as they may not arise on the next trial, we do not deem it necessary to pass on them.

For the errors indicated, the judgment is reversed, with directions to grant a new trial.

GREAT NORTHERN PAC. S. S. CO. v. RAINIER BREWING CO.*

(Circuit Court of Appeals, Ninth Circuit. February 24, 1919.)

No. 3120.

1. INTOXICATING LIQUORS ⟸138—INTERSTATE SHIPMENT—LABELING PACKAGE—"CONSIGNEE."

"Consignee," in Criminal Code, § 240 (Comp. St. § 10410), declaring it an offense to ship into a state a package of liquors unless labeled to show the name of the consignee, not being defined, must be assumed to be used in its ordinary commercial and legal significance, and so to mean the one to whom the carrier may lawfully make delivery in accordance with its contract of carriage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consignee.]

2. INTOXICATING LIQUORS ⟸138—INTERSTATE SHIPMENT—OFFENSES.

In view of Rem. Code Wash. 1915, § 6262—15, authorizing a person to bring into the state two quarts of whisky or a dozen quarts of beer, first obtaining a permit giving his name, which shall be affixed to the package, and requiring the carrier before delivering the package to cancel the permit, and section 6262—18, making it unlawful for a carrier to bring liquor into the state otherwise than permitted by the statute, it would be a crime, both under such statute and Criminal Code, § 240 (Comp. St. § 10410), for a carrier to deliver to a transfer company named as consignee in the bill of lading, a carload of liquor made up of packages bearing permits so issued to individuals.

3. CARRIERS ⟸35—INTERSTATE SHIPMENT — INTOXICATING LIQUOR — RATES RECOVERABLE.

Where it would be a crime for carrier to deliver to transfer company named in bill of lading as consignee, a carload of liquor shipped into Washington, and made up of numerous packages for various individuals, bearing their permits therefor, carrier could break up the shipment into individual consignments, deliver each package to the person indicated by permit, and recover of shipper the tariff rate for less than carload shipment, though contract was for carload shipment rate; it being required to collect the rate applicable to the transportation furnished.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by the Great Northern Pacific Steamship Company against the Rainier Brewing Company. Judgment of dismissal, and plaintiff brings error. Reversed and remanded.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied May 12, 1919.

Carey & Kerr and Charles A. Hart, all of Portland, Or., and F. G. Dorety, of Seattle, Wash., for plaintiff in error.

S. J. Wettrick, of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. It is provided, among other things, by the statutes of the state of Washington (section 6262—15, Remington's Codes and Statutes of 1915), that any person, desiring to ship or transport a certain prescribed quantity of any intoxicating liquor into any county of that state, shall appear before the county auditor and make a sworn statement showing, among other things, his name, that he is over 21 years of age, and the name and address of the person, firm, or corporation from whom the shipment is to be made, upon which statement the auditor is authorized to issue a permit to such applicant to ship or transport such limited quantity of liquor. Such permit the statute requires to be attached to and plainly affixed in a conspicuous place to the package or parcel containing the liquor, and when so affixed "shall authorize any railroad company, express company, transportation company, common carrier, or any person, firm or corporation operating any boat, launch or vehicle for the transportation of goods, wares and mechandise within the state of Washington, to transport, ship or carry not to exceed one-half gallon of intoxicating liquor other than beer, or twelve quarts or twenty-four pints of beer"; and it further declares that "any person so transporting such intoxicating liquor shall, before the delivery of such package or parcel of intoxicating liquor, cancel said permit and so deface the same that it cannot be used again."

Section 6262—18 of the same statutes makes it unlawful for any carrier to bring any liquor into the state except such as is expressly permitted by the statute, and section 6262—20 prohibits all carriers from making any such transportation within the state unless the package or parcel is plainly marked with the words: "This Package Contains Intoxicating Liquor."

The complaint in the action which was brought in the court below by the plaintiff in error to recover an alleged balance claimed to be due for the transportation and delivery of certain beer, together with the other pleadings, shows, among other things, that plaintiff was a common carrier by water, operating boats between San Francisco and Flavel, Or.; that at Flavel it connected with the rail line of the Spokane, Portland & Seattle Railway Company, which at Portland connected with the line of the Northern Pacific Company to Seattle and elsewhere; that the steamship company had joined with the rail lines in making through rates from San Francisco to Seattle, thus bringing the transportation in question under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379; that in May, 1917, the defendant brewing company delivered to the steamship company at San Francisco two shipments of beer for transportation by the steamship company and its rail connections to Seattle; that the shipments were billed as carload shipments and were consigned to the American Transfer Company; that each shipment consisted of a large number of individual

cases or packages of bottled beer, each package containing not more than the quantity allowed to be imported into the state of Washington by an individual; that each package had affixed to it the permit required by the statute of that state; that the freight charges demanded and paid at the time of making the shipment were based on the carload rate and amounted to $425.57; that when the shipments were received by the rail carriers they concluded that the beer could not be transported into the state of Washington in carload lots and delivery made to a transfer company; that the two shipments were thereupon broken up into individual consignments, and each of the packages included in the two cars was thereafter handled to destination as a less than carload shipment, and delivered to the person indicated by the permit affixed to the package; that according to the duly filed and published tariffs the charges for the transportation of the packages of beer in less than carload shipments amounted to $2,041.54; and, giving defendant company credit for the $425.57 paid at the time of making the shipment, the plaintiff carrier claimed and asked judgment for the balance of $1,615.97.

The court below dismissed the action, and the present writ of error was sued out to review its judgment.

Section 240 of the federal Code (Act March 4, 1909, c. 321, 35 Stat. 1137 [Comp. St. § 10410]) provides, among other things, as follows:

"Whoever shall knowingly ship * * * from one state * * * into any other state * * * any package of or package containing any * * * intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than $5,000. * * *"

[1, 2] There being no definition of the word "consignee" contained in that act, it must be assumed, as was held in United States v. Eighty-Seven Barrels, etc., of Wine (D. C.) 180 Fed. 215, that "Congress used it in its ordinary commercial and legal signification," and which plainly means (page 220) "that person or corporation to whom the carrier may lawfully make delivery of the consigned goods in accordance with its contract of carriage." In the instant case the carrier could not lawfully make delivery of either of the two carloads of beer shipped to the consignee named in the respective bills of lading—the transfer company—by reason of the prohibitive provisions of the statutes of the state of Washington that have been referred to. To have done so would therefore have been a crime, not only under the statute of that state, but under section 240 of the federal Criminal Code as well.

[3] It is well settled that an interstate carrier must collect the tariff rates applicable to the transportation furnished as fixed by law, no matter what may have been the terms or compensation agreed upon by it and the shipper. Texas & Pacific Railway v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011. And while the plaintiff was authorized to carry the beer here in question into the state of Washington, it did so subject to the requirements of the laws of that state, which, as has been seen, prohibited its delivery in bulk to the consignee, or in any other manner than by the individual package to the individual

authorized by the state statutes to receive it, taking care to first cancel and deface the permit thereto attached. Clark Distilling Co. v. Western Maryland Railway Co. and State of West Virginia, Clark Distilling Co. v. American Express Co. and State of West Virginia, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845.

We therefore think it clear that for the services thus required of and performed by the carrier in the present case it was legally entitled to recover the legally established rates therefor, and that, accordingly, the judgment below must be, and hereby is, reversed, and the case remanded for further proceedings in accordance with the views above expressed.

MEYERS v. PRATT et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3160.

MINES AND MINERALS ⊂=9—CONFLICTING CLAIMS—MINERAL AND AGRICULTURAL ENTRIES.

Discovery of a few colors of gold in a stream on public land occupied by an entryman, and which is more valuable for agriculture than for mineral, will not sustain a mining location, as against the prior agricultural entry.

Appeal from the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Suit in equity by Grace Meyers against Merritt Pratt and the Juneau Dairy, a copartnership composed of L. H. Smith and William Aultmiller. Decree for defendants, and complainant appeals. Affirmed.

John H. Cobb, of Juneau, Alaska, for appellant.

J. A. Hellenthal and Simon Hellenthal, both of Juneau, Alaska, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appellant, as plaintiff in the court below, brought this suit, alleging her possession and ownership of three certain placer mining claims about eight miles northwest of the town of Juneau, Alaska, called Jim D., Jim M., and Jim O'D., respectively, containing an area of about 60 acres, and alleging that the defendants to the suit asserted some claim thereto while having no right, title, or interest therein, and asking that they be required to set forth the nature of their claim and that the plaintiff's title to the property be quieted.

The answer of the defendant Pratt put in issue both the alleged ownership and possession of the plaintiff, and alleged his own ownership and possession of all of the land described in the amended complaint, by virtue of an entry made by him under sanction of the government of the United States long prior to the time of the placer locations under which the plaintiff asserts title, and the answer of the other de-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

fendants alleged the ownership and possession by the defendant L. H. Smith of a specifically described portion of the premises claimed by the plaintiff. The suit, therefore, was one simply to quiet the plaintiff's alleged title, and was not brought in aid of any proceeding in the United States Land Office.

The act of Congress, entitled "An act to provide for the entry of agricultural lands within forest reserves," of June 11, 1906 (34 Stat. 233, c. 3074), authorized the Secretary of Agriculture, in his discretion, to examine and ascertain as to the location and extent of lands within permanent or temporary forest reserves (with certain exceptions not here pertinent) which are chiefly valuable for agriculture, and which in his opinion might be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and to list and describe the same by metes and bounds, or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and of that act.

The act further provided that upon the filing of any such list or description the Secretary of the Interior should declare the said lands open to homestead settlement and entry in tracts not exceeding 160 acres in area and not exceeding one mile in length, at the expiration of 60 days from the filing of the list in the land office of the district within which the lands are located, during which period the said list or description should be prominently posted in the land office and advertised for a period of not less than 4 weeks in one newspaper of general circulation published in the county in which the lands are situated:

"Provided, that any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry, upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry," etc.

The court below found as facts that the property described in the complaint is, and ever since February 16, 1909, has been situated within the boundaries of the Tongass National Forest as the same was created and established by executive proclamation of that date issued under authority of the act of Congress approved March 3, 1891; that on the 29th day of June, 1915, and the 5th day of August, 1915, defendants Lee H. Smith and Merritt S. Pratt, respectively, made application to the Secretary of Agriculture, as provided by the act above mentioned, for the examination and listing with the Department of the Interior of the lands in question, with the bona fide desire and intent on their part of procuring the same to be restored to the public domain and opened for homestead entry, with the preferential rights in themselves, specified in the statute; that a similar application was subsequently, to wit, on August 10, 1916, made by the plaintiff for the same land described in Pratt's application, and that the plaintiff was informed by the Department of Agriculture that "since two applications for the same area cannot remain of record, the preference must be given to the prior application," and that her application was, accordingly, canceled;

that as soon as practicable after the receipt by the Department of Agriculture of the applications of the defendants, that department caused an examination of the status and character of the lands so applied for to be duly made, as to whether or not the said lands should be restored to the public domain and made subject to homestead entry; that pending the determination of that question "special use" permits were issued by the Department of Agriculture to the defendants, authorizing them to enter upon, use, and occupy the tracts of land so respectively applied for, for purposes of agriculture, grazing, and residence; that under the permits and preferential rights they entered upon the tracts so respectively applied for, improved the same by the building thereon of valuable houses, and have continuously used the same for grazing, dairying, and residential purposes, paying to the government rent therefor in the amounts required by law and the regulations of the Department; that on September 22, 1916, the said lands so applied for by the defendants were, as the result of such examination, duly and regularly listed with the Secretary of the Interior as being subject to homestead entry, and that the defendants possess and claim, and at all of the times mentioned have possessed and claimed, the same as agricultural lands; that after the plaintiff had made her aforesaid application of August 10, 1916, she discovered in the beds of the water courses flowing from the mountains back of the said property a few colors of gold, whereupon she made the mining locations that form the basis of her suit.

The court further found as facts, in effect, that the land in controversy is not mineral, but agricultural, land, and accordingly entered judgment dismissing the complaint, with costs in favor of the defendants.

To the contention, on the part of the appellant, that the findings of fact are not supported by the evidence, we have given careful consideration, and find in the record abundant evidence to sustain them. Referring to the case of Steele v. Tanana Mines, 148 Fed. 678, 78 C. C. A. 412, we think nothing more need be said to show that the judgment must be affirmed.

It is so ordered.

SLATER, Public Adm'r of City of St. Louis, Mo., v. THOMPSON et al.

(Circuit Court of Appeals, Eighth Circuit. January 13, 1919.)

No. 5222.

1. EXECUTORS AND ADMINISTRATORS ⟸518(1)—PROPERTY SUBJECT TO ADMINISTRATION.
Where the property of a testator has been vested in the devisee by the probate court of the state where testator resided and where the will was probated, a part of the property situated in another state cannot be subjected to further administration proceedings therein.

2. EXECUTORS AND ADMINISTRATORS ⟸35(20)—PUBLIC ADMINISTRATORS—EFFECT OF REMOVAL FROM OFFICE.
A public administrator, after his removal from office, has no interest in an estate of which he has taken charge which will support an appeal by him in a pending suit.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by Morgan Jones, W. B. Thompson, and others against the Missouri-Edison Electric Company and others. Frank M. Slater, as Public Administrator of the City of St. Louis, appeals from an order denying his petition for intervention. On motion by appellees to dismiss appeal, and on motion of James P. Newell, Public Administrator of the City of St. Louis, Mo., to be substituted as appellant. Motion to be substituted denied, and motion to dismiss appeal sustained.

Wells H. Blodgett, George B. Webster, Henry W. Blodgett, and Walter N. Fisher, all of St. Louis, Mo., for appellant.

Daniel G. Taylor, Jacob Chasnoff, and George C. Willson, all of St. Louis, Mo., for appellees.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. [1] The first motion is made by Theodore Rassieur, as administrator de bonis non cum testamento annexo of the estate of Eleneious Smith, Anna E. Bomar, and Douglas W. Robert, appellees, to dismiss the appeal of Frank M. Slater, public administrator of the city of St. Louis, as administrator of D. T. Bomar. Bomar's estate had been vested in the devisee under the will by the proper court of the state of Texas having probate jurisdiction of the estate, where the testator resided at the time of his death and where the will had been probated, before Slater as public administrator of the city of St. Louis, had attempted to take charge of that portion of the estate which was in the city of St. Louis, and before he was appointed administrator de bonis non cum testamento annexo. There was therefore no estate in the state of Missouri to be administered when Slater attempted to take possession of it. Morton v. Hatch, 54 Mo. 408; Richardson v. Busch, 198 Mo. 174, 95 S. W. 894, 115 Am. St. Rep. 472.

[2] Again, Slater was appointed by virtue of his office as public administrator, without any other bond except his official bond. On

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

June 25, 1918, he was removed as public administrator and as administrator of this estate. He has had and has therefore no interest whatever in the estate and no further right to act therein. California v. San Pablo & Tulare R. Co., 149 U. S. 308, 314, 13 Sup. Ct. 876, 37 L. Ed. 747; Kimball v. Kimball, 174 U. S. 158, 161, 19 Sup. Ct. 639, 43 L. Ed. 932; Tyler v. Judges of Court of Registration, 179 U. S. 405, 408, 21 Sup. Ct. 206, 45 L. Ed. 252; Keeley v. Ophir Hill Consolidated Mining Co., 169 Fed. 601, 605, 95 C. C. A. 99.

As Slater, before he was discharged as public administrator and as administrator of this estate, had no right to take charge of any part of it in the city of St. Louis, his successor as public administrator James P. Newell, has no right to or interest in it, and his motion to be substituted for Slater in this suit must be denied, and the motion of Mr. Rassieur and others to dismiss the appeal of Slater herein must be granted. Let orders be entered accordingly.

HENRY v. CITY OF LOS ANGELES.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1919.)

No. 3108.

1. PATENTS ⟸328—INFRINGEMENT—WATER WHEEL GOVERNOR.
   The Lyndon patent, No. 695,220, for an electro-mechanical water wheel governor, designed to regulate the speed of the water wheel by maintaining a constant flow in the pipe line, by using a by-pass normally kept in half-open position, through which water wastes, construed, and *held* not infringed.
2. PATENTS ⟸178—CONSTRUCTION OF CLAIMS—"MEANS."
   The general term "means," used in a patent claim, will not include all means which can perform the same function, but only those which are shown in the patent and their mechanical equivalents.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Means.]
3. PATENTS ⟸167(1)—SCOPE—LIMITATION BY CLAIMS.
   The scope of every patent is limited to the invention described in the claims, read in the light of the specification.
4. PATENTS ⟸165—CONSTRUCTION—PAPER PATENTS.
   A patent for a device which has never gone into actual use may properly be limited to what is plainly shown and distinctly claimed.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit in equity by George J. Henry, Jr., against the City of Los Angeles. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 230 Fed. 457.

Raymond Ives Blakeslee, of Los Angeles, Cal., for appellant.

Albert Lee Stephens, City Atty., of Los Angeles, Cal., and Frederick S. Lyon, Sp. Counsel, of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an appeal from a decree dismissing the complaint of appellant, Henry, upon the ground that the Lyndon patent, No. 695,220, issued March 11, 1902, here involved, was not infringed.

The patent describes the invention generally as improvements in electro-mechanical water wheel governors. In his specifications the inventor sets forth that governors used to regulate the water supply to the water wheel in general operate only to open or close the water wheel gate, thereby allowing of the admission of a greater or less supply of water. He continues:

"Now, the first effect of such opening or closing of the gate, owing to the inertia of the water, is always the opposite to that which it is desired to bring about—i. e., the opening of the gate operating to momentarily cause less velocity of water at the wheel, owing to the great orifice the water has to flow through, and, vice versa, the closing of the gate operating to momentarily cause an increase of velocity, owing to the contraction of the orifice."

To overcome these opposite effects, the patentee provides a by-pass inserted into the penstock or flume at a point near the water gate and a gate in the by-pass controlled by the same governing mechanism that controls the water gate and operating to allow a greater or less flow through the by-pass, according as the water gate is being closed or opened. Other principal features enumerated in the specifications "relate to means for preventing excessive action of the governor," and to the control of the governor by a dynamo driven by the water wheel.

[1] The use of electric governors for water wheels was old in the art, as were the uses of mechanical governors; but the appellant contends that prior to the coming of Lyndon into the field there prevailed in the electro-mechanical water wheel art an absolute want of sensitive and accurate speed governing—that is, the governing of the generating apparatus driven by water power—and that often there were fluctuations of wide extremes occurring in the supply of electrical energy produced by any electro-mechanical generating unit. Obviously it is desirable to retain a constant speed in the use of power required from a water wheel, and inventors have sought to maintain a balance or equilibrium between the power of the water projected upon the buckets or blades of the water wheel and mechanical power being taken from the water wheel.

Appellant says that Lyndon pointed the way to securing in a water wheel governor the automatic return of the controller to normal position to interrupt the governing action before it had overrun, or the introduction of means such that the governor, when in the act of moving the water gate to a new position, would be prevented from moving the gate "a little too far and then later moving it back a little farther than necessary."

The claims which appellant quotes as bearing upon the breadth and import of the invention are as follows:

3. In a water wheel governor, the combination with a water gate operating shaft, and means for operating same in either direction to govern the water wheel, of a controller for said operating means, responsive to changes of speed of the water wheel, a returning device for said controller provided with a clutch connection to said operating shaft, and means, actuated by

said controller on movement thereof from normal position to engage said clutch with the said shaft, so as to cause the return of the controller to normal position and interrupt the governing action before it has overrun the proper amount, substantially as for the purpose set forth.

4. In a water wheel governor, the combination with a water gate operating shaft, a driving shaft and reversing clutch gear, adapted to turn the water gate operating shaft in either direction, a controller, responsive to changes of speed of the water wheel and controlling such reversing gear, and a returning device for said controller provided with actuating means controlled by said controlling means to return the controller to inoperative position, so as to prevent excessive movement of the governor.

6. In a water wheel governor, the combination with means for operating the water gate in either direction, a by-pass for the water wheel, and a valve controlling said by-pass, of means connected to the water gate operating means and operating the by-pass valve inversely to the operation of the water gate.

7. In a water wheel governor, the combination with means for operating the water gate in either direction from normal position, a by-pass for the water wheel, and a valve for such by-pass, of means connected to the water gate operating means and adapted to operate the by-pass valve from normal position in either direction, so as to control such valve inversely to the control of the water gate, during the governing action of the water gate, and means for returning the by-pass valve to normal position on completion of governing movement of the water gate operating means.

8. In a water wheel governor, the combination with a shaft for operating the water gate in either direction from normal position, a by-pass for the water wheel and a valve for such by-pass normally held in partly open position, of an operating device for said valve provided with means for returning the valve to normal position, a clutch, adapted to connect said operating device for the by-pass valve with the water gate operating shaft to control the by-pass valve inversely to the water gate, reversing means for operating the water gate operating shaft in either direction, a controller, responsive to the speed of the water wheel and controlling said reversing means, and means operated by said controller to bring the aforesaid clutch into operation and to release said clutch when the governing action is effected.

It is contended that the by-pass combination is broadly and basicly claimed in claims 6, 7, and 8 of the patent, and the combination preventing overrunning is broadly claimed in claims 3 and 4, and that the structures used by the appellee contain and utilize the substance of the invention within the meaning of the leading and controlling decisions under the patent law. Stating the contentions more concretely, they are, that the relation between the by-pass valve and the water gate was new with Lyndon, as also were the relations between the features preventing overrunning of the governor.

The whole problem of speed control and use of electro motive force in water wheel engines appears to be complex. To explain in detail the many features involved in this case would require very lengthy statements of the evidence. We shall therefore attempt no more than to refer to the more important points upon which our judgment is founded.

Lyndon's device contains the following essential elements: A speed-sensitive device, comprising a dynamo and connected parts, is connected by mechanical means to the prime mover, and therefore varies in speed responsive to variations in the prime mover. Variations in speed of the speed-sensitive device produce a change in degree of magnetization of a solenoid, which results in the movement of the solenoid core, which movement produces certain electrical contacts, the closure of which serves to energize certain magnets, the energizing of which serves

to set in operation a train of movements intended to bring about a regulation or control in operation of the speed of the prime mover. Lyndon also discloses what is called a by-pass and by-pass valve intended to move inversely to the movement of the main gate; the purpose being to minimize the rate of change in the velocity of the water in the main conduit flowing to the prime mover and eliminating variations of pressure in the same during the period of governing.

Figure 1 is a perspective view of Lyndon's governor; Figure 2, a plan view showing certain detailed parts; Figure 6 illustrates in detail a part of the controlling device:

Fig. 1.

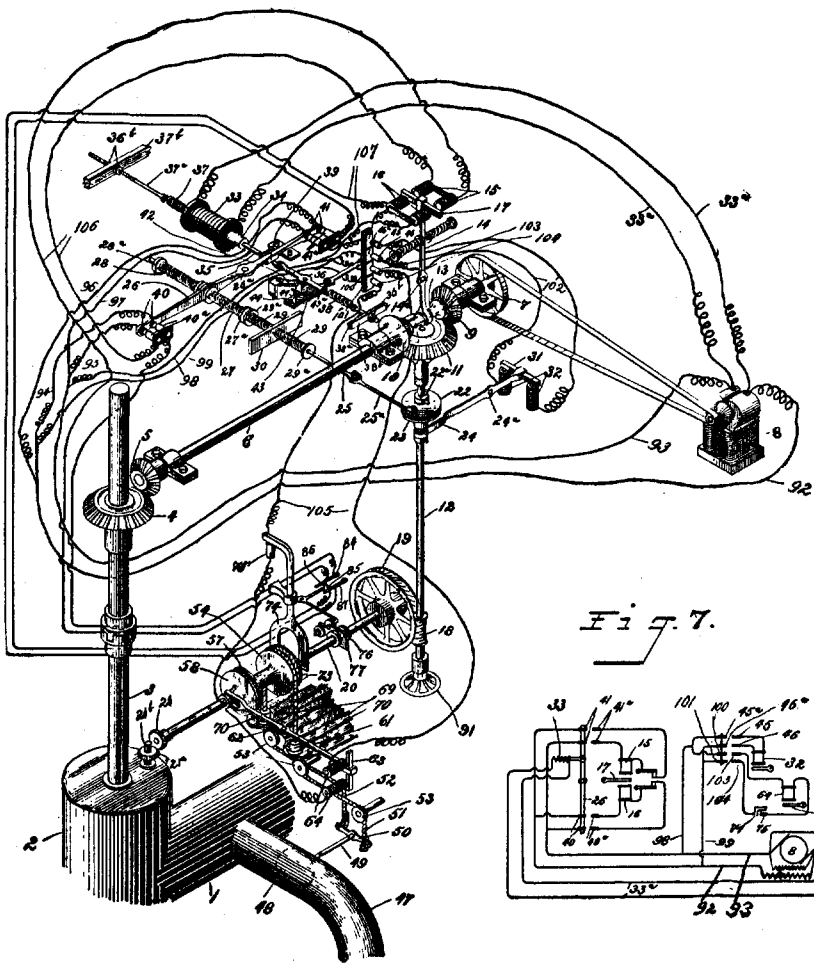


Fig. 7.

Fig. 2.

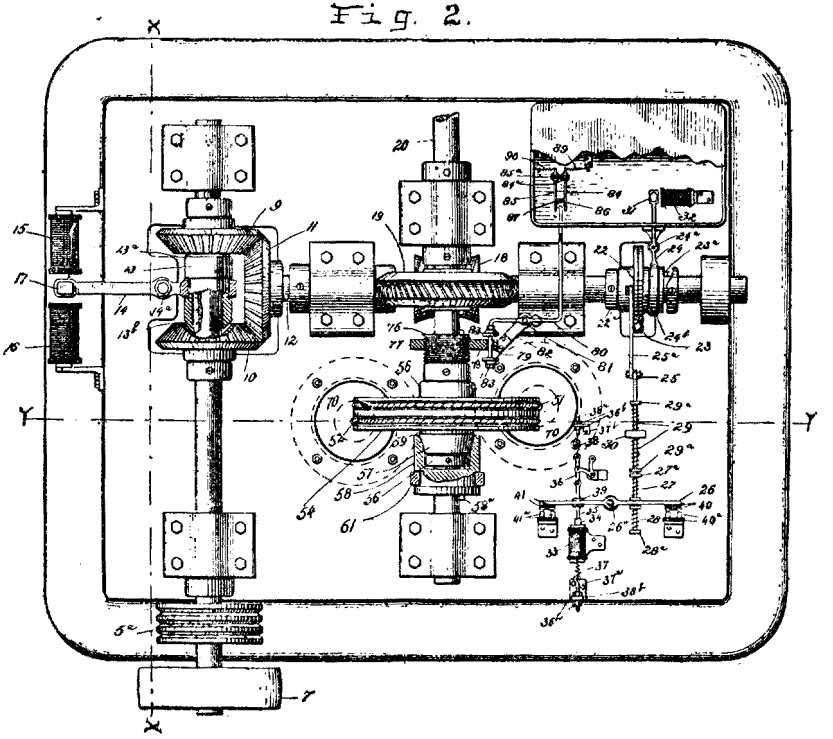
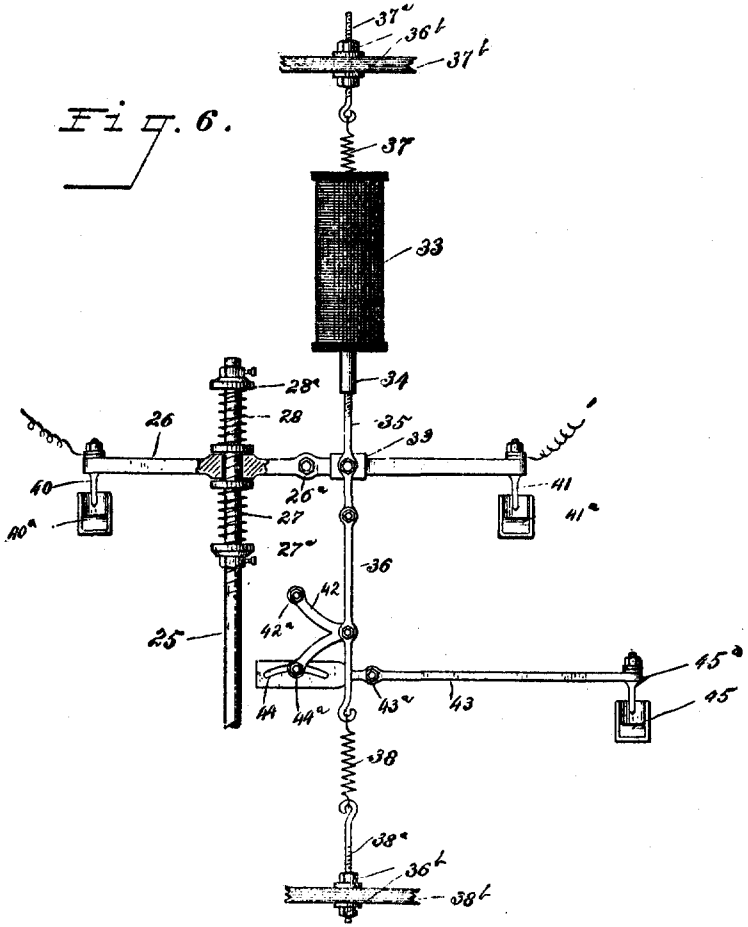


Fig. 6.



It is plain that if a prime mover is operating, for example, at half load, and there comes a sudden demand for full load, the water for the increased demand will not be present at or near the prime mover unless some special provision is made for supplying it at that point; furthermore, if the prime mover is operating at full load, and there is a sudden rejection of one-half the load, and the necessity of closing the gate to a corresponding amount, the excess water must be taken care of in one way or another, because the velocity in the main conduit cannot be instantaneously arrested without danger of a serious increase in pressure. To overcome these troubles, Lyndon places in a by-pass just back of the main gate a by-pass valve normally held in half-open position. Experts testified in effect that the water which flows along the main conduit then goes partly to the wheel and partly through the partly open by-pass. In case of sudden demand from half load to full load, enough water will be available in the conduit itself, and it will

be only necessary, in order to make it available, for the wheel to close, or partially close, the by-pass valve, thereby preventing the water from wasting through the by-pass and turning it to the wheel; and, on the other hand, in case of a sudden change from full to half load, the excess water which is going along the main conduit may be disposed of by simply opening the by-pass valve wider, thereby allowing the excess water to waste through the by-pass, while the reduced amount of water as controlled by the main gate will pass to the wheel. In the Lyndon patent there must be a coincident movement of the by-pass and of the main gate, and that Lyndon disclosed such is evidenced by the following quotations from his patent:

"I provide a by-pass inserted into the penstock or flume at a point near the water gate, and a gate in the said by-pass controlled by the same governing mechanism that controls the water gate, and operating to allow a greater or less flow through the by-pass, according as the water gate is being closed or open."

Again:

"When the gate is operated as above described, the lever *43* is moved to close the contacts *45a*, *46a*, *100*, *101*; this closure being effected whatever the direction of the movement of the controlling lever *26* by reason of the pin and curved slot connection between such lever."

Again:

"Consequently the by-pass valve will be turned toward open or shut position according to whether the gate is closing or opening for the purpose above stated."

And further:

"When the governor acts to close the main gate, the compensating device will open more widely the by-pass. The rapidity with which the valve in the by-pass opens is such that the increased volume of water which it allows to pass through is proportional to the decrease in area which the main gate effects by reason of its closing. Should the main gate open, the reverse action takes place."

And also:

"It is obvious that the by-pass arranged as described, opening or closing in a manner opposite to that in which the main gate opens or closes, will, if properly adjusted, admit of the main gate being rapidly operated and the governing of the water wheel quickly accomplished."

In this connection it is well to say that in the opinion of several highly qualified witnesses there was serious confusion in certain of the language of the Lyndon patent, and particularly in the use of the term "returning device." In the specifications of the patent Lyndon refers to—

"the rod *25*, discs *22* and *23* and the controlling clutch magnet *32* as constituting a returning device for preventing the governor from overrunning—that is, moving the water wheel gate a greater distance than is actually necessary for proper regulation; this necessitating a second movement of the gate in an opposite direction, which in turn may overtravel and require the gate to be moved back again."

Professor Durand, of Stanford University, testified that he concluded that the rod *25* was considered the returning device, because Lyndon refers to a "returning device" consisting of a rod *25* connected by a pivoted link or connecting rod *25a* with the disc *22*, and because in discussing the general operation he says, "while springs *29*, *29*, are placed between collars *29a*, *29a*, on the rod," etc. Other portions of the specifications mention the magnet as apparently claimed independently of the "returning device," and there would seem to be a distinguishing of the rod from the means involved in the movement of the rod.

The best evidence is that the element described as a controller in claims 3, 4, and 8 refers to the lever *26*. This is gathered from the language in the specifications, where Lyndon refers to the exertion of pressure "on the controller *26* to return it to normal position"; also from his reference to "the lever *26*, which acts as a circuit controller"; and elsewhere in claims the "actuating means" is regarded as distinguished from the controller itself. In the claims just referred to the solenoid is not intended apparently as the controller.

The "means connected to the water gate operating means" described in claims 6 and 7, and the element in claim 8 described as "an operating device for said valve," are understood to comprise the drum or sheave wheel *54* with its immediate attached parts, *56* and *57*, with ropes *51*, *52*; and the "means for returning the by-pass valve to normal position" elements described in claims 7 and 8 refers to the weights *70* in the drawing. Professor Durand said that the function of the dashpot was to retard or control the return slowly and easily to its position of rest, but its function is not to determine or produce such return.

Much could be said to show why we are satisfied that the theory of the Lyndon patent pertaining to the governing of the hydraulic prime mover implies the provision of a by-pass valve in normal position half open and the movement of such valve in either direction inversely to the movement of the main gate, but it would extend the discussion too far. The movement of the valve is in either direction from its normal position. This language from the specification is helpful in understanding the situation:

"Consequently the by-pass valve will be turned toward open or shut position according to whether the gate is closing or opening for the purpose above stated. Normally, the gate or valve in the by-pass will be half way open, so that the amount of water flowing through the by-pass and around the wheel without doing work will be half the amount which the by-pass is capable of carrying."

The inventor also specified:

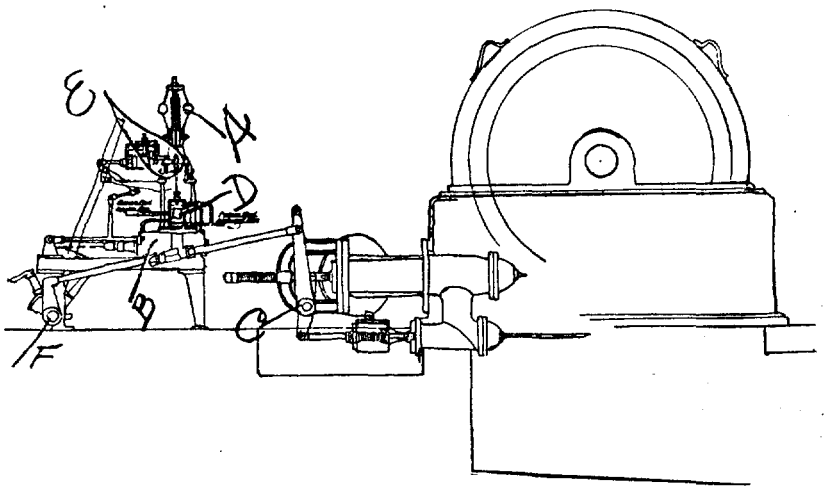
"It is obvious that the by-pass arranged as described, opening or closing in a manner opposite to that in which the main gate opens or closes, will, if properly adjusted, admit of the main gate being rapidly operated and the governing of the water wheel quickly accomplished. After the governing takes place, the by-pass gate is either open or closed, or nearly so, and in order to be useful for a second governing must return to its normal position."

Thus again the normal position is indicated, with movement in either direction therefrom. And we do not find any statement or drawing

which shows that the by-pass valve may be adjusted to occupy any position other than a half-open one as the normal one.

While there is elaborate testimony from men of long experience in hydraulics and electric devices that Lyndon's device as described by him is inoperative, we are not prepared to adopt such a conclusion. But we are satisfied from the evidence that Lyndon's device as described is to regulate the speed of the water wheel by maintaining a constant flow in the pipe line, and the flow in the pipe line is to be kept constant by the use of a by-pass normally kept in half-open position, through which water flows to waste. The purpose is to have a supply of water capable of being thrown on the wheel when, because of an opening movement of the water gate, the wheel slows down, and an outlet may be had for the water to compensate for an acceleration of the flow of water in the pipe line at the instant the water gate is moved toward a closing position.

The alleged infringing device is illustrated by the annexed drawing:



In the device the normal position of the auxiliary relief nozzle is fully closed, moved from its normal position only when the nature of the reduction in load on the water wheel calls for a prompt closure of the valve of the main needle nozzle. A witness illustrated this by saying that a slow load would produce little or no action on the part of the auxiliary relief valve and an increase of load requiring an opening of the main nozzle would fail to produce any result thereon. The object of the device is to prevent excessive and dangerous pressure in the main line and at the same time to permit economy in the use of water—the latter a most important matter, but one not mentioned or seemingly practicable in the construction of the Lyndon device.

It is satisfactorily shown that the combinations set forth in claims 3 and 4 are not shown in the device used by the defendant. There is not a reversing clutch gear adapted to turn the water gate operating shaft in either direction, nor is there a controller responsive to changes of

speed of the water wheel and controlling such reversing gear. The controller in the device of the defendant, which is responsive to the change of speed, does not control a reversing or reversing clutch gear. The returning device is controlled specially by the nature of the movement of the water gate operating shaft, and not as positive and immediate result of movement on the part of the controlling means.

Nor does the mechanism in the device of the defendant for controlling the motions within the hydraulic cylinder appear to be the same.

Referring to claim 8, we gather from the exhibits and testimony that there is a water gate operating shaft which will operate the water gate. There is a by-pass for the water wheel, and a valve for such by-pass, and an operating device for the valve (shown on Exhibit H), but there is no clutch adapted to connect the operating device for the by-pass valve with the water gate operating shaft; nor is there a valve for the by-pass normally held in partly open position. The mechanism shown is adapted to connect the operating device for the by-pass valve with the water gate operating shaft and to control the by-pass valve inversely to the water gate, which is constructed and operates independently of any clutch mechanism. Reversing means for operating the water gate operating shaft in either direction are found, but there is no driving shaft or reversing clutch gear adapted to turn the water gate operating shaft in either direction. There is a controller responsive to change of speed in the water wheel, but it does not control a reversing clutch gear.

The combination of elements claimed in claim 7, supra, is clearly not found in defendant's device, inasmuch as the automatic relief nozzle used is not operated from normal position in either direction, but in one direction only, and when the main gate is closed.

The arrangement of the various parts of the dashpot connected with the relief nozzle in defendant's device is such that a closing movement in the valve of the main needle nozzle, when slow, produces an effect on the action of the valve of the relief nozzle, especially when the valve of the main needle nozzle operates nearest its full open position. The by-pass valve of the Lyndon patent is moved at a definite rate of speed responsive to movement on the part of the main water wheel gate; this movement being put into operation by instantaneously operating the electrical contacts in such manner that this by-pass valve will open when the main water wheel gate closes and close when the main water wheel gate opens.

Defendant provides means for governing the water wheel in a manner without causing excessive pressure rises in the main conduit, and thus protects the pipe line and permits great economy of water in accomplishing such object.

The speed-operated element and the fly ball governor used by defendant are not the mechanical equivalents of the wound dynamo marked upon the Lyndon patent. The valve-operating shaft in defendant's device does not make a complete revolution, and is not in the usual sense an operating shaft used for transmitting motion, as indicated by *20* or *49* in Figure 1 of the Lyndon patent.

[2] In arguing in support of the position that no one has obtained

the results produced by the Lyndon invention without using that invention as claimed, appellant would have us hold that in claims 3, 4, 6, and 7 the word "means," or the like, "is employed to describe connective features of the combination, and that such terms may be considered to cover practically any substitute part or feature." Proceeding with his argument, appellant says that, the substance of the claim being the combination, such combination is a unit, and that, where the component parts are recited as interrelated through the agency of means, the claim is to be construed as a unit. We find ourselves unable to sustain this argument. To permit a patentee to burden his claims by the use of indefinite language would lead to supporting him in a monopoly of a principle or result, which would bar other inventors from arriving at the same result by different means. In Walker on Patents, § 117a, p. 137, the author says:

"Where some of the parts of a combination operate therein to give motion to other parts which do the final work of the combination, it is proper to specify the former by the use of such terms as 'means,' 'mechanism,' or 'devices' for giving that motion, except when these terms are applied to an element or part which constitutes the essence of the invention. If they are used under such circumstances, the claim will be regarded as functional. But such general language will not include all means, mechanism, or devices which can perform that function, but only those which are shown in the patent and their equivalents. And in this case, also, the question whether other means, mechanism, or devices are equivalents to those shown in the patent will be determined by the established rules on that subject, rather than by any apparent precision or elasticity of the language used in the claims to designate the parts involved in the inquiry."

We do not find in the defendant's device any mechanical equivalent to the reversing clutch gear or the means for operating the water gate in either direction as stated in the claims of the patent to Lyndon. Singer Manufacturing Co. v. Cramer, 192 U. S. 265, 24 Sup. Ct. 291, 48 L. Ed. 437. Nor do we find any returning device for the controller in the defendant's device, as called for by claims 3 and 4. There is lack of similarity between the butterfly valve, an old style of valve used by Lyndon, and the needle valve, used by the defendant. They operate on different principles; the one inversely to the water gate in both directions, and at all times half open when in normal position, while defendant's is closed.

The appellant earnestly contends that the object of defendant's governing device is, not to take the pressure off the wheel and make it tend to slow down, but equally with Lyndon to keep the wheel moving at a constant speed, and thereby keep the potential of electric energy constant in the circuit of the generator. This view is supported by opinions of witnesses for the appellant. But with Lyndon the by-pass is a very important means of overcoming the inertia effects of water which interfere with the proper speed of the water wheel, the half-open by-pass being the indispensable means for governing the speed of the water wheel; while in defendant's governing device the main needle is the principal thing, the auxiliary nozzle being used as a valve to prevent the damaging effects of excessive pressure to the pipe line, and the main needle moves often to govern the water wheel, without causing movement of the auxiliary relief nozzle.

[3] If, in sustaining the conclusion of the lower court, our construction of the claims of the patent, and particularly of claims 6 and 7, seems narrow, the position taken is, we think, in accord with the long-established rule of the Supreme and other federal courts, which limit the scope of every patent to the invention described in the claims in it, read in the light of the specifications. As has been very recently said by the Supreme Court, referring to the claims of a patent:

"These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute; 'he can claim nothing beyond them.'" Motion Picture Patents Co. v. Universal Film Mfg. Co. et al., 243 U. S. 502, 510, 37 Sup. Ct. 416, 418, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959.

The court cited the Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122.

Furthermore, unless Lyndon is limited to the specific form of the device described in his specifications and illustrated in his drawings, it is not improbable that claims 6 and 7 of the Lyndon patent would have to be declared void, as anticipated by a water wheel and device used by the Power Development Company near Bakersfield, Cal., in 1896 and 1897, where there was a by-pass mechanism operated inversely to the main water gates. In the mechanism designed for use at Bakersfield there was a governor which responded to load and speed changes. The by-pass valve was a necessary part of the equipment, for the rapidity of action of the governor there used made operation impossible without the by-pass feature.

The evidence concerning that device tends strongly to show that the governor used at Bakersfield was efficient and performed the functions of its design satisfactorily, although the failures of the wheels used to give required efficiency led to the discarding of use. Two of the principal experts for the defendant testified to the effect that there is closer similarity in the mechanical parts, the interrelation of parts and principles of action, between the Bakersfield governor, than there is between the device of the Lyndon patent and that used by defendant.

[4] It is also to be considered that there never has been a water wheel governor constructed in accord with the drawings and specifications of the patent in suit—that is, a governor constructed and using all the principles of governing revealed in the patent. The Court of Appeals of the Sixth Circuit in National Malleable Castings Co. v. Buckeye M. I. & C. Co., 171 Fed. 847, 96 C. C. A. 515, said:

"The use we make of the fact that the device has never gone into actual service is in the construction or interpretation of the patent. We are justified, in view of the facts of this case, in exercising much caution in attributing to this patent anything more than is plainly shown and distinctly claimed. * * * This inference from nonuse, under the circumstances, is the converse of the inference drawn with respect of a doubtful patent when a showing is made that it has gone into large use and has displaced other devices. It is an inference against utility from the fact of long nonuse, unexplained by want of means or opportunity."

Again, if Lyndon's claims are not to be construed as limited to an electro-mechanical device substantially as shown and described in the specifications and drawings, his claims 6 and 7 would be in danger of having been anticipated by the earlier French and Swiss patents (neither of which was cited by the examiner). The former patent concerns a self-regulating by-pass for the water wheel with the idea of overcoming inertia of pressure produced by the too rapid changes of the motor power, especially in long conduits, and the Swiss is an invention of an automatically regulated by-pass for high pressure water wheels with the idea to avoid the impact of the water in the conduits resulting from the sudden closing of the water gate.

The effort of the appellant to satisfy the court that his invention dated back ahead of the French and Swiss patents is not altogether convincing. Westinghouse E. & M. Co. v. Saranac Lake E. L. Co. (C. C.) 108 Fed. 221; Automatic Weighing M. Co. v. Pneumatic Scale Corporation, 166 Fed. 288, 92 C. C. A. 206.

But, leaving these questions open, we are of the opinion that on the ground that the device used by the defendant is not shown to be an infringement of the device described in the patent of Lyndon the decree of the District Court dismissing the bill should be affirmed.

Affirmed.

DAVEY TREE EXPERT CO. et al. v. VAN BILLIARD et al.

(Circuit Court of Appeals, Third Circuit. December 5, 1918.)

No. 2390.

1. PATENTS ⇐324(5)—QUESTION PRESENTED FOR REVIEW.
In a suit for the infringement of two patents, where one patent was found infringed, etc., the question of the validity of such patent cannot be reviewed on plaintiff's appeal from the other portion of the decree, denying relief as to the other patent.

2. PATENTS ⇐156—INFRINGEMENT SUIT—REFUSAL TO FILE DISCLAIMER.
Where trial court found that several claims of plaintiffs' patent were valid and infringed, but that one claim was invalid, *held*, that plaintiffs should not be denied all relief because of their refusal to file a disclaimer as to the single claim, Rev. St. § 4922 (Comp. St. § 9468) authorizing no such procedure, but the trial court should instead enter a decree finding invalid the single claim, and finding the others valid and infringed, etc.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Edward G. Bradford, Judge.

Bill by the Davey Tree Expert Company and others against Rue J. Van Billiard and another. From a decree which dismissed plaintiffs' bill in so far as it relied on one patent, because plaintiffs refused to file a disclaimer as to the first claim of said patent, which was found invalid by the trial court, plaintiffs appeal. Reversed and remanded.

See, also, 248 Fed. 718.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The following memorandum opinion of the court below was filed March 14, 1918:

"This court has heretofore found that United States patent No. 890,968 is valid as to claims 3, 4, 6 and 8, and that all of said claims have been infringed as charged, and that United States patent No. 958,478 is valid as to claims 2, 3, 4, 5, 8 and 11, but void as to claim 1 in view of the prior art, and that all of the above-mentioned claims of the last-named patent have been infringed, and February 4, 1918 ordered that the complainants have leave within thirty days next thereafter to enter a disclaimer as to claim 1 of patent No. 958,478 in the Patent Office, and to file in this court a duly certified copy of said disclaimer in default of which the bill would be dismissed as to the patent last aforesaid (248 Fed. 718); and no disclaimer having been entered and filed pursuant to said leave, the solicitors for the complainants have prepared and submitted a proposed interlocutory decree to the effect that the above-enumerated claims of patent No. 890,968 are valid and have been infringed as charged; that the complainants recover the profits made by the defendants and damages sustained by the complainants by reason of the said infringements; that the cause be referred to a master to ascertain the amount thereof, and that the defendants be enjoined from violating the claims of the patents last aforesaid; that claim 1 of patent No. 958,478 is invalid in view of the prior art; that the bill as to the patent last aforesaid be dismissed for want of a disclaimer, and that the cross-bill also be dismissed.

"The solicitor for the defendants objects to the proposed interlocutory decree for several reasons. He contends that, patent No. 958,478 having been found invalid as to claim 1, and no disclaimer having been made as to that claim, it is improper to recognize any of the claims of that patent as valid and infringed. Undoubtedly it would be erroneous to hold that the above enumerated claims of that patent, other than claim 1, are absolutely and without qualification valid and enforceable in the absence of disclaimer as to that claim. But obviously it is necessary in order to determine how far a disclaimer duly made as to a void claim may operate to save to a patent owner the benefit of unobjectionable claims, to ascertain which of the other claims in suit are valid and enforceable in the absence of all necessity for a disclaimer. Otherwise it would be difficult, if not impossible, to have knowledge of the number and identity of the claims necessary to be included in a disclaimer. Thus it is not only not improper but highly desirable, if not necessary, to pass upon the validity or invalidity of the remaining claims in suit. Such ascertainment of the validity of such claims and of the fact of infringement does not entitle a complainant to recover profits or damages where a disclaimer is necessary and has not been made, nor can it in any manner prejudice the rights of a defendant.

Another ground of objection is that where a patent contains a number of claims and the bill charges infringement generally without alleging infringement of any particular claims, it is the right of the parties to receive and the duty of the court to give a decision as to the validity and infringement of all of the claims. This objection has no force where the court passes upon all of the claims in suit although not all the claims of the patent in suit. The claims in suit do not necessarily embrace all the claims in the patent. A defendant by his action may infringe one claim of the patent without violating another claim in the least degree. In view of this consideration it is a usual, reasonable and proper course for the complainant not to stand upon fifty patent claims where he cannot hope to succeed on more than one or two, but to limit on the record his demand for relief to certain specified claims. Having done this the claims upon which the parties have a right to expect a decision from the court are subject to such limitation. In the defendants' brief it is stated, as it was in substance by their counsel in open court, that "defendants are charged with infringement of claims 3, 4, 6 and 7 of letters patent No. 890,968, * * * and claims 1, 2, 3, 4, 5, 8 and 11 of letters patent No. 958,478;" that "although said letters patent No. 890,968 includes seven claims, only claims 3, 4, 6 and 7 are in suit"; and that "although said letters patent No. 958,478 includes seventeen claims

only claims 1, 2, 3, 4, 5, 8 and 11 are in suit." The court has passed upon all of the above-specified claims; the same being admittedly all of those in suit. The defendants cannot now be heard to deny this fact, and thereby open the door to confusion, surprise and embarrassment in the disposition of the case. Reference has been made by the solicitor for the defendants to National Malleable Castings Co. v. T. H. Symington Co., 234 Fed. 343, 148 C. C. A. 245; but that case as there reported read in connection with the facts as disclosed in the same case at earlier stages (230 Fed. 821, 145 C. C. A. 131; [D. C.] 222 Fed. 517), contains nothing in conflict with the conclusion here expressed and wholly fails to support the defendants' contention.

"An interlocutory decree in accordance with these views will be made."

Bakewell & Byrnes, of Pittsburgh, Pa. (William A. Schnader, of Philadelphia, Pa., and Clarence P. Byrnes, of Pittsburgh, Pa., of counsel), for appellants.

Arthur E. Paige, of Philadelphia, Pa., for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This case is one that challenges a consideration of some matters not discussed at the hearing. The subject involved is what is commonly known as "tree doctoring" by filling up the cavities of decaying trees. The care of trees is a matter of such general importance, and one of the patents involved is of so broad, inclusive a character, that if the inventor has benefited the art in the way he claims, he is entitled to and should have a broad, generic claim to cover his invention. On the other hand, if his invention is not of that character, he should not preclude the public from doing everything it can in the way of the preservation of trees.

The present case was against two former workmen of the plaintiff, and was not defended by strong parties. We do not know, and do not say, that a stronger defense could have been made out than has been, but we are not willing to give, at the present stage of the case, the stamp of approval of the Third Circuit to the validity of the broad, generic claim here involved, unless the record compels us so to do. In making this statement, we express no opinion adverse to the validity of that claim.

[1] Infringement of two patents was charged in the bill filed below. The earlier patent, No. 890,968, issued June 16, 1908, to John Davey and others, was found valid by the court and held infringed by the defendant, and its further use enjoined by the decree. From this decree the defendants have not appealed, and the validity and infringement of that patent are not before us.

[2] The second patent, No. 958,478, issued May 17, 1910, to Wellington E. Davey, is of a much broader subject-matter, and claim 1 thereof is for the alleged generic feature. The court below found several other claims of the patent valid and infringed, and in its opinion directed the preparation of a decree holding such claims infringed. In that opinion, which is reported at 248 Fed. 718, it further found claim 1, which was the broad general claim, was invalid, and thereupon directed the plaintiff to file a disclaimer thereof in the Patent Office within thirty days. The plaintiff declined to file such disclaim-

er, and thereupon the court entered a decree dismissing the bill entirely as to patent No. 958,478, which, it will be observed, carried with it the dismissal of those claims of the patent which the court had found valid and infringed. The practical effect of the direction of the court that the plaintiff file a disclaimer would have been to prevent the plaintiff, had he complied with such order, from reviewing the decision of the court below on the validity of his generic claim; and the bill being dismissed as to the other claims of the patent, the defendant has no opportunity to now review the question of the validity and infringement of the claims which the court in its opinion so held valid and infringed.

After due consideration had, we are of opinion the penalty imposed by the court below upon the plaintiff for not filing a disclaimer cannot be justified. Congress, by Rev. St. § 4922 (Comp. St. § 9468), has provided a statutory penalty on a patentee for failure to enter a disclaimer, namely, that unless he does so before he brings suit he cannot recover costs. But Congress has nowhere enacted that a refusal to enter a disclaimer should be punished by a dismissal of a patentee's bill. Of the plaintiff's right to review in this court the decree of a District Court adjudging a claim of his patent invalid, there can be no question. But, if the order of the court forcing the plaintiff to file a disclaimer had been followed, it would have resulted in the extinction of the claim, and consequently of the right of the plaintiff to review in this court the question of the validity of such claim which he had been thus forced to disclaim, for it is quite evident that, if the plaintiff once filed his disclaimer, that was the end of his claim, and he never could raise the question of its validity in the court below, in this court on appeal, or in any other jurisdiction. The claim simply would not exist. Moreover, the practical effect of the decree below was that, while the opinion of the court held certain claims of the patent valid, dismissal of the bill prevented the defendant contesting the correctness of that conclusion.

In view of these conclusions, it has seemed to us the decree below should be reversed, and the cause remanded for further action in the court below, which, if the court still holds to its opinion, so far as patent No. 958,478 is concerned, would take the form of a decree against the plaintiff, adjudging the first claim of his patent invalid, and against the defendant, holding the other claims valid and infringed. The question of cost would be determined in such a way as the situation warranted in view of Rev. St. § 9468. Such a decree being then entered, there would be a final decree from which the plaintiff could appeal in so far as the bill is dismissed as to the the first claim, and from which the defendant could appeal in so far as the decree sustained the other claims involved in plaintiff's patent. In this way we would have the whole controversy before us at one hearing, and by that time there might be other developments in other cases involving this patent, which would lead to our having a more complete view of the situation, before this court committed itself to sustaining the validity of the broad first claim of patent No. 958,478, in case we should reach that conclusion.

HINER et al. v. C. G. ALDRICH CO.

(District Court, D. Massachusetts. February 25, 1919.)

No. 735.

1. PATENTS ⟸215—CONTRACTS—CONSTRUCTION.
A contract whereby plaintiffs, owners of a patent for reels for eyeglasses, contracted to sell their entire interest to defendant for $1,500, $300 to be paid in cash and the remainder to be paid as royalties, involved a license to defendant to manufacture the patented article.

2. PATENTS ⟸215—CONTRACTS—CONSTRUCTION.
Where plaintiffs, owners of a patent for reels for eyeglasses, contracted to sell their entire interest to defendant for $1,500, $300 to be paid in cash and the remainder to be paid as royalties, and defendant proceeded to manufacture reels, claiming that they were not covered by the patent, and plaintiffs asserted that the reels manufactured were so covered, plaintiffs were not entitled to declare the contract rescinded and recover for the infringement, for, if the reels manufactured by defendant were covered by the patent, defendant's refusal to pay the royalties which in time would entitle it to the patent was such a breach as could be compensated by damages.

3. COURTS ⟸290—JURISDICTION—FEDERAL COURTS.
Where defendant, sued for infringement of patent, at most was guilty of a breach of contract of sale of patent rights, and the amount plaintiffs were entitled to recover would not exceed $1,200, the federal court was without jurisdiction.

4. COURTS ⟸351½—DISMISSAL OF SUIT—WANT OF JURISDICTION.
Where bill in equity does not show jurisdiction of federal court, and cannot be made good by amendment, bill must be dismissed.

5. COSTS ⟸48—DISMISSAL OF BILL FOR TECHNICAL LACK OF JURISDICTION.
Costs need not be awarded, where the defendant's course has been found grossly unfair and inequitable, and the bill has been dismissed for technical lack of jurisdiction.

In Equity. Bill by Charles H. Hiner and others against the C. G. Aldrich Company. Bill dismissed.

Charles J. Williamson, of Washington, D. C., and Nathan Heard, of Boston, Mass., for plaintiffs.

Jesse A. Holton, for defendant.

ANDERSON, Circuit Judge. The bill in this case is a typical infringement bill, brought by owners of a patent, citizens of Virginia, against a Massachusetts corporation, the alleged infringer. The defenses set up in the amended answer are that the Hiner patent, construed in the light of the prior art, does not cover the construction used by the defendant. In the alternative, the defendant claims a license under a written instrument dated September 12, 1913, executed by plaintiffs and defendant. This instrument is alleged never to have been rescinded or annulled as the result of any judicial proceeding, nor terminated by mutual consent of the parties.

In this agreement the plaintiffs are parties of the first part, and the defendant corporation the party of the second part. It recites that:

"Whereas, parties of the first part are the owners" of the Hiner patent "covering a reel for eyeglasses"; and

"Whereas," the defendant company "is desirous of purchasing such patent and all interests thereunder":

"Now, therefore, this indenture witnesseth:

"First: The parties of the first part hereby agree to sell to said party of the second part their entire interest in said patent on the following terms and conditions: The total purchase price shall be the sum of fifteen hundred dollars ($1,500), of which one hundred dollars shall be paid in cash October 1, 1913; one hundred dollars November 1, 1913; one hundred dollars February 1, 1914. For the balance of the purchase price the party of the second part shall pay to the parties of the first part a royalty of twenty-five cents per dozen of reels sold by said party of the second part, monthly payments to be made on account of said royalty on the 20th day of each and every month, beginning with the 20th day of November, 1913, and to cover accounts to the 1st day of said month. Succeeding settlements to be made monthly on the 20th day of each month until the royalties so realized shall equal the amount of twelve hundred dollars ($1,200), at which time full title to said patent and all improvements on the same shall pass to the parties of the second part.

"Second. The parties of the first part hereby agree to execute a proper assignment of said patent when said payments shall have been fully completed.

"In witness whereof, the said C. G. Aldrich Company has caused these presents to be signed, sealed, and delivered, and its corporate seal hereto affixed, and the said parties of the second part have hereto set their hands and seals, the day and year first above written."

The instrument is duly signed and acknowledged by all the parties thereto; it was recorded in the Patent Office on November 6, 1913.

The parties agree that the three $100 payments referred to in this instrument were duly made, leaving unpaid $1,200, referred to in the instrument as "the balance of the purchase price."

The defendant proceeded shortly after the execution of this instrument to manufacture and put upon the market in large numbers, many thousands in all, a reel for eyeglasses which the defendant claims is not within the scope of this patent.

Carl G. Aldrich appears to be the chief executive officer of the defendant corporation. Under date of August 10, 1914, he filed in the Patent Office an application for a patent on an improved eyeglass reel, which patent was granted on July 18, 1916. Apparently the reels manufactured by the defendant are claimed to be covered by the Aldrich patent. It does not appear that the plaintiffs, until at or about the time of the trial, had any knowledge that Aldrich had made this application, or that a patent had been granted to him.

The written contract, dated September 12, 1913, contemplated that the defendant should begin almost immediately the manufacture and sale of reels under the Hiner patent, for it provided for the first accounting of royalties on the 20th of November, 1913, to cover the preceding month of October. The plaintiff Lang, who seems to have had a store in Staunton, Va., where he sold diamonds, watches, optical goods, etc., in a letter written in October, 1913, expressed to the defendant the hope that it would hurry along the dies, as he (Lang) was anxious to get some of the reels manufactured by the defendant, thinking the prospects good for their sale. The dealings between the parties thereafter are indicated by correspondence as follows:

On October 31, 1914, the plaintiff Lang wrote the defendant:

"I have been waiting for some time to see the reels on the market; also to hear from you in regard to same. You will recall that the royalty should have commenced some time back, but I took it for granted that you did not have it ready for the market. I understand that the same is being placed, and I will be glad to hear from you."

To this the defendant replied on November 6, 1914:

"In reply to your favor of the 31st Oct., will say that we have not as yet sold any reels made under your patent No. 1,036,844. When we do, we will, of course, give an accounting and settlement according to agreement."

At that time defendant was manufacturing and selling reels, and Aldrich had already applied for his patent.

On March 13, 1915, Lang wrote again to the defendant:

"You will please render me a statement of all reels sold, according to contract. I want to congratulate you on the beautiful reel which you have put on the market. I am selling them, and think they are going to have a big sale, from all indications."

The defendant replied to Lang on March 22, 1915:

"In reply to your letter of the 14th, will say that in our experiments to date we have not produced a satisfactory working model of a reel embodying the particular construction of the Hiner patent, therefore have sold none under that contract. The reels which we are marketing are of entirely different construction, as you will observe by a comparison."

On January 12, 1916, the plaintiff sent a registered letter to the defendant, which is as follows:

"We hereby notify you that your course in regard to the contract, dated September 12, 1913, between you and us, respecting United States letters patent No. 1,036,844, issued August 27, 1912, to Chas. N. Hiner, for a reel for eyeglass, and particularly what is set forth in your letter dated March 22, 1915, to Mr. Henry L. Lang, wherein you say that you have not made the 'particular construction of the Hiner patent,' and 'therefore have sold none under the contract,' has constituted such a repudiation and breach by you of said contract as to terminate the same, and to discharge and release us from any obligations which performance on your part would have created, and to render you liable for all other consequences that have ensued from your said repudiation and breach. We further notify you that the eyeglass reel which you have made and sold, and which in your said letter of March 22, 1915, you say is an 'entirely different construction' from the 'particular construction of the Hiner patent' forming the subject of said contract, is an infringement of said patent, and we have instructed our attorney to institute suit against you for an injunction, and an accounting of profits for your said infringement."

By this letter the plaintiff sets up:

(a) That the defendant's course of conduct, and particularly its claim that it has not made "the particular construction of the Hiner patent," and therefore sold none under that contract, is such a repudiation and breach of the contract as to terminate the obligations under it; and

(b) The inconsistent claim that the eyeglasses which the defendant has made and sold are covered by the Hiner patent and are therefore an infringement of it.

The bill was sworn to on February 8, 1916, although actually filed in court on June 19, 1916.

[1] Clearly, both parties are correct in their construction of this contract as involving a license to the defendant to manufacture reels covered by the plaintiffs' patent. Whether it is, or was at any time, an exclusive license, need not now be considered. It is not entirely clear that the plaintiffs' claim that the defendant, under the terms of the contract, was bound to manufacture and sell reels covered by the patent, is sound. There is no express covenant in the contract requiring the defendant to make any use whatsoever of the plaintiffs'

patent. Whether such covenant arises as a matter of necessary implication need not now be determined. Nor is it necessary to decide whether the defendant, having manufactured and sold by the thousand reels meeting the same commercial demand that reels manufactured under the plaintiffs' patent were intended to meet, is estopped to deny its accountability for royalties on such reels, even if they were not technically covered by the Hiner patent.

[2] Passing, then, all these questions, which might arise between the parties on different pleadings, we have this situation: The plaintiffs by their infringement suit allege that the defendant has actually manufactured reels covered by the plaintiffs' patent. If this is so, defendant's sole breach of the contract lies in its failure to account and pay royalties at 25 cents per dozen up to the amount of $1,200. The defendant pleads the contract as still outstanding, thereby admitting itself bound to full performance of its terms. The plaintiffs do not offer to return the $300 already paid. They do not ask the court to adjudicate that the defendant has been guilty of such breach of contract as to entitle the plaintiffs to a rescission. They ground their infringement suit upon the proposition that the contract was ended by their notice on January 12, 1916. This amounts to a claim that for all reels sold by the defendant prior to January 12, 1916, the plaintiffs are entitled to an accounting under the terms of the contract at the rate of 25 cents per dozen; that for all reels sold subsequent to January 12, 1916, the plaintiffs are entitled to an accounting by the defendant as an infringer of the plaintiffs' patent. The number of reels sold by the defendant prior to January 12, 1916, was not shown with any approximate accuracy at the trial. That the number was substantial did appear. As the case now stands, it cannot be said that, on an accounting under the contract, the full amount of $1,200, the balance of the purchase price, would not appear to be due from the defendant to the plaintiffs, payment of which would entitle the defendant to full title to the patent. To hold that the contract has been rescinded under these circumstances is manifestly impossible.

The plaintiffs cite as their main reliance Oscar Barnett Foundry Co. v. Crowe, 219 Fed. 450, 455, 135 C. C. A. 162. This case does not sustain the plaintiffs' proposition. In that case, the contract between Crowe, the patentee, and the foundry company expressly required the foundry company to manufacture the patented article and to render accounts and pay royalties on the sales thereof. The court said (219 Fed. 454, 135 C. C. A. 166):

"The whole consideration moving from the foundry company to Crowe in the contract of license was the manufacture and sale of stokers, and thereafter the making of quarterly reports of sales and quarterly payments of royalties. The defendant admitted breaches of all these undertakings by admitting that after January 10, 1912, it neither made stokers, submitted reports, nor paid royalties—in short, that it had 'stopped working under the license.' In the face of these admissions, there was left nothing necessary to be proved, leaving for determination only the question whether the facts as proved supported the claim of a rescission."

It was held that the decision of this question was—

"controlled by the principle of law that a breach of a covenant, which goes to the whole consideration of a contract, gives to the injured party the right

to rescind the contract or to recover damages for the breach; or, stated conversely, a breach of a covenant, which does not go to the whole consideration of a contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract or warrant its rescission by the injured party" (citing Kauffman v. Raeder, 108 Fed. 172, 47 C. C. A. 278, 54 L. R. A. 247; Howe v. Howe & Owen Ball Bearing Co., 154 Fed. 820, 83 C. C. A. 536; Neenan v. Otis Elevator Co. [C. C.] 180 Fed. 997, 1000).

In the Crowe Case the patentee's entire consideration for the license contract grew out of the foundry company's agreement to manufacture and sell the patented article, so that Crowe might have accruing royalties. When the foundry company "stopped working under the license," they destroyed, from that time on, all of Crowe's rights under the contract. But in the case at bar the evidence shows that the defendant has manufactured and sold thousands of reels which the plaintiffs say are covered by the Hiner patent. If this is so, then the plaintiffs are entitled under the contract to an accounting from the defendant for all reels sold at the rate of 25 cents per dozen reels until the aggregate of $1,200 is reached. This sum being paid (plus some interest), then all their rights in the patent cease, and it becomes entirely the property of the defendant.

On this state of facts it cannot be held that the defendant's conduct, however unfair and inequitable it may appear to be, goes to the essence of the plaintiffs' contractual rights.

On the plaintiffs' own claim, if the defendant was guilty of a breach, that breach may readily be compensated for in money damages. See 13 Corpus Juris, p. 615, and cases cited. Snow v. Alley, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119, and cases cited; Foster Hose Supporting Co. v. Taylor (C. C.) 180 Fed. 995; Hartell v. Tilghman, 99 U. S. 547, 25 L. Ed. 357; Standard Dental Mfg. Co. v. Nat. Tooth Co. (C. C.) 95 Fed. 291.

The result is that, if the plaintiffs' allegation that the defendant's reels fall within the scope of the Hiner patent is well grounded, their rights are to be found within the terms of the outstanding contract. That contract cannot be held annulled or rescinded. If the plaintiffs' allegations of infringement are not, in point of fact, true, obviously the present bill cannot be maintained.

It is therefore unnecessary to attempt to reach a conclusion as to whether the reels manufactured by the defendant did or did not fall within the scope of the Hiner patent. The bill must be dismissed.

[3-5] If it were practicable for the plaintiffs to amend their bill, so that such rights as they may have under the contract could be tried in this court, leave for such amendment should be granted; but it is clear that the plaintiffs cannot allege and prove that under this contract they are entitled to a sum in excess of $3,000. The defendant must therefore in this court prevail. But there is nothing in the course pursued by the defendant which calls for the exercise in its favor of judicial discretion. The contract possibly is inadequate and ambiguous. But as a matter of fair business dealing, and perhaps as a matter of legal construction, it required the defendant to manufacture and sell, or at any rate to attempt to manufacture and sell, reels made under the Hiner patent, accounting for royalties at the stipulated rate to

the amount of $1,200 as the balance of the purchase price. Instead of pursuing this straightforward, businesslike course, the defendant has construed this contract as a license, without time limit, plus an option of purchase. It denies that there is any obligation upon it to purchase. Aldrich took the plaintiffs' patent and studied—whether successfully or not no opinion is expressed—how to avoid using it, technically, while getting the benefit of a device commercially intended for exactly the same purposes. The defendant attempts under this contract to continue to hold the patent, more than a third of whose life has already run, so as to destroy its value to the plaintiffs, and prevent its being used in competition with the Aldrich patent, while at the same time seeking to escape from the payment of four-fifths of the contemplated purchase price. Under these circumstances, it is to be regretted that this court has not power to do real justice as between the parties.

Let a decree be entered, dismissing the bill, without costs to the defendant.

In re UNITED STATES MOLYBDENUM CO.

Petition of McKAY.

(District Court, D. Maine. November 30, 1918.)

No. 376.

1. CORPORATIONS ⟸407(1)—LIABILITY—LEGAL SERVICES.
   Where an attorney rendered legal services for a corporation with knowledge of those whose duty it was to take charge of its affairs, the corporation should pay what the services were reasonably worth.
2. BANKRUPTCY ⟸340—FRAUD OF CLAIMANT—EVIDENCE.
   Evidence *held* insufficient to show that an attorney, who made a claim against a bankrupt corporation for legal services, was guilty of any fraudulent participation in a conspiracy to convey away the corporation's property.
3. BANKRUPTCY ⟸340—CLAIMS—VALUE OF SERVICES.
   An attorney, who made a claim against the estate of a bankrupt corporation for legal services, must clearly establish the value of his services.
4. BANKRUPTCY ⟸340—EVIDENCE OF VALUE OF SERVICES OF ATTORNEY.
   An attorney, who filed a claim against the estate of a bankrupt Maine corporation, *held*, under the evidence, entitled to no more than $1,000 and his disbursements.

In Bankruptcy. In the matter of the United States Molybdenum Company, bankrupt. On petition by John A. McKay to review the order of the referee, allowing the claim of William H. Edwards. Allowance in part affirmed.

Carl W. Smith, of Portland, Me., for petitioning creditors and trustee.

R. J. McGarrigle, of Calais, Me., for bankrupt.

Woodman & Whitehouse, of Portland, Me., for petitioner McKay.

HALE, District Judge. This petition seeks to review the order of the referee allowing the claim of William H. Edwards for $2,000.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Mr. Edwards is an attorney at law in New York City. He claims for consultations and conferences with the officers of the United States Molybdenum Company, construing and interpreting documents, rendering various opinions on legal and other questions, preparation of instruments, correspondence, conferences, and interviews with various persons; expenses for car fare, telephone, and postage, $2,900. The services run from June 24, 1916, to April, 1917. One hundred dollars is for disbursements.

It is contended by the petitioner that Edwards never acted, and never was employed to perform any service, for the bankrupt company, but was employed by one Nickerson in his capacity as trustee for the private interest of certain stockholders; that the claim is based entirely upon the authority of Nickerson, and is not based upon any vote, or upon any affirmative action, of the bankrupt company. The testimony shows that the greater part of the services, for which the proof of claim is made, consists of conferences touching the sale of the company's property. Edwards testifies that he looked upon these conferences as very important, and gave them his full attention for a long time. He bases his authority for rendering the services upon his employment by Nickerson, the treasurer and a director of the company, and upon an actual, but unrecorded, vote.

[1] It appears by the testimony that Edwards did render some services for which the corporation would have had the benefit, if any benefit had accrued to anybody. After he was employed by Mr. Nickerson, he had certain conferences and made certain efforts to sell the property. If any directors were attending to their business, they must have known that such efforts were being made by Edwards. Without undertaking to settle certain questions of authority raised by the learned counsel for the petitioner, I find that services of some value were rendered for the company, with the knowledge of those whose duty it was to take charge of its affairs. So far as this defense is concerned, the corporation should pay what those services were reasonably worth.

[2] Another question—and a vital one—is raised by the petitioner. He says that Edwards acted in fraud of the bankrupt company; that he perpetrated a fraud, in company with Nickerson and one Wohlfarth, in obtaining a conveyance of certain land to the Doric Improvement Company; that the land in question was held by Nickerson as trustee for the bankrupt company, and was transferred by him to the Doric Improvement Company, in pursuance of a conspiracy between these men; and that, in equity, Edwards should be paid nothing, until he has caused the real estate, fraudulently conveyed to the Doric Improvement Company, to be reconveyed to the bankrupt company.

The petitioner contends that the testimony should lead the court to find that Edwards was the attorney on whom rested the responsibility for the fraud; that he was the guiding mind in it; that, largely by his agency, the fraud was perpetrated; that, while the participants in the fraud are holding the property, none of them can be heard in court to make a claim such as is made here; that, under the general equity power of the court, it should refuse to allow this claim against such proof of fraud and conspiracy as is found within this record; that a

court of bankruptcy is a court in equity, and has such original jurisdiction in equity as will enable it to prevent a party from enjoying the fruits of fraud, without restoring property which he has inequitably obtained. Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571; Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200; Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Mason v. Wolkowich, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765; In re Chase, 124 Fed. 753, 59 C. C. A. 629. Other cases are also cited by the petitioner.

It is undoubtedly true that a court in bankruptcy has broad equity powers. It can hardly be claimed, however, that, upon the facts shown in this record, I have power to order a reconveyance of the land forming the subject of the charge of fraud. I have carefully reviewed the testimony touching this question of fraudulent conspiracy. After examining all the evidence, I must come to the conclusion that the petitioner has not met the burden of showing, by a preponderance of evidence, that the land in question was conveyed in pursuance of any conspiracy to which Edwards was a party. Mr. Edwards has denied all knowledge of the giving of the deed and any participation in it; in view of his denial, there is not sufficient evidence of his fraudulent participation in any conspiracy to sustain the charge. It is not, therefore, necessary to discuss the law relating to this question. As bearing upon the matter, the court is asked to order the production in court of a certain record book of the Doric Improvement Company; but, from my view of the case, I find that the production of the book is not important.

[3, 4] It is now my duty to examine the testimony with reference to the value of Edwards' services. He is a New York lawyer. He rendered certain services for which the company would have received the benefit, if any benefit had resulted; he apparently spent some time in interviews and conferences relating to certain attempted sales. No sales were effected. All his attempts to sell proved fruitless. The company got no benefit from them. What his time was worth is not shown. He was working for a Maine corporation; his charges must be for services at their fair value to this Maine corporation. The testimony is not very persuasive touching this matter. I can find nothing in the record from which I think I ought to allow him his whole claim, or even the claim of $2,000 allowed by the referee. Edwards says he has given up important matters, in order to conduct conferences for which the company was to receive the benefit by the sale of its property. No testimony is introduced from any unprejudiced source showing the value of the services; no Maine lawyer is produced to show what the proper charges would be under circumstances shown by the record; the whole matter is left vague. It is the duty of the claimant to clearly establish the value of his services. From the testimony, I think I am allowing him all his services are proved to have been worth, if I allow him the sum of $1,000, in addition to his disbursements of $100.

The order of the referee is affirmed to the extent of allowing the claim of William H. Edwards for the sum of $1,100. A decree may be presented accordingly.

UNITED STATES v. ONE BUICK AUTOMOBILE.

(District Court, D. Colorado. February 13, 1919.)

No. 6882.

INDIANS ⊂=35—INTRODUCTION OF INTOXICANTS INTO INDIAN COUNTRY—FORFEITURE OF AUTOMOBILE.

In Act March 2, 1917, § 1 (Comp. St. 1918, § 4141a), providing for the forfeiture of automobiles or other vehicles used in introducing liquor into the Indian country, "or where the introduction is prohibited by treaty or federal statute," the phrase quoted must be limited to treaties or statutes relating to Indian affairs, to which the statute solely relates, and cannot be extended to apply to vehicles used in introducing liquors into prohibition states in violation of Act March 3, 1917, § 5 (Comp. St. 1918, § 8739a).

Libel by the United States against One Buick Automobile. On application for issuance of process. Denied.

Harry B. Tedrow, U. S. Atty., of Boulder, Colo., for plaintiff.

LEWIS, District Judge. This is an application for the issuance of process in a proceeding brought to condemn and forfeit one Buick automobile. The libel of information verified and presented by the District Attorney, on which the issuance of process is sought, discloses that the automobile was seized by the State constabulary; that at the time it was seized by the State officer it was in the possession and control of one Anderson, a white person, and was then being used by Anderson in introducing intoxicants into the State of Colorado from the State of Wyoming, in violation of Section 5 of the Act of March 3, 1917, c. 162, 39 Stat. 1069 (Comp. St. 1918, § 8739a); that after its seizure the Superintendent of the State constabulary turned said automobile over to the custody of Roy O. Samson, Special Agent of the Bureau of Investigation of the Department of Justice of the United States at Denver, Colorado, and that said automobile is now in the custody of said Samson, and is now held by him on the assumption that it is subject to forfeiture and sale because of its use as an instrument in carrying on the unlawful traffic in violation of the Reed Amendment, Act of March 3, 1917.

The District Attorney rests the libel on Section 4141, Compiled Statutes (R. S. § 2140), and the Act of March 2, 1917, c. 146, 39 Stat. 970 (Comp. St. 1918, § 4141a). Section 4141 has been considered and applied by our Court of Appeals in Evans v. Victor, 204 Fed. 361, 122 C. C. A. 531, and Shawnee National Bank v. U. S., 249 Fed. 583, 161 C. C. A. 509. Neither case presented the issue now up, still they are instructive and helpful. The statute is of early origin, and has always been continued as a part of the Congressional purpose of protecting the Indian against the use of intoxicants. It is not now claimed that Section 4141 could be carried beyond that immediate end without the Act of March 2, 1917. That, too, is a part of an act dealing solely with Indian affairs. The particular paragraph reads thus:

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"For the suppression of the traffic in intoxicating liquors among Indians, $150,000: Provided, that automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or Federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section twenty-one hundred and forty of the Revised Statutes of the United States."

It adds automobiles to the appliances named in the section and subjects them also to forfeiture when used in the traffic; but the particular matter of vital importance here rests upon the claim that the words "or where the introduction is prohibited by treaty or Federal statute," should be held to cover any and all territory within the contemplation of the Reed amendment (39 Stat. 1069, § 5).

Can such a meaning and purpose be reasonably attributed to the quoted phrase? If the words used clearly express that as the meaning and purpose of Congress the court will so apply them. The inquiry is to find out the intention of the lawmakers, and if that be clear from the language used the inquiry has been answered. "Attempted judicial construction of the unequivocal language of a statute or of a contract serves only to create doubt and to confuse the judgment. There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction." Swarts v. Siegel, 117 Fed. 13, 18, 54 C. C. A. 399, 404. Is the meaning and purpose claimed for the phrase clearly expressed by it? Does it within itself, without more, disclose that to be the intention of Congress, and one of the objects that were to be accomplished by the use of the phrase? There is hesitation in answering in the affirmative, and when there is hesitation there is doubt. Indeed, the phrase not only fails to clearly express the purpose claimed for it but the words themselves create ambiguity. Why "treaty" associated with "Federal statute"? Neither can be ignored. The legislative intent is to be discovered from something more than the mere words. The title of the Act is of some weight when there is doubt. Holy Trinity Church v. United States, 143 U. S. 457, 462, 12 Sup. Ct. 511, 36 L. Ed. 226. The prior Act to which it refers, or supplements, or on which it in part depends, can not be ignored. If the two treat of the same subject-matter they must be harmonized. With these general principles of interpretation in mind it seems quite evident there was no legislative purpose to deal with conditions that might arise under the Reed amendment, but that the only object in the use of the phrase was to protect the Indian against the introduction of intoxicants into territory other than Indian country, where perchance such introduction is prohibited by treaty with the Indian or by statute, or both. The course of legislation on the subject discloses that such prohibition by treaty or statute, or both, for the Indian's good was not unusual. Perrin v. U. S., 232 U. S. 478, 34 Sup. Ct. 387, 58 L. Ed. 691.

I know of no law that supports the proceeding and authorizes the condemnation and forfeiture. The order for process on the libel is therefore denied.

JENSEN v. LEHIGH VALLEY R. CO.

(District Court, S. D. New York. February 1, 1919.)

RAILROADS ⇐⇒5½, New, vol. 6A Key-No. Series—ACTIONS AGAINST—SUBSTITUTION OF DIRECTOR GENERAL AS DEFENDANT—"MAY."

The provision of General Order of Director General of Railroads No. 50 of October 28, 1918, that pleadings in pending actions for injuries against a railroad company "may" be amended by substituting the Director General and dismissing the company as defendant, must be construed as permissive only, in view of Federal Control Act (Comp. St. 1918, §§ 3115¾a–3115¾p), providing that carriers, while under federal control, shall be subject to all laws and liabilities as common carriers, and that actions may be brought against them, "and judgments rendered as now provided by law," and such substitution of parties will not be made on motion of defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

At Law. Action by Jens Martinius Jensen against the Lehigh Valley Railroad Company. On motion by the defendant to substitute the Director General of Railroads in place of the defendant, Lehigh Valley Railroad Company, as defendant, and to dismiss the action as against the Lehigh Valley Railroad Company. Denied.

On April 27, 1918, the plaintiff was injured while an employé of the Director General of Railroads upon the Lehigh Valley Railroad Company. On July 25, 1918, he brought an action at law against the Lehigh Valley Railroad Company for negligence under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657–8665]). Issue was joined and the case set for trial upon the day calendar. At 12 o'clock noon on December 28, 1917, the President took possession and assumed control of the Lehigh Valley Railroad Company by virtue of authority vested in him by act of Congress approved August 29, 1916, and appointed William G. McAdoo Director General of such railroads. By the proclamation assuming possession of the railroads the President empowered the Director General to pass general and special orders which should have paramount authority subject to existing statutes. On March 21, 1918, Congress passed the "Federal Control Act" (Act March 21, 1918, c. 25 [Comp. St. 1918, §§ 3115¾a–3115¾p]), of which section 10 provided that "carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or of any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. * * * No process, mesne or final, shall be levied against any property under such federal control." Section 8 of that act provided: "The President may execute any of the powers herein and heretofore granted him with relations to federal control through such agencies as he may determine."

The Director General, on October 28, 1918, by General Order No. 50, provided as follows: "Actions at law, suits in equity and proceedings in admiralty hereafter brought in any court based on * * * claim for death or injury to person or for loss or damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads which action, suit or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G.

McAdoo, Director General of Railroads, and not otherwise." The General Order further provided: "The pleadings in all actions at law, suits in equity, or proceedings in admiralty now pending against any carrier company for a cause of action arising since December 31, 1917, based upon the cause of action arising from or out of the operation of any railroad or other carrier may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

The question involved in the motion is whether, under the paragraph of General Order No. 50 last above recited, an action pending on October 28, 1918, for an injury occurring on April 27, 1918, should, upon the defendant's motion, under section 10 of the Federal Control Act, be changed from an action against the railroad to an action against the Director General.

Alexander & Green, of New York City, for the motion.
Edward J. McCrossin, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). The change in the language of the third paragraph from that of the first is significant. In the first the order directs that all actions "shall" be thereafter brought against the Director General. In the third that the existing pleadings "may" be changed. "May" does indeed at times mean "shall," but hardly when the two words are in such immediate contrast. At least there is no presumption that way. Moreover, I think that, if the third section be construed as permissive only, it serves a sufficient purpose; it would give plaintiffs the right to substitute the Director General, which they might well wish to do, considering the prohibition of the statute against any process upon judgments against the carriers while the roads were in federal control. It is quite true that the third recital is to the effect that the liability should be of the Director General, and that was certainly the meaning of the first paragraph. I think that that paragraph was enough to satisfy the recital, without carrying the meaning into the apparently permissive language of the third.

If, on the other hand, I were to construe the third paragraph as retroactive, at least a formal difficulty would arise, in that it would annul a liability once attached, and substitute another. Now, it is true that that substituted liability, though without express sanctions, has by implication the pledge of the public faith, when reduced to judgment against the Director General. Such a judgment would be probably as good a remedy as a judgment against the United States in the Court of Claims, which was held sufficient in cases of condemnation in Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771. It is therefore not necessary to say that an explicitly retroactive order would be invalid, if the Director General had made one. I concede, moreover, that there is no presumption against retroactive interpretation, if the change be only in procedure. Yet even if this be possibly only a change in remedy, it is an important change, and not under our traditional notions in such matters to be lightly assumed. I think there ought to be a more definite indication of such a purpose than the words contain.

It is, of course, true that normally we should expect the liabilities to be those of the Director General, who is in control; but Congress

has prescribed otherwise, and the general situation is not one in which the judgments need inevitably fall upon the carriers. A final settlement must be made, in which such claims may well be taken to the account of the Director General, whoever be the judgment debtor. Congress, which had to prescribe a modus vivendi, subject to changes on which the Director General might from time to time determine, appears to have found it easier to leave matters as they were till such time as he chose to act. It does not follow that he is to be assumed to mean to upset that status retroactively, when the just result can be later reached in the settlement. Indeed, it does not even follow that Congress meant to give him the power to do so if he should mean to. Since justice to the carriers may be accomplished without departing from our accustomed habits in relation to provisions of the kind, it seems to me better to follow them.

The only decisions upon the order which I know are two. Keefe v. Chicago, etc., Ry. Co., decided December 2, 1918, in the state district court of Minnesota, goes further than I need go here. Rutherford v. Union Pac. R. Co., 254 Fed. 880, decided in January, 1919, by Judge Munger in the United States District Court for the District of Nebraska, is contrary. It must be conceded that the judicial opinion upon the validity and meaning of the order has not yet become definitely settled. It appears to me that Congress pretty clearly meant, by the term "carriers," the corporations themselves, and that the right to sue them must remain certainly till it is changed by some valid provision.

The motion is denied.

SHWAYDER v. ILLINOIS COMMERCIAL MEN'S ASS'N.

(District Court, D. Colorado. December 21, 1918.)

No. 6766.

1. INSURANCE ⊂=814—PROCESS—"DOING BUSINESS" IN STATE.
A mutual insurance society, organized under the laws of Illinois, which had no paid employés to go about the country soliciting members, and which only accepted members on receiving their application with the first installment of dues at Chicago, *held* not "doing business" in the state of Colorado, so that attempted service of summons by leaving a copy with the state insurance commissioner did not give the Colorado court jurisdiction over the society.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. INSURANCE ⊂=814—PROCESS—AUTHORITY OF AGENT.
A member of a mutual insurance society, having its principal office in the state of Illinois, who solicited residents of Colorado to apply for membership, but received no compensation therefor, etc., *held* not an authorized agent of the association, and so the association could not be served in Colorado by leaving copies of the summons with such member.

At Law. Action by Rachael L. Shwayder against the Illinois Commercial Men's Association, a corporation, begun in the state court and

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

removed to the federal court. On motion to quash service of summons. Motion granted.

David E. Rayor and C. Clyde Barker, both of Denver, Colo., for plaintiff.

Hindry, Friedman & Brewster, of Denver, Colo., for defendant.

LEWIS, District Judge. This case is here on removal from the State Court, and the defendant has entered a special appearance in order to move that the service of process issued by the State Court be quashed. There are affidavits supporting and opposing the grounds of the motion, they being that the defendant was not doing business in the State of Colorado, and that the parties on whom service was had did not represent it. There is no basis for dispute as to the real facts. The affidavits disclose that the defendant is a mutual insurance society organized under the laws of Illinois. It extends the privilege of becoming members of the society to a restricted class, viz. traveling men. It has no paid employés to go about the country soliciting members or transacting any business for it. It depends solely upon the good will and enthusiasm of those who are already members. It periodically sends to members circular letters, calling their attention to the advantages of membership, and requesting that they commend the society to other traveling men with a view to having them make application for membership. The universal procedure in acquiring membership is this: The applicant makes out his application in his own handwriting and mails it, with the first installment of dues, to the defendant at Chicago. The Board of Directors sit at Chicago to pass upon all applications. If an application be approved a certificate of membership is then issued to the applicant and mailed to him at his post office address indicated in his application. In the event of the death of a member proof of that fact is made out and sent to the defendant at Chicago. There is no agent or officer in Colorado who can receive such proof or pass upon its sufficiency, or who is authorized in any respect to deal with the beneficiary in adjusting the claim. The service was attempted in a twofold manner; that is, by leaving copies of the summons with the State Insurance Commissioner, and also with James R. Mitchel.

[1, 2] Under the state statute the service had by leaving copies with the State Insurance Commissioner would have been good if the defendant was doing business in this state, and the service had on James R. Mitchel would have been good if the defendant was doing business in this state and Mitchel was, at the time, its agent or representative to the extent required for that purpose. Mitchel was a member of the society, and the sole basis for the plaintiff's claim that the service on him was good, as is shown, is that it appears that he, on various occasions, solicited parties to send in their applications for membership; that he was requested to do so by circular letters received by him from the defendant, and that in this way he had authority to solicit members; that he was provided with blank forms of application, and those forms required that the applicant must be recommended by a member; that he, in September, 1917, solicited one

Kobey, and that he forwarded Kobey's application when made out, and enclosed his personal check therewith for $2.10, in payment of Kobey's dues, and that said application was accepted and Kobey received as a member. On these facts I find that neither of the elements requisite to the validity of the service exists. They do not sustain but repel any conclusion that the defendant was "doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state the process will be valid only if served upon some authorized agent." Railway Co. v. McKibbin, 243 U. S. 265, 37 Sup. Ct. 280, 61 L. Ed. 710. Other cases in addition to those cited by counsel for the defendant, establishing the lack of jurisdiction over the person of the defendant, are Tobacco Co. v. Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537; Simon v. Railway Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; and Toledo Co. v. Hill, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982.

The motion to quash the service of summons on both Mitchel and Fairchild, the State Insurance Commissioner, is sustained.

W. & C. T. JONES S. S. CORPORATION v. HAMILTON.

(District Court, E. D. Virginia. May 10, 1918.)

ALIENS ⇐57—BRINGING IN ALIENS AFFLICTED WITH TUBERCULOSIS—CONSTRUCTION OF STATUTE—"ALIEN BROUGHT TO THIS COUNTRY."

An English seaman who signed in England for the round voyage apparently in good health, but afterward became ill with tuberculosis, who did not leave the vessel at an American port, but was taken off by immigration officers, was not an "alien brought to this country," within the meaning of Immigration Act Feb. 20, 1907, § 9 (Comp. St. 1916, § 4254), and the vessel is not subject to a fine thereunder.

At Law. Action by the W. & C. T. Jones Steamship Corporation against Norman R. Hamilton, Collector of Customs. Judgment for plaintiff.

Kirlin, Woolsey & Hickox, of New York City, and Edward R. Baird, Jr., of Norfolk, Va., for plaintiff.

Richard H. Mann, U. S. Atty., of Petersburg, Va., and Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va., for defendant.

WADDILL, District Judge. This is an action at law brought by the W. & C. T. Jones Steamship Company against Norman R. Hamilton, collector of customs for the ports of Norfolk, Portsmouth, and Newport News, individually, to recover a fine of $100 imposed upon the British steamship Ilwen for an alleged violation of section 9 of the act of Congress known as the Immigration Act, approved February 20, 1907 (34 Stat. 901, c. 1134 [Comp. St. 1916, § 4254]). The vessel put into Newport News for bunker coal. There then was upon her a seaman who had signed as a member of her crew at Newcastle, England, for a round trip. At the time of signing he appeared to be healthy,

and neither the master nor any of the officers of the Ilwen had any reason to suspect he was diseased, but it appears that a medical examination at the time the ship's articles were signed would have disclosed the fact that he was suffering from tuberculosis. Some time after the ship left Newcastle, this seaman became ill, and it was found that he was tubercular. He did not land at Newport News, nor attempt to do so, but remained on the ship until taken ashore by the immigration officials for appearance before a board of inquiry. Subsequently notice was given that an examination disclosed the fact that the seaman was suffering from tuberculosis, and that a fine might be imposed upon the Ilwen by the provisions of the Immigration Act, and that within 60 days from the date of the notice a hearing would be had to determine whether such a fine should be imposed, and that the Ilwen would not be permitted to sail until she had deposited with the collector the sum of $100 as security for the payment of a fine, if one was imposed. The deposit was made for the purpose of avoiding detention of the vessel. Subsequently, after a hearing, a fine of $100 was imposed, and the sum deposited appropriated to pay the same.

The conclusion reached by the court is that the seaman, Bisbee, on account of whom the plaintiffs, at the instance of the immigration authorities, were required to pay the sum of $100 for bringing an alleged tubercular seaman into the port of Newport News, is not such a person as comes within the meaning of the federal statute under which the fine was imposed and collected, and therefore the plaintiff is entitled to recover and have refunded to it the sum thus paid.

The suit in this case is against the collector of customs individually, and judgment will therefore be withheld against him until such reasonable time as may be found necessary to refund the amount to the plaintiffs.

CITY OF OMAHA et al. v. OMAHA ELECTRIC LIGHT & POWER CO.

(Circuit Court of Appeals, Eighth Circuit. February 10, 1919.)

No. 5098.

1. APPEAL AND ERROR ⊜1194(1)—DETERMINATION—THEORY OF DECISION.
A judgment of the United States Supreme Court *held* an adjudication that complainant, which had a franchise for the purpose of transacting general electric light business, was entitled to furnish current for heat and power, and a resolution limiting complainant to the heat and power business already existing cannot stand, on the theory that the decision was based on an estoppel.

2. COURTS ⊜90(4)—PRECEDENCE—STARE DECISIS.
The former decision of the Circuit Court of Appeals, construing a decision of the United States Supreme Court, is conclusive, where the question is a second time raised.

3. EQUITY ⊜295—PRACTICE—SUPPLEMENTAL BILL.
Where a resolution of a city limiting the power of an electric company was in violation of a previous adjudication of the federal Supreme Court, a supplemental bill, setting up the prior adjudication, was proper.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Bill to restrain enforcement of ordinance by the Omaha Electric Light & Power Company against the City of Omaha and others. From a decree for complainant, defendants appeal. Affirmed.

W. C. Lambert, of Omaha, Neb. (John A. Rine and L. J. Te Poel, both of Omaha, Neb., on the brief), for appellants.

William D. McHugh, of Omaha, Neb., for appellee.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

WADE, District Judge. The question at issue in this case was finally adjudicated by the Supreme Court of the United States in Old Colony Trust Co. v. City of Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410, and Omaha Electric Light & Power Co. v. City of Omaha et al., 216 Fed. 848, 133 C. C. A. 52. In the latter case, and in the case at bar, the same plaintiffs appear, and in both cases, and the case at bar, the defendants are the same. In the Old Colony Case, the plaintiff was trustee under a mortgage. The issues in both of the foregoing cases were the same; the only questions before the court being whether a certain ordinance granted by the city of Omaha in 1884 to the assignor of the Omaha Electric Light & Power Company, hereafter called "plaintiff," was still in force, and, if so, whether, under the grant of the use of the streets "for the purpose of transacting general electric light business," the equipment could be used for furnishing current for heat and power.

It is needless to recite a history of the litigation. The points in issue were squarely decided by the Supreme Court of the United States in the Old Colony Case, and this decision was afterwards given effect by this court through its mandate in the Omaha Electric Light & Power Company Case, supra.

In 1908 the city of Omaha (hereafter called "defendant") adopted a resolution directing the city electrician to disconnect all wires of the plaintiff "transmitting electricity to private persons or premises to be used for heat or power," and directing the removal of poles and wires from the streets in Omaha—such resolution being based, as disclosed in the litigation, upon the claim of the defendant that the franchise of 1884 had terminated, and also upon the claim that, even if the franchise was still in force the plaintiff was limited to the use of its poles, wires, and equipment for furnishing current for electric light alone, and that it had no authority under such franchise to furnish current for heat or power.

Under decree upon mandate of the Supreme Court of the United States, and of this court, as aforesaid, a permanent injunction issued, restraining the city from proceeding with the enforcement of the resolution.

In 1914 the city adopted another resolution, asserting that the plaintiff had no authority "to construct and maintain new equipment, etc., in the public streets and places of this city for the purpose of furnishing power and heat, and the extension and enlargement of the equipment and apparatus for that purpose." The resolution prohibited officers and employés of the city from issuing permits to the plaintiff company to "use or occupy any of the public streets or places of this city for the purpose of enlarging, extending, or adding to its existing equipment and apparatus in the public streets and places, used and designed to be used by it in supplying and furnishing electric current to be used for power and heat purposes." The resolution further provided:

"(3) That the city electrician be, and he is hereby, directed and required to disconnect and remove, or cause to be removed, from the public streets and places, all poles, wires, apparatus, and other fixtures established, maintained, or used in the public streets and places of this city by said company, contrary to or in violation of the provisions of part one of this resolution."

In this action the plaintiff sought an injunction restraining the execution or enforcement of the resolution aforesaid, which injunction was granted by the District Court, and upon the appeal of the defendant it is now here for review.

[1] 2. There is no claim here that the adjudication that the franchise still continues is open to question; but it is contended that, so far as the right to use poles, wires, and other equipment "for transmitting current for heat and power," the adjudication rests only upon estoppel, and is limited to the equipment and the uses for heat and power existing at the time of the adjudication. With this contention we cannot agree. The language of the Supreme Court will not bear this construction. This language must be considered in connection with the issues then before the court.

The plaintiff in the original bill did not plead estoppel. It pleaded many facts which it claimed constituted recognition and acquiescence, and it alleged large expenditures, based upon such facts; but these facts were pleaded as showing that the parties themselves had mutually "construed the said franchise license, or privilege granted as afore-

said, as a right to occupy the streets and alleys with the proper appliances for the transmission of electric current for sale to consumers, without any restriction whatever upon the plaintiff as to the use to be made of such current by such consumers." These facts were pleaded as an "interpretation continuously given to said franchise."

The bill sought to bring the case within the rule expressed by the Supreme Court:

"Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence."

That the Supreme Court did not consider the question as one of estoppel, is indicated by the statement:

"Although not strictly such, this rule is sometimes treated as a branch of the law of estoppel."

Entering upon this branch of the case, the Supreme Court clearly indicates that the thing decided is what the "franchise" meant—what was included within the language of the ordinance, "the purpose of transacting general electric light business." It is said:

"Concluding, as we do, that the franchise has not expired but is still subsisting, we come to the question whether it [the franchise] is limited to the distribution of electric current for lighting purposes or includes its distribution for power and heat."

After reviewing all the Nebraska cases, the Supreme Court says:

"These decisions of the Supreme Court of the state are conclusive upon the question of the right of the trust company to have the distribution of electric current for power and heat treated as included within the franchise contract of 1884 while it continues in force. In other words, the trust company is entitled to insist upon a recognition and continuation, subject to all the qualifications inhering in the franchise, of all the rights conferred by the franchise ordinance as the same was interpreted in an actual practice by the electric company and the city prior to the resolution of 1908."

This language does not refer to property rights then existing, but explicitly determines what is "within the franchise contract." The language is emphatic that the plaintiff has the right to "insist upon" "all the rights conferred by the franchise ordinance"; not "conferred" by acts or acquiescence of the city with relation to any existing poles, wires, or equipment, but conferred "by the franchise ordinance." The acts and conduct of the city are considered as an aid in determining what the language of the ordinance meant. The court held that the "franchise" should be construed as it had been "interpreted in an actual practice" by the parties.

The only language in the opinion which is at all uncertain or doubtful, is the clause relied upon by counsel:

"But neither the trust company nor the electric company is entitled to make that construction a basis for enlarging or extending those rights."

In view of the previous language in the opinion, which is clear and emphatic, this clause cannot be construed to mean that the electric company should have only the right to continue then existing equip-

ment. The very nature of the thing in issue negatives any such purpose.

Counsel for defendant insists upon the application of the rule applied by the Supreme Court of Nebraska in State ex rel. Caldwell v. Lincoln Street Railway Co., 80 Neb. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336; but in that case there was no question before the court as to the construction of the franchise. The franchise was void. It was a "blanket" franchise, while under the law it should have specified the particular streets to be occupied by the street railway. The street railway company, however, insisted that in view of the fact that it had been permitted to occupy certain streets with its street car lines, and in view of other facts, the city should be estopped from questioning the right to occupy such streets, and the court so held. But the difference between a street railway property and the equipment of an electric light and power company, in relation to the question in issue, is obvious. A street railway, when it completes its line —when it builds its track and equips it with cars—has done everything necessary to render its full service for all time, aside, of course, from improvements or increased equipment upon the line. But here is a line of poles equipped with wires for carrying current; service cannot yet be rendered; it can only be rendered by having the proper extensions made to the homes or places of business along the street. These extensions, of course, can only be made as demanded by the development of the city and the wants of its inhabitants. Here is a block which in 1913, when the opinion in the Old Colony Case was written, may have had 2 extensions; in fact, there may have been but 2 houses upon the block at that time; but from time to time residences have been erected, until now there are 12 houses in the block. It clearly could not have been the purpose of the Supreme Court to suspend further extensions of the wires to these houses as they were built. Especially is this true, when it is a matter of common knowledge that, in the erection of poles and the equipment with wire cables, the electric company expends its money, not alone to furnish the equipment necessary for the present number of users who may be in a given block or a number of blocks, but that such equipment, in the very nature of things, is built with the power and the permanency to supply all the demands which may be reasonably anticipated in the future; thus large sums of money are expended by such companies—not for the immediate limited use, but for the remote expanded use.

The resolution sought to be enjoined in this case is not limited in its application to the further extension of main wires for heat and power purposes, but it would prohibit the extension of a feed wire to a house in the middle of the block, and would remove the equipment which would enable the occupant to use power for a washing machine, unless the power had been used prior to the date of the resolution. This should not be permitted, even upon the principle of estoppel, if the plant, the machinery, and the street equipment of the company were planned and established with the purpose in view of ultimately supplying this demand, and the execution of the resolution would unjustly deprive the plaintiff of any income upon such expenditure.

A court might, in the exercise of its discretion, justly limit an unauthorized street railway to the streets already occupied; but a court could not justly deprive this plaintiff of the right to use its equipment to the full power and extent for which it was originally devised.

These considerations, with the language of the Supreme Court, leaves no doubt in our minds that the Supreme Court rested its decision solely upon the construction of the franchise, and not upon any principle of estoppel, with relation to then existing tangible property.

[2] 3. And if there were any doubt, in view of the foregoing considerations, this court (216 Fed. 848, 133 C. C. A. 52, supra) has already clearly construed the opinion of the Supreme Court in the Old Colony Case. It is only necessary to quote the following from the opinion:

"In the Old Colony Trust Co. Case the court held that the ordinance granted a perpetual franchise, which included the right to distribute electricity for power and heat as well as light."

"In the Old Colony Trust Co. Case the facts showing the practical construction which the parties themselves had put upon the ordinance were set forth with greater fullness than in the other case. This, however, was used by the Supreme Court, not for the purpose of creating an estoppel, but for the purpose of applying a familiar canon of construction, with a view to ascertaining the true meaning of the ordinance. It is that meaning, however ascertained, which defines the right of the plaintiff in each case. The Old Colony Trust Company had no right, except that which it derived from the electric company. The ordinance measures both."

"The Supreme Court held, in the Old Colony Trust Co. Case, that the franchise granted by the ordinance was perpetual; that it embraced the right to distribute current for heat and power, as well as light; and directed the trial court to issue an injunction to restrain the enforcement of the resolution. If we send down a mandate pursuant to our decree, we shall declare, in square conflict with the mandate of the Supreme Court, that the company has no franchise to distribute current for heat and power, and that the city has the right to cut all wires used for those purposes."

Comment can add nothing to the force of the foregoing language. The ordinance having been construed to be a subsisting ordinance, permitting the use of the streets for light, heat, and power, the execution of the resolution of 1914 should be enjoined.

[3] 4. The foregoing disposes of the contention of defendant that the jurisdiction of the court in this case could not be invoked by supplemental bill. Holding, as we do, that the action directed by the resolution adopted by the city is in conflict with the prior adjudication, the supplemental bill must be regarded as proper practice.

The judgment of the District Court is affirmed.

BROWN v. KOSSOVE et al.*

In re PIPAL.

(Circuit Court of Appeals, Eighth Circuit. February 4, 1919.)

No. 5169.

1. COURTS ⟸351½—GROUND FOR DISMISSAL.
In view of equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) and Act March 3, 1915 (Comp. St. §§ 1251a–1251c), a suit in equity will not be dismissed because the relief sought is obtainable only by an action at law.

2. APPEAL AND ERROR ⟸361(5)—DISMISSAL—GROUND FOR DISMISSING APPEAL.
Where a suit against two defendants was on different days dismissed as to each, and the citation signed by the District Judge granting the appeal was directed to both of the defendants and served on both, *held*, that the appeal will not be dismissed as to the real party in interest, though the decree in his favor was entered first, and through clerical mistake the prayer for appeal did not mention the decree of dismissal in his favor, but only the last one.

3. CONTRACTS ⟸105—VALIDITY—STATUTE.
Contract or sale expressly forbidden by law, and made a criminal offense, is void, although the statute does not so declare.

4. BANKRUPTCY ⟸185—TRUSTEE—RIGHTS OF—FAILURE TO COMPLY WITH BULK SALES ACT.
Under Bankruptcy Act July 1, 1898, § 47a(2), as amended by Act June 25, 1910, § 8, and sections 70a(4) and 70e (Comp. St. §§ 9631, 9654), *held*, that a trustee of a South Dakota bankrupt may maintain an action against a purchaser of a stock of goods from the bankrupt and one to whom the consideration was paid, where the parties did not comply with the Bulk Sales Act of South Dakota.

5. FRAUDULENT CONVEYANCES ⟸47—BULK SALES ACT.
Although South Dakota "Bulk Sales Act" does not expressly provide that a sale in violation of the act shall be void, but makes the purchaser or person receiving the money a trustee for creditors of the vendor, yet, since section 6 of the act makes violation of the act by the seller a misdemeanor, a sale in willful violation of the act is void, and must be treated as a fraudulent conveyance.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action in equity by James Brown, as trustee in bankruptcy of the estate of Frank E. Pipal, against Max Kossove and Henry A. Schoenberger. From a decree dismissing the complaint, plaintiff appeals. Reversed, with directions to overrule motions to dismiss.

Augustus L. Abbott, of St. Louis, Mo. (M. E. Culhane, of Brookings, S. D., on the brief), for appellant.

R. W. Parliman, Sr., R. W. Parliman, Jr., and James C. Parliman, all of Sioux Falls, S. D., for appellee Schoenberger.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. This is an action in equity by the appellant, as trustee in bankruptcy of the estate of Frank E. Pipal, to recover from the defendants the purchase money due by reason of

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied March 25, 1919.

the sale in bulk by the bankrupt on November 2, 1915, to the defendant Kossove of his entire stock of merchandise and store fixtures, in his store, where he was engaged in carrying on a mercantile business. The allegations in the complaint are that, on November 17, 1915, an involuntary petition was filed against the said Pipal, and on December 21, 1915, he was duly adjudicated a bankrupt. That $2,500 of the purchase money agreed to be paid was paid to the defendant Schoenberger, who aided in the sale, and had full knowledge of its illegality. The illegality charged is that neither of the parties, the vendor, purchaser, or Schoenberger, notified any of the creditors of the bankrupt, Pipal, either by personal notice or by registered mail, of the making of the sale in bulk of all the merchandise and fixtures of Pipal, as required by the laws of the state of South Dakota. It is further charged that at the time of the sale the bankrupt was indebted to his creditors in a sum exceeding $8,000, and that the assets of his bankrupt estate, which have come into the hands of his trustee, do not exceed in value the sum of $3,000.

The defendants filed separate answers and also motions to dismiss, alleging as grounds that the plaintiff had no right to maintain this action under the statutes of South Dakota, but that the individual creditors alone can maintain it, and also that, if the action be tried, it be transferred to the law side of the court. On October 8, 1917, the motion to dismiss, filed by the defendant Schoenberger, was sustained, and a final decree dismissing the complaint entered. A like decree was made as to the defendant Kossove on October 17, 1917, and entered of record on that day. The memorandum filed by the learned trial judge, sustaining the motions to dismiss, shows that he based his conclusions on the ground that, as after the sale no interest whatever remained in the bankrupt, neither in the property itself nor the purchase price, the right of action, if there was any, was in his creditors.

[1] The learned trial judge also indicated that the right of the creditors could only be enforced at law, but as that would be no cause for dismissal under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) and Act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. §§ 1251a–1251c), we need not discuss that phase of the memorandum opinion.

[2] In behalf of the appellee Schoenberger, the court is asked to dismiss the appeal as to him, upon the ground that the prayer for the appeal is from the decree entered on October 17, 1917, the day the decree dismissing the complaint against the defendant Kossove was entered, while the decree in favor of the appellee Schoenberger was entered on October 8, 1917. But the citation signed by the District Judge, who granted the appeal, was directed to both appellees and was served on both.

The statement in the petition for appeal, mentioning only October 17 as the date of the decree, was clearly a clerical error, which would not justify us to dismiss the appeal. That it is such a clerical mistake is shown conclusively by the fact that the citation is addressed to and was served on both appellees, and the money, sought to be recovered by this action, is in the hands of the defendant Schoenberger, and he

is the only appellee who appeared in this court; the appellee Kossove having filed no brief, nor entered an appearance in this court, although served with the citation.

[3-5] The action is based on the provisions of the "Bulk Sales Act" of South Dakota (chapter 116, Session Laws S. D. 1913). Without setting the act out, it is sufficient to state that it provides that, when any such sale and purchase is about to be made, the purchaser must notify all creditors of the vendor, contained in a list to be furnished him by the vendor, not less than seven days prior to paying therefor, and the consideration to be paid or so much thereof, as is necessary, shall be held in trust by him for the creditors.

The act nowhere provides in express language that a sale failing to comply with the act shall be void, but it makes the purchaser or person receiving the money a trustee for the creditors of the vendor.

The question to be determined is within a narrow compass. May a trustee in bankruptcy maintain an action against the purchaser, who has not complied with the provisions of the statute, or are the creditors the only persons who can maintain the action?

Section 70a (4) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. § 9654]) vests in the trustee the title of the bankrupt to all property transferred by him in fraud of his creditors, and section 47a (2) as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. § 9631), provides that the trustee shall "as to all property not in the custody of the bankruptcy court * * * be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." There can be no doubt that under Bankruptcy Act, § 70a (4), the title to property fraudulently transferred, passes to the trustee, although the bankrupt could not have maintained an action therefor.

That a trustee in bankruptcy may maintain an action against the vendee when the sale was made in violation of the "Bulk Sales Law" and against the person who received the purchase money, with knowledge of that fact, has been frequently decided. Parker v. Sherman, 212 Fed. 917, 129 C. C. A. 437; Goodwin v. Tuttle, 70 Or. 424, 141 Pac. 1120; Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133; Niklaus v. Lessenhop, 99 Neb. 803, 157 N. W. 1019.

Again section 70e of the Bankruptcy Act authorizes the trustee to recover any property transferred by the bankrupt, or its value, which any creditor of such bankrupt might have avoided. This provision is undoubtedly broad enough to authorize the trustee to maintain this action. Goodwin v. Tuttle, supra; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229.

But counsel for appellees claim that those authorities are not in point, as the statutes of those states differ materially from that of South Dakota, in that they expressly declare sales not made in conformity with the provisions of the statute, void as against creditors, while the South Dakota statute does not declare the sale void, but only makes the purchaser, who fails to comply with the provision of the act liable to any creditor of the vendor for the pro rata share of the proceeds of such sale.

That such a purchaser is a trustee has been frequently decided. Kohn v. Fishback, 36 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941; Nicrosi v. Irvine, 102 Ala. 648, 15 South. 429, 48 Am. St. Rep. 92; Jaques & Tinsley Co. v. Carstarphen Warehouse Co., 131 Ga. 1, 62 S. E. 82; Appel Mercantile Co. v. Barker, supra. In their brief counsel for appellee concede this to be the law. They say:

"We concede this to be a trust proposition, but it is a trust between the purchaser, or the person receiving the consideration on one hand, and the creditors of the bankrupt on the other"

—and deny that the trustee in bankruptcy may enforce the trust, but that the creditors alone may do so under the statute of South Dakota. To sustain this contention they rely on Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119. But the statute of Indiana, in force when that cause of action arose (Act March 11, 1906), provided:

"The word 'creditors' as used herein shall apply only to such creditors whose claims arose from the sale of some part of such stock of merchandise."

And the court held:

"Where, by force of a statute, the effect of a conveyance is to create a statutory lien in favor of a particular creditor, and the conveyance is otherwise valid and sufficient to pass a title to the purchaser, our opinion is that such a transfer cannot properly be denominated a fraudulent conveyance, * * * which is * * * null and void as against all the creditors of such a debtor by the laws of the state."

That case is therefore clearly distinguishable from the case at bar, as that statute only made the sale void in favor of particular creditors, while the South Dakota statute applies to all creditors of the vendor.

Although the act in question does not declare such sales void, it not only prohibits them, but section 6 of the act makes a violation thereof by the seller a misdemeanor.

That section reads:

"Any person making such sale or exchange, or any person acting for or in his behalf, who shall willfully make and deliver, or cause to be made and delivered, any false list or statement required by this act, or who shall knowingly or willfully omit the name or names of any creditor or creditors of such person from such list, or who, having creditors, shall fail to furnish such list or statement shall be guilty of a misdemeanor."

It is elementary that any contract or sale expressly forbidden by law, and made a criminal offense, is void, although the statute does not so declare. Danciger v. Cooley, 248 U. S. 319, 39 Sup. Ct. 119, 63 L. Ed. ——; Continental Wall Paper Co. v. Voight, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; Levy v. Kansas City, 168 Fed. 524, 93 C. C. A. 523, 22 L. R. A. (N. S.) 862. Therefore a sale, in willful violation of this statute, is void, and must be treated as a fraudulent conveyance. Sales in violation of such a statute have been declared fraudulent conveyances, and therefore void, in Re Calvi (D. C.) 185 Fed. 642; Coffey v. McGahey, 181 Mich. 225, 148 N. W. 356, Ann. Cas. 1916C, 923; Joplin Supply Co. v. Smith, 182 Mo. App. 212, 167 S. W. 649; Goodwin v. Tuttle, supra.

As the complaint charges, and the motions to dismiss admitted, that the sale by the bankrupt was in violation of the "Bulk Sales Act" of South Dakota, and that the appellee Schoenberger received the amounts charged with full knowledge of that fact, it stated a good cause of action against both appellees, and the court erred in sustaining the motions to dismiss.

The cause is reversed, with directions to overrule the motions to dismiss and proceed in conformity with the views herein expressed.

ALASKA TREADWELL GOLD MINING CO. v. CRINIS.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3212.

1. APPEAL AND ERROR ⟸1050(1)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.
   Error in the admission in evidence of opinions of witnesses as to whose employment a person was in *held* without prejudice to defendant, in view of detail by the witnesses as to the facts forming the bases of their opinion.
2. MASTER AND SERVANT ⟸404—EVIDENCE OF RELATION—MATERIALITY.
   In an action against a mining company for compensation for the death of an employé, on the issue whether deceased was an employé of defendant the pay roll of another company, made out by a bookkeeper, and which deceased did not sign nor see, *held* properly excluded as immaterial.
3. MASTER AND SERVANT ⟸397½, New, vol. 7A, Key-No. Series—NOTICE OF ACCIDENTS—ALASKA COMPENSATION LAW.
   Provision of Alaska Workmen's Compensation Law, § 9, requiring an employer who has been furnished by the employé with the names and addresses of his beneficiaries to notify them of his death, *held* to apply to an employer which, with other companies, hired men through a common agent, who was furnished with such statement.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

Action at law by Catherine Crinis against the Alaska Treadwell Gold Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hellenthal & Hellenthal, of Juneau, Alaska, for plaintiff in error.

J. H. Cobb, of Juneau, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Section 9 of the Alaska Compensation Act (Session Laws Alaska 1915, p. 146), provides that, where a person claims to be a beneficiary entitled to compensation under the act, such beneficiary or some one in his or her behalf shall within 120 days from and after the death of such employé serve a written notice upon the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and certain other matters not now material. It is also provided that:

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this act."

After providing for a method of service upon the employer the section ends with the following sentence:

"* * * Except in the cases in this section otherwise expressly provided, no action or other proceeding to recover such compensation shall be brought or maintained, nor shall any claim for such compensation be filed or allowed as hereinafter provided unless such notice shall have been served in the manner and within the time herein provided."

In the complaint filed by Catherine Crinis, widow of Nicholas P. Crinis, it was set up that Nicholas Crinis was killed about June 30, 1916, while in the employ of the Alaska Treadwell Gold Mining Company, and left a widow and five children; the children being under the age of 16 years. There was no allegation that any notice of claim had been served upon the defendant. The mining company demurred, but the court overruled the demurrer. The matter went to trial upon the direct issue whether Nick Crinis at the time of his death was an employé of the defendant mining company.

In the course of the trial defendant offered to prove that no notice had been served upon it by the plaintiff or any one in her behalf stating that she was a beneficiary. The court excluded such evidence upon the ground that that was not part of the right, but was a matter of affirmative defense, which had not been pleaded in the answer of the mining company. The jury found specially that at the time of his death Crinis was an employé of the Alaska Treadwell Gold Mining Company. Judgment was entered in favor of the plaintiff, and by writ of error the case is brought here for review.

[1] Error is assigned because the court in the course of the examination of several of the plaintiff's witnesses permitted them to answer questions substantially in this form:

"What was Crinis' occupation, and in whose employ was he at the time he was killed?"

Considering the issue, we think the court should have sustained objections to the questions. But inasmuch as the witnesses testified in detail as to where and how the miners were employed, who paid them their wages, what the method of transacting business was, who was president and who was employment agent of the several mining companies of which group the plaintiff in error was one, there was no prejudice to the rights of the plaintiff in error. It was in evidence that plaintiff in error, the Alaska United Gold Mining Company, and the Alaska Mexican Gold Mining Company had the same officers and were intimately associated in business conduct; that purchases were made by the companies from the Alaska Treadwell Company; that the Alaska Treadwell acted as a banker; that the offices of the several companies are combined; that the bookkeeping is all done in one department and one place, and the cash all disbursed by one man, each company contributing to the Treadwell Company the amount of cash

the Treadwell Company has advanced on its account. The men were employed by one employment agent, whose office had but a single sign, "Employment Office" over the door, and the men were then directed as to what mines they were to work in. Crinis was killed in the Ready Bullion mine, operated by the Alaska United Gold Mining Company and was paid some money by that company very shortly before his death. As all these matters bore upon the issue whether or not deceased was an employé of the plaintiff in error, and the court carefully instructed the jury that the issue was whether Crinis was an employé of the plaintiff in error or of the Alaska United Company, the answers which became opinions of the witnesses that the deceased was in the "employ" of the plaintiff in error at the time of his death could not have misled the jury.

[2] It is said that the court erred in refusing the offer of the pay roll of the Alaska United Gold Mining Company. Counsel for the plaintiff below objected to the introduction of this paper because it was not signed by Nick Crinis, and he particularly objected to all of the pay roll except for the months of June and July, 1916. We think the court correctly excluded the pay roll, because it did not bear the signature of Crinis. He never saw it; it was made up by the bookkeeper of the Alaska United Gold Mining Company. It was immaterial. Furthermore, counsel for the plaintiff below in his final objection did not attempt to exclude the offer of such pay rolls for June 30th and July 1st, but counsel for plaintiff in error made no further attempt to have the pay roll of these particular dates put before the jury, and the court made its ruling as to the whole pay roll which evidently covered a long period of time.

[3] It is contended that failure by the beneficiary or some one in her behalf to serve notice called for by the statute precluded the filing or allowance of any claim for compensation, as well as any action to recover such compensation. We are convinced that the plaintiff in error cannot take advantage of this point and for this reason. The plaintiff in error, as well as the other mining companies heretofore referred to, had a common employment agent. He testified that Nick Crinis at the time of his death was not in the employ of the Alaska Treadwell Company; that there had been furnished to witness as employment agent, through the foreman of the Ready Bullion mine, a card statement showing the names of those who would be entitled to benefits under the provisions of the statute herein involved in case he should die as a result of an injury received by him arising in the course of his employment. This statement appeared to be signed by Nick Crinis, although in the opinion of the employment agent Crinis himself did not make the signature. However that may have been, the employment agent certified that the answers to the questions on the card had been made by Crinis in his presence, and undoubtedly the card was accepted and filed by the employment agent, representing his principals, as to who the beneficiaries of Crinis would be in case of his death.

The first paragraph of section 9 of the statute provides that every employé, when he is employed, or thereafter, shall furnish a written

statement showing the names of the persons who would be entitled to benefits under the provisions of the act, in case he should die. In all cases where the statement referred to is furnished the employer by the employé, the employer shall, if the employé be killed as a result of an injury received in the course of his employment, notify each beneficiary named in the last statement of the fact of such death. The form of notice is included in the statute, and it is provided that a failure on the part of the employé to supply the employer with a statement as provided shall not work a forfeiture of the right of his beneficiaries to benefits under the statute, but shall relieve the employer of all obligation to give to any of the beneficiaries of such deceased employé notice of the fact that the employé is dead. The statute continues:

"In cases where the employer shall have been furnished with such statement or statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and in the manner: * * * Provided, such beneficiaries who have not been so notified shall have the right to notify the employer of their claim to benefits and file claims and prosecute actions or other proceedings for the recovery thereof, notwithstanding the fact that such notice was not served as hereinafter provided within the period of 120 days from and after the time that the employé became deceased."

Now, if Crinis when he was killed was an employé of the Alaska Treadwell Company, and the verdict of the jury is that he was, and the statement already referred to was accepted by the employment agent of that company acting for such principal, then we have a situation where the Alaska Treadwell Company, employer, failed to notify the beneficiaries named in the statement within the time required by the statute, or at all, after the employé was killed, in which event the beneficiaries named in the statement and who were not notified had the right, not only to notify the employer of their claims and to file claims, but also to "prosecute actions or other proceedings for the recovery thereof," notwithstanding the fact that notice to the employer was not served within 120 days from and after the time that Crinis, the employé, was killed.

Counsel have urged that, if it is held the Alaska Treadwell Company is liable under the circumstances of the case, it is to hold practically that the plan under which the several mining companies referred to are operated must be abandoned. We cannot agree that any such result must follow a general plan of employment of the same persons as officers by the several mining companies. It would seem to be quite simple for such an employment agent, when he acts in employing a man, to make it perfectly plain to the employé for which company the agent is acting, and for which the employé is to work.

Judgment affirmed.

ERIE R. CO. v. GALLAGHER.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 107.

APPEAL AND ERROR ⊂=1062(3)—TRIAL ⊂=145—ALLEGATION NOT PROVED—REFUSAL TO WITHDRAW FROM JURY.

A refusal to grant a specific request to withdraw from the jury one of several specific charges of negligence is fatal error, if there is no substantial evidence to sustain the charge and it is not possible to determine on which of the issues the jury based its verdict.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by Mary J. Gallagher, administratrix of Charles G. Gallagher, deceased, against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

This cause comes here on writ of error to the United States District Court for the Southern District of New York.

This is an action brought by defendant in error who was plaintiff below, and is hereinafter called plaintiff, to recover damages in the sum of $40,000 for causing the death of Charles Gallagher.

The action is brought under the federal Employers' Liability Act.

The defendant at the time of his death was employed by plaintiff in error, hereinafter called defendant, as a watchman, and in the performance of his duties was ordered by defendant to go on floats attached to the bridges of Pier 8, Jersey City, and seal freight cars thereon.

It is alleged that the deceased, after having sealed the cars as directed, and while attempting to return from one of the floats to his post on the bridge, and while still in performance of his duties and without any fault on his part, was precipitated from the float connected to the bridge into the river between the float and the bridge and was drowned. The accident was due, it is alleged, to a sudden release of the float from the bridge by the agents and employés of the defendant without giving any warning. And it is averred that this accident was caused solely by reason of the carelessness, recklessness, and negligence of the defendant.

It is alleged that this accident was further caused by reason of the negligence of defendant, in that it failed to provide a safe place in which to work, as well as failed to furnish any lights on the float, and failed to provide a sufficient light on the bridge, and failed to provide the deceased with a lamp, searchlight, or other means of light.

The defendant moved to dismiss the complaint at the end of the plaintiff's case. The motion was denied. It was renewed at the end of defendant's case, and it was also moved that the court direct a verdict for defendant. Both motions were denied. The case was submitted to the jury, and a verdict was returned for the plaintiff in the sum of $7,000.

Stetson, Jennings & Russell, of New York City (William C. Cannon, of New York City, and Theodore Kiendl, Jr., of Brooklyn, N. Y., of counsel), for plaintiff in error.

Lawrence B. Cohen, of New York City (Jacob Shientag, of New York City, on the brief), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The able and experienced judge who presided at the trial of this case instructed

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the jury very fully in a carefully prepared charge which covers 18 printed pages in the transcript of the record. The jury has given the plaintiff a verdict which is moderate in amount. Nevertheless we think it necessary to send this case back for a new trial.

The negligence with which the defendant is charged consists in two alleged omissions:

1. Failure to warn the deceased of the sudden release of the float from the bridge.

2. Failure to furnish sufficient light to enable the deceased to work in safety at the place where the accident occurred.

It was admitted in this court that no warning of the release of the float was given. At the trial the defendant introduced testimony to show that the Lehigh Valley and the D. L. & W. companies, engaged in similar operations, do not give warnings when a float is about to be released, but a man has to look out for himself. The following excerpt from the testimony tells its own story:

"Q. How does he know what is going to happen? A. He has two eyes.

"Q. Suppose he is working in the back of the boat, up very near the bumper? A. The way they work everybody looks out for himself.

"Q. The boat does take a very violent drop when she leaves the toggle pins? A. Naturally; yes, sir.

"Q. If, at high tide, she takes, you say, a bigger drop than at low tide? A. Yes, she would take a bigger drop at high tide.

"Q. And she will take a drop sometimes as much as six feet at high tide? A. More than that.

"Q. How much is the highest you know of? A. Eight to ten feet. * * *

"Q. You say a man should look out for himself? A. Yes, sir. * * *

"Q. Suppose it is a watchman the first night he is on there and doesn't know anything about it? A. He stands on his own responsibility.

"Q. That is the way you work it? A. Yes.

"Q. That applies to the crew? A. Everybody. * * *

"Q. If a float is going to drop six or eight or ten feet, and he doesn't know the drop is going to come, he is in danger, isn't he? A. If he don't know it, he has no business being there.

"Q. He is in danger when that boat is going to drop, isn't he? A. If he is in the way, yes."

The jury were properly instructed and at great length on this branch of the case and were charged, among other things, that if they were reasonably satisfied from the evidence that it was the duty of defendant to give notice to Gallagher before the release of the float from the bridge, and negligently failed to give notice, that would entitle Mr. Gallagher's administratrix to damages; and that the burden was on the plaintiff reasonably to satisfy them that it was the duty of defendant to give that notice.

The defendant asked the court to charge:

"You cannot find any negligence on the part of defendant upon the ground that no warning was given that the float was to be released from the bridge."

The request was refused and exception taken. This was not error.

We come now to the second allegation of defendant's negligence, in that it failed to furnish sufficient light to enable the deceased to work in safety. The bridgeman was examined as to the lights on the bridge at the time of the accident. His testimony was as follows:

"Q. Were there any lights on the bridge at that time? A. Yes, the whole business.

"Q. Now, where were the lights, if you remember, Mr. Stanton? A. Right over the entrance to the bridge—on the bridge work.

"Q. And you now distinctly remember that the lights were lit there? A. Sure.

"Q. Did you have any difficulty in seeing the edge of the bridge and the floats on bridge 4, or only bridge 4, on that night? A. No.

"Q. Did you have any difficulty in seeing at that place on any night that you worked there? A. See what?

"Q. Were the lights sufficiently illuminated to see what you were working at at that place? A. Sure; they might once in a while go out—something might happen to the dynamo.

"Q. On this night they didn't go out? A. No.

"Q. Was it necessary for the bridgeman to have lights working on bridge 4 and the other bridges on any night? A. Yes, sure.

"Q. Was it possible for the bridgemen to perform their duties without lights? A. Well, that I could not say.

"Q. You don't know? A. No.

"Q. It would make it hard, would it not? A. Yes, likely to get killed; that's about all."

Another witness, who was a floatman on the railway company's tug which was to pull out the float on which Gallagher was at work, and who was standing on the bridge about 15 feet from the point where the bridge met the float when the accident occurred, saw and recognized Gallagher when he was halfway down the float 100 feet away. He testified as follows:

"Q. And Gallagher was halfway down that float, or about 100 feet away from you, was he? A. Yes, sir.

"Q. And you saw him working? A. Yes, sir.

"Q. Did he have a light? A. I didn't see a light.

"Q. Were there any lights on the float? A. No, there were no lights on the float, but lights on Dock 8.

"Q. And were there lights on the bridge? A. Yes, sir; there was a light there.

"Q. Those lights were right over your head while you were standing there, weren't they? A. Yes, sir.

"Q. And you could see plainly a distance of 100 feet, so that you could recognize Gallagher? A. Yes, sir.

"Q. From the time you first saw him nailing this door, you say after he had finished that job he came walking toward you? A. Yes, sir."

In approaching the witness he was, of course, approaching the light on the bridge. One other witness, a deck hand on the tugboat, who, when the accident happened, jumped from the tugboat upon the bumper end of the float and then ran to the toggle end, was asked as to the lights, but testified as to the persons he saw and recognized on the bridge while he was standing on the float. There is not in the record any other evidence in the plaintiff's case regarding lighting facilities. The defendant by the uncontradicted testimony of seven witnesses established the fact that there was a cluster of four 100-candle power electric lights covered by a reflector about 15 feet from the place of the accident and that the lights were burning. The defendant at the close of the case stated that he had three other witnesses who, if called to the stand, would testify that the lights on the bridge were lit at the time of the occurrence of the accident and that

no system of warning employés of the release of the floats was used by defendant at that time. Counsel for plaintiff then conceded that if the witnesses were called they would so testify. There is absolutely no testimony in the case from any witness that the light was insufficient.

Counsel for defendant asked the court to charge:

"You cannot find any negligence of the defendant upon the ground that there was not sufficient light at the place where deceased fell into the water."

The request was refused and an exception was taken. The refusal to give the request was error.

The rule is well established that a refusal to grant a specific request to withdraw from the jury one of several specific charges of negligence is fatal error if there is no substantial evidence to sustain the charge. The reason is that the appellate court cannot know but that the jury may have found its verdict upon the baseless charge. Wilmington Mining Co. v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708; Deserant v. Cerillos Coal R. R. Co., 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127; Buckeye Cotton Oil Co. v. Sloan, 250 Fed. 712, — C. C. A. —; Chicago, St. Paul, M. & O. Ry. Co. v. Kroloff, 217 Fed. 525, 133 C. C. A. 377.

Judgment is reversed, and a new trial ordered.

WESTERN FUEL CO. v. GARCIA.*

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3195.

1. ADMIRALTY ⊂⊃7—MARITIME CAUSE OF ACTION—STATE STATUTES.
Where a cause of action is maritime in its nature the rights, obligations, and liabilities of the parties are measured by the maritime law, unaffected by any state statute.

2. ADMIRALTY ⊂⊃21—ENFORCING STATE STATUTE—SUIT FOR WRONGFUL DEATH.
While under the maritime law a suit cannot be maintained for the death of a person on the high seas or waters navigable therefrom, a statute of the state where the injury occurred, giving a right of action therefor, will be enforced by a court of admiralty, if the case is of admiralty cognizance.

3. ADMIRALTY ⊂⊃21—ACTION FOR WRONGFUL DEATH—RIGHT OF ACTION GIVEN BY STATE STATUTE.
A court of admiralty, in enforcing a right of action for wrongful death given by a state statute, will enforce it in accordance with the recognized principles of maritime law, unaffected by the provisions of any state or local law, and hence it is not bound by a state statute of limitations.

4. SHIPPING ⊂⊃84(5)—INJURY TO STEVEDORE—ASSUMPTION OF RISK.
Conceding that a stevedore employed in loading coal into buckets in a hold assumed the ordinary risk from the occasional falling of a lump of coal, he did not assume the risk from the spilling of a large quantity into the hold through the negligence of the hatch tender.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing granted May 20, 1919.

Action in admiralty by Antone Garcia, administrator of the estate of Manuel Sousa, deceased, against the Western Fuel Company. Decree for libelant, and respondent appeals. Affirmed.

Ira S. Lillick and Hartley F. Peart, both of San Francisco, Cal., for appellant.

Henry Heidelberg and Christopher M. Bradley, both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The widow and minor children of Manuel Sousa, deceased, filed, August 21, 1917, in the court below, a libel against the appellant and two of its employés, to recover damages growing out of the death of the deceased while working as a stevedore in unloading coal from the hold of the steamer Tancred, at the time operated by the appellant company under charter, and discharging its cargo at the Howard Wharf in Oakland creek, Cal.—it being alleged that the death of the deceased was caused by the negligence of the libelees in the improper handling of the bucket, by which some of the coal was spilled and fell upon the deceased, killing him, on the 5th day of August, 1916. Subsequently the appellee was appointed administrator of the estate of the deceased, and as such filed an amended libel, upon which the cause was tried. It will be seen from what has been said that the original libel was not filed until a few days more than one year after the death of the deceased.

[1] The record shows, however, that on April 25, 1917, his widow and minor children commenced proceedings for the recovery of the damages sustained by them, before the Industrial Accident Commission of the state of California, pursuant to the provisions of the Workmen's Compensation Act of 1913 (St. 1913, c. 176), which commission awarded them damages, but which proceedings were subsequently annulled by the Supreme Court of the state, following the decision of the Supreme Court of the United States in the case of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, and other decisions of that court, the last of which was decided by that tribunal January 7, 1919, in the case entitled Union Fish Co. v. Erickson, 248 U. S. 308, 39 Sup. Ct. 112, 62 L. Ed. —.

The present case being in admiralty, it is obvious that no provision of the California statute above referred to has any application here; the rights, obligations, and liabilities of the respective parties being measured by the maritime law. In addition to the cases already cited, see The Lottawanna, 21 Wall. 558, 575, 22 L. Ed. 654; Butler v. Boston Steamship Co., 130 U. S. 527, 557, 9 Sup. Ct. 612, 32 L. Ed. 1017; Workman v. Mayor, etc., of New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; South Covington & Cincinnati Street Ry. Co. v. South Covington et al., 235 U. S. 537, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792; The Steamship Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907; The Chusan, Fed. Cas. No. 2717.

[2] It is well settled that, in the absence of an act of Congress or a statute of a state giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence. The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; The Alaska, 130 U. S. 201, 9 Sup. Ct. 461, 32 L. Ed. 923. Where, however, a statute of the state where the injury occurs gives such right of action, it will be enforced by a court of admiralty, if of admiralty cognizance. Authorities supra, and Buttner v. Adams, 236 Fed. 105, 149 C. C. A. 315; The Horsa (D. C.) 232 Fed. 997; 1 Corp. Jur. 1290, and cases there cited.

There being no United States statute upon the subject, the appellee's right to recover in the instant case must be found in a statute of California. Section 377 of its Code of Civil Procedure provides:

"When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The right upon which the judgment of the court below rests was clearly given by that statute. Subsequently section 1970 of the Civil Code of California was enacted, which provides, among other things, as follows:

"An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé: Provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employé injured, or of a person employed by such employer having the right to control or direct the services of such employé injured, and also when such injury results from the wrongful act, neglect or default of a co-employé engaged in another department of labor from that of the employé injured. * * *"

In the case of Gonsalves v. Petaluma, etc., Ry. Co., 173 Cal. 264, 266, 159 Pac. 724, the Supreme Court of that state, after referring to the question as to the extent, if at all, the above-mentioned sections of the California statutes conflicted, said:

"It was for the consideration of this important question that a hearing before this court was ordered. Heretofore this court has not been called upon to determine the matter. Thus in Ruiz v. Santa Barbara Gas Co., 164 Cal. 188, 128 Pac. 330, we declared that in that case it was immaterial whether it be considered that the action was brought by virtue of section 377 of the Code of Civil Procedure or by section 1970 of the Civil Code. Again in Pritchard v. Whitney Estate Co., 164 Cal. 564, 129 Pac. 989, the only pronouncement of the court upon this subject is that 'so far as injuries arising out of that relation are made actionable where death ensues, where they were not actionable before, section 1970 is now the only statute authorizing the action.'

This of course is a perfectly sound declaration, but it is giving it an unwarranted meaning to say that by it this court even intimated that the general provisions of section 377 of the Code of Civil Procedure were abrogated in every case of actions by the representatives of deceased employés. Indeed, it would call for very direct and positive language to lead a court to say that the lawmakers, in giving the general right of action provided for by section 377 of the Code of Civil Procedure to everybody else, and therein declaring that in every such action such damages may be given 'as under all the circumstances may be just,' meant to deny that right of action and forbid that measure of recovery in the case of representatives of deceased employés, and to declare that as to them there could be no recovery at all, unless the heirs of such employés were actual dependents upon them. But there is no language in our law which prompts, much less which forces, the view that the Legislature thus designed to restrict this right of action in cases where the death of an employé had been negligently caused. Section 377 of the Code of Civil Procedure still remains in full force and gives the right of action and fixes the measure of recovery in all cases. Section 1970 of the Civil Code is to be construed with section 377, not as superseding it, and so construed it means, as declared in Pritchard v. Whitney Estate Co., 164 Cal. 564, 129 Pac. 989, that where section 1970 has created rights of action growing out of the relationship of employer and employé, which rights of action did not formerly exist, such rights of action by the representative of an employé who has lost his life, may be prosecuted for the benefit of the class limited and designated in the section itself. So construed there is no conflict between the two sections. This construction, we repeat, is not only reasonable, but uniformly it is the construction which other courts have put upon their laws in cases where the provisions of those laws are similar to or identical with our own. We need not be at pains to review these authorities at length. It will be sufficient to refer to [citing a number of cases]."

April 8, 1911, California passed another act (St. 1911, p. 796), providing, among other things, as follows:

"In any action to recover damages for a personal injury sustained within this state by an employé while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé, and it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury; and it shall not be a defense:

"(1) That the employé either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant."

[3] The right of action for the death of the deceased being given by a statute of the state, a court of admiralty will enforce it (authorities supra), but enforce it in accordance with the recognized principles of maritime law, unaffected by the provisions of any state or local law. Otherwise one admiralty court might readily be required to rule one way upon a certain state of facts, and another to rule another way upon a precisely similar state of facts, depending upon conflicting state or local laws, thus working the practical destruction of a uniform maritime law. For this reason the California statute of limitations of one year, relied upon by the appellant in bar of the action, has

no more application to the case than had the California statute of frauds involved in the case of Union Fish Co. v. Erickson, supra, just decided by the Supreme Court.

[4] The court below found that the death of Sousa was caused by the negligence of the hatch tender in withdrawing the bucket from the hopper before it was fully dumped, and to his negligence in not giving warning to those in the hold where Sousa was working as a stevedore and killed, and, further, that the deceased was not guilty of any contributory negligence. Upon the record we see no sufficient reason to disturb those findings of fact.

We also agree with that court that the risk of his employment did not include the spilling of such a quantity of coal through the hatch as inflicted the fatal injury, even though it be conceded that the deceased assumed the ordinary risk of his employment due to the falling of an occasional lump of coal.

We are of the opinion that upon the merits the case was rightly decided, and that we would not be justified in increasing the amount of the award, as the appellee contends we should, made by the trial court, which was $10,000, less $494 already paid.

The judgment is affirmed.

OZARK SMELTING & MINING CO. v. SILVA.

SAME v. LOPEZ.

(Circuit Court of Appeals, Eighth Circuit. January 28, 1919.)

Nos. 5123, 5124.

1. MASTER AND SERVANT ⊂⊃278(20)—INJURIES TO SERVANT—WARNING.
   In an action for the death of two miners who were swallowed in an ore chute which was clogged when they began to shovel ore therein, evidence *held* to warrant a finding that the warning given was insufficient; such miners being inexperienced.
2. MASTER AND SERVANT ⊂⊃219(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.
   An employé by entering and continuing in the employment without complaint assumes ordinary risks and extraordinary risks of which he knows and which he appreciates, as well as patent risks and dangers of defects in the place of work; but he does not assume risks or dangers that are latent and unknown to him.
3. MASTER AND SERVANT ⊂⊃153(3)—INJURIES TO SERVANT—LATENT DEFECTS.
   The danger that an ore chute in a mine might be clogged and might well open with a rush so as to swallow miners who were shoveling ore therein is a latent danger as to inexperienced miners, and they should be given warning.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Action by Barney P. Silva, as administrator, etc., against the Ozark Smelting & Mining Company, together with an action by Juanita Luna de Lopez, administratrix, etc., against the same defendant, which were tried together. There were judgments for plaintiff in both cases, and defendant brings error. Affirmed.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Reid, Hervey & Iden, of Roswell, N. M., and William E. Hutton, of Denver, Colo., for plaintiff in error.

O. A. Larrazolo, of Las Vegas, N. M., and J. A. Gillett, of El Paso, Tex., for defendants in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

SANBORN, Circuit Judge. About 5 o'clock in the afternoon of March 16, 1916, Carlos Luas, Jr., a young man 20 years of age, and Manuel Antonio Lopez, a youth 17 years of age, employés of the Ozark Smelting & Mining Company, a corporation, were directed by its night foreman to go to chute 802a and shovel ore into it. Chute 802a was from 30 to 50 feet in length. It extended in a line substantially straight at an angle of about 45 degrees from the eighth level of the Ozark Company's mine, where that company was mining ore, to a level below where the ore was loaded into cars to be carried away. There was a door or gate at the lower end of the chute which could be so opened and closed as to permit a carload of ore at a time to run from it into a car. The chute was used to lead the ore from the eighth level to the place of loading it upon the cars. If the chute was full of ore or nearly so, and an employé was at work upon this ore or near the upper end of the chute and the door or gate was opened to load a car, the ore in the upper end of the chute would settle down slowly into the chute, but not in such a way as to endanger the workmen. There were 30 or 40 chutes of this character in this mine; some of them were straight, and some were crooked. Sometimes the ore in one or more of these chutes would form a jam part way down the chute, leaving the lower part of the chute empty, and the company had an employé whose duty it was to break such jams and let the ore down to the gate or door.

At the time the order to shovel ore into chute 802a was given to the young men, the upper end of the chute was full of ore, and it was piled up from 1½ to 2½ feet above its upper portal. The testimony was conflicting whether the natural inference from the fact that the upper end of the chute was full of ore was that it was full from the door or gate at its lower end, or that the ore was congested at some point above the door or gate, leaving the lower portion of the chute empty. The upper mouth or portal of the chute was in a stope on the eighth level where the company was taking out ore, and on one or two sides of this mouth the face of the ore in place was so near to it that when the blasting was done some of the ore would roll down into or upon the portal of the chute. Sometimes when the ore became congested in a chute it would suddenly give way and the ore would run down the chute so fast as to swallow up and kill a man working upon the ore in or on the upper end of the chute, or near enough to be drawn into it, as the ore ran down from the sides of the stope above it. This was what happened to Luas and Lopez within an hour or two after they went to shovel coal into the chute. No living witness of the accident remained, but the dead bodies of these young men

were taken out of the lower end of the chute during the night. The administrator of the estate of Luas and the administratrix of the estate of Lopez sued the Ozark Company for its alleged failure to exercise reasonable care to furnish a safe place for the deceased to work. The two suits were tried together. At the close of the trial the court denied the motion of the Ozark Company, in each case, to instruct the jury to return a verdict in its favor. It excepted to that ruling. The court held that there was no substantial evidence of any actionable negligence of the defendant, unless in that it failed sufficiently to warn the young men of the danger of working on or too near the ore in or over the upper end of the chute on account of the possibility of a congestion of the ore in the chute and the danger of its carrying them down into it. Thereupon the court charged the jury, and at the request of the Ozark Company submitted to them two questions: First, whether or not the deceased were warned that it was dangerous at all times to work or be upon the ore body immediately above the mouth of the ore chute when the ore in the chute was in a congested condition; and, second, whether or not the danger of working or being upon the ore body immediately above the ore chute and the mouth thereof, when the chute was in a congested condition, would have been observed and apparent, to men of the age, intelligence, and experience of the deceased exercising ordinary care. The jury answered both questions in the negative, and returned a verdict against the company.

[1] In this state of this case, but a single question is presented to this court, and that is: Was the evidence of a sufficient warning to the deceased of the danger of working or being on or too near the ore over the mouth of the chute on account of the possible congested condition thereof therein, so conclusive that the court erred in its refusal to withdraw that question from the jury and to instruct them to return a verdict for the defendant? All the evidence regarding that subject is in the testimony of a single witness, the night foreman of the Ozark Company, who hired the deceased, gave them the warning they received, and sent them to shovel ore into the chute. At the time they were so sent Luas had been at work in the mine about twelve days. He had worked at the place where he was injured four or five times. Lopez had worked in the mine three or four days, but had never shoveled ore into or onto chute 802a. At the time the foreman sent these men to their work at the head of this chute, he had not seen it during that day, and he gave them no warning at that time of the danger from its congestion. There is no evidence that either he or the deceased knew or suspected that it was congested, nor is there any evidence tending to show that the deceased knew or were ever told how they could find out whether a chute the upper mouth of which was covered with ore was full from the gate or door to the top, or was empty in some parts of it and the ore was congested above that part.

After the foreman had testified that, at the time he sent the deceased to their work on the day of their death, he simply told them to go to the chute and shovel ore into it, he answered in the affirmative this question of one of the counsel for the company:

"Did you at that time, or at any previous time, call their attention to the fact that it was dangerous to step up on an ore pile that was over a chute that was congested?"

In answer to like questions he testified that at the time he employed Luas he told him to be careful of the chutes because chutes would swallow men, that he explained to him that chutes sometimes or quite frequently congested or choked up, and that that was the time they were dangerous, and that he gave Lopez the same warning when he was employed, but, when asked by counsel for the plaintiffs below to tell what warning he gave Lopez when the latter went to work for him, his answer was:

"I told him to be careful in different places, different rocks that might come down, and to be always careful in the chutes, that chutes swallowed men because other times men have been swallowed in that mine the same as the two; that is all."

If that was all, it was clearly an insufficient warning, and he had already testified that he gave the same warning to Lopez that he did to Luas, and, if that was true, the warning to Luas was insufficient. Whether his testimony in answer to the questions of counsel for the company or his testimony in answer to the request of counsel for the plaintiffs, to tell just what he told Lopez, was true, was clearly a question for the jury. Here is an extract from the testimony of this witness:

"Q. Mr. Reed asked you that if you saw ore piled up over the mouth of the chute that you would naturally suppose that the chute was congested and that the ore was not running down well. A. Yes, I said so; and I can say so under your question.

"Q. I suppose you mean by that that if you saw the ore piled up over the opening of the chute, you mean by that that you would naturally suppose that the door of the lower mouth of the chute was closed and that the whole chute was filled up with ore; that is right, isn't it? A. The door was closed, yes.

"Q. And the supposition would be that the whole chute was packed full of ore? A. Yes."

[2] An employé by entering and continuing in the employment of his employer without complaint assumes the ordinary risks and dangers of the employment, the extraordinary risks and dangers thereof which he knows and appreciates, and the risks and dangers of defects in the place, structure or work, which are so patent as to be readily observable by the use of his senses, having in view his age, intelligence, and experience. Chgo., B. & Q. Ry. v. Shalstrom, 195 Fed. 725, 728, 729, 115 C. C. A. 515. But he does not assume risks and dangers that are latent, that, though known to the employer, are unknown and unappreciated by him and are not readily observable by one of his age, intelligence, and experience, and of such dangers and risks it is the duty of the master so to notify him that one of his age, experience, and intelligence would know and appreciate them and would know how to avoid the dangers. Bohn Mfg. Co. v. Erickson, 55 Fed. 943, 946, 5 C. C. A. 341.

[3] The risk and the danger in this case were latent, not readily observable, not likely to be known or appreciated by young men of the

age, intelligence, and experience of the deceased. There is no evidence that either of them had ever experienced or observed the effect of the unexpected break of a congestion in an ore chute. The fact that the upper mouth of the chute was covered and the ore piled upon it was no clear indication that the ore was congested in the chute and the chute empty beneath the congestion. The foreman himself does not seem to have known whether the fact that the upper portal of the chute was covered with piled ore was an evidence of a congested chute or of one that was full all the way from top to the door or gate at the lower mouth thereof, for he testified that it indicated each. Moreover, there is no evidence that the deceased knew or were ever told how to find out and know when a chute was congested so that they could avoid the danger of the congestion.

In view of the situation of the deceased, of the extent of their knowledge, intelligence, and experience, and of their relation to the Ozark Company portrayed by the evidence, and of the uncertainty in which the testimony of the foreman leaves the nature and extent of the warning he gave them, the fact that they were fairly warned of the risk or danger of being or working over the upper portal of the chute, and of the way to avoid this danger, was not so clearly proved that there was error in leaving the question of the sufficiency of that warning to the jury, and the judgment below is affirmed.

SCOGGINS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1919.)

No. 4871.

1. INTOXICATING LIQUORS ⊂⊃146(1)—"SALE"—WHAT IS.
   A "sale" is a contract for the transfer of property from one person to another for a valuable consideration, and to constitute a sale of whisky there must be the assent of two parties (quoting Words and Phrases, Sale).
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

2. INTOXICATING LIQUORS ⊂⊃224—PRESUMPTIONS.
   Where an alleged sale of intoxicants was in violation of law, there is a presumption that defendant did not make the sale, and the government must prove the sale beyond a reasonable doubt.

3. CRIMINAL LAW ⊂⊃562—TRIAL—CONVICTION.
   Evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction.

4. INTERNAL REVENUE ⊂⊃47—SALE—EVIDENCE.
   In a prosecution, under Comp. St. §§ 5971, 5973, for selling whisky in less quantities than five wine gallons without paying a tax as a retail liquor dealer, evidence *held* insufficient to show the sale and sustain a conviction.

Smith, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Arthur Scoggins was convicted under Comp. St. §§ 5971, 5973, of selling whisky in less quantities than five wine gallons without paying the tax as a retail liquor dealer, and he brings error. Reversed and remanded, with directions to grant new trial.

Gardner K. Oliphint, of Little Rock, Ark. (James E. Hogue, Douglas Heard and Edward B. Downie, all of Little Rock, Ark., on the brief), for plaintiff in error.

W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark. (W. H. Martin, U. S. Atty., of Hot Springs, Ark., on the brief), for the United States.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. The defendant below was indicted and convicted of selling whisky in less quantities than five wine gallons at the same time without paying a tax as a retail liquor dealer. Sections 5971 and 5973, 6 U. S. Compiled Statutes 1916 Annotated. He complains that the court refused to instruct the jury to return a verdict in his favor at the close of the evidence. The United States introduced testimony to the effect that the defendant received whisky in packages regularly up to November, 1915; that in that month he received two packages, one marked 24 pints, consigned to Jack McGee, and the other consigned to J. Burke; that these packages were delivered in an old outhouse where a German used to crate eggs; and that prior to the delivery of these packages the defendant had received other packages of like character, consigned to himself. The United States called as a witness one McDaniel, who testified that he purchased one bottle of whisky of the defendant in November, 1915, on a Saturday night; that he did not give him the money, but told him he would see him Tuesday; that on Tuesday he offered him his money, but the defendant said he was not selling whisky and refused to take it; and that meanwhile the defendant had been arrested. Being asked how he got the whisky, this colloquy followed:

"A. I saw him on a side street, and took it out of his pocket, and told him I would see him Tuesday.

"Q. How come you to do that? A. Well, I saw the whisky, and took it out of his pocket.

"Q. What did you say about paying him? A. I told him I would see him Tuesday. * * *"

On cross-examination he testified, among other things, in this way:

"Q. Now, did you not put your arms around him and pull it out of his pocket? A. Yes; I did.

"Q. You did not say anything to him about paying for it? A. I did. I told him I would see him Tuesday."

There was no other testimony tending to show any sale of any whisky by the defendant, if, indeed, this so tends. The defendant testified that he never sold any whisky to McDaniel or to any other person; that one Saturday night he and McDaniel had been drinking earlier in the evening, and he met him again; that he had a little whisky in a bottle in his pocket; that McDaniel grabbed hold of him, took it out of his pocket, and commenced to drink it right on the sidewalk;

that he persuaded him to go into the alley, where they both took a drink; that he asked McDaniel to give the bottle back to him, but that he put it in his pocket; and that nothing was ever said between them about paying for it. The defendant and Mr. Burke testified that the package of whisky consigned to Burke was Burke's, and was not the defendant's; that Burke bought it, and paid $12 for it; that the defendant did not contribute to the purchase of it, and had no interest in it; that Burke gave him an order for it, and told him to take it out and take care of it for him. The defendant testified that he never received the package of whisky consigned to McGee, and that he never had any interest in it. Mr. Ernest Cook testified that McGee was his brother-in-law; that he and McGee occasionally bought whisky together, and had it consigned, sometimes to one of them, and sometimes to the other; that the package addressed to McGee was Cook's; that he told the express driver to deliver it to the defendant, but that it was in fact delivered to him (Cook). Mr. Burke and Mr. Cook both testified that McDaniel told them that he never bought any whisky of the defendant. There was no other substantial evidence in this case, and upon the testimony which has been recited the jury and the court below have founded a judgment against the defendant, and a sentence against him of a fine of $100 and imprisonment for a year and a day.

[1-4] But it is indispensable to the maintenance of this verdict and judgment that there should have been substantial evidence of a sale or of an offer to sell some of the whisky by the defendant.

"A sale is a contract for the transfer of property from one person to another for a valuable consideration." 7 Words and Phrases, "Sale," pp. 6291, 6292.

"To constitute such a sale, there must be the assent of the two parties; there must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction, with a view of evading the penalty of the law, can avail them, if in truth such sale is found to have taken place." Commonwealth v. Thayer, 49 Mass. (8 Metc.) 525, 526.

But one party cannot make a contract of sale. No such contract can be made without assent of the minds of two parties at the same time to the sale and to the terms of the sale, to the subject-matter and the consideration of the sale; and as the alleged contract here was illegal, and its making criminal, the legal presumption was that the defendant did not make it, and this presumption prevailed until he was proved to have done so beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Our search for substantial evidence in this record that the defendant ever consented to sell any whisky to McDaniel has been in vain. The latter's testimony goes no further than this: That he saw the defendant on a side street on a Saturday night; that he put his arms around him and took a bottle of whisky out of the defendant's pocket; that he told him he would see him Tuesday; that he offered to pay him something on that day, and the defendant refused to take

the money. The statement in his testimony that he bought the whisky and that he said something about paying for it, to wit, that he would see the defendant Tuesday, are nothing but his inferences from what he testified was said and done on that Saturday night, and they are immaterial. There is no evidence here that the defendant ever consented to the taking of the whisky by McDaniel; there is no evidence that he consented to receive any promise to pay any price or any consideration for the whisky; there is no evidence of the agreement of the minds of McDaniel and the defendant to the amount of the pretended price for it, or to any contract of any kind about it. Not only this, but the evidence is not only as consistent with the innocence of the defendant as with his guilt, as consistent with the conclusion that he did not consent to make a contract to sell the whisky as that he did, but it is more so. It is more consistent with the view that on that Saturday night McDaniel and the defendant were drinking together in a jovial mood; that such a thought as the selling of whisky to his companion never entered the mind of the defendant.

As there is no substantial evidence of the alleged sale, the judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

SMITH, Circuit Judge (dissenting). I find myself unable to concur in the foregoing opinion.

The defendant was indicted for selling liquor at retail without having first paid the special tax therefor as required by the United States statutes. The opinion says that:

"As the alleged contract here was illegal, and its making criminal, the legal presumption was that the defendant did not make it, and this presumption prevailed until he was proved to have done so beyond a reasonable doubt."

As I understand it, this case in no wise involved the legality of the sale, except coupled with the failure to pay the special tax as a retail liquor dealer, as required by the United States statutes. That the defendant at one time owned the liquor in question there can be no doubt. The witness McDaniel got the liquor from the possession of the defendant and consumed it. He either bought it or stole it. He testified that he purchased the bottle one Saturday night, and told the defendant he would see him Tuesday. Before Tuesday the defendant had been arrested. On Tuesday he was offered the money for the whisky, and then defendant said he was not selling whisky. The opinion says:

"To constitute such a sale, there must be the assent of the two parties: there must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction, with a view of evading the penalty of the law, can avail them, if in truth such sale is found to have taken place."

If this were a case against McDaniel, and he had been convicted of larceny of this liquor, I should unhesitatingly say that the conviction should be reversed; that, so far from there being any evidence of larceny, the evidence quite conclusively showed the acquiescence of

Scoggins in the acquirement of the liquor by McDaniel; and, if that is the way I should feel about a conviction of larceny of McDaniel, I see no reason why I should not feel that a conviction of the defendant should be affirmed.

If the defendant acquiesced in the acquirement of this liquor by McDaniel, he was guilty of the offense charged, and this judgment should be affirmed. If he did not so acquiesce, McDaniel stole the liquor; and I think neither one of my associates would claim there was sufficient evidence of that fact. The whole question of how McDaniel acquired the liquor was submitted to the jury, and no exception was taken to any of the instructions, and the jury found that Scoggins sold the bottle of liquor to McDaniel.

Manifestly, from my viewpoint, this case ought to be affirmed upon the authorities and the reasoning of the opinion.

HEARD v. UNITED STATES.

DUNN v. SAME.

(Circuit Court of Appeals, Eighth Circuit. January 23, 1919.)

Nos. 4890, 4908.

1. WITNESSES ⟸389—CROSS-EXAMINATION AS TO INCONSISTENT STATEMENT—EFFECT OF ADMISSION.
   In a prosecution for stealing interstate shipments of money from an express car, where the express messenger testified against defendants, his admission that his first statement as to the robbery was false will not preclude cross-examination in detail as to his original statement.
2. WITNESSES ⟸266—CROSS-EXAMINATION.
   It is no answer to a refusal to permit a full cross-examination that the party against whom the witness is called might have made him his own witness, and might then have proved by him, or by some other witness, or by some writing, the facts which the cross-examiner was entitled to draw from the testimony of his adversary's witness, for no one is bound to make his adversary's witness his own to prove facts which he is entitled to establish by cross-examination, as testimony given by a witness on cross-examination is evidence of the party in whose behalf he is called.
3. WITNESSES ⟸266—CROSS-EXAMINATION.
   A full cross-examination of a witness upon subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of such right is prejudicial and fatal error.
4. WITNESSES ⟸269(1)—EXAMINATION—CROSS-EXAMINATION.
   It is the rule in the national courts that the party in whose behalf a witness is called has the right to restrict the cross-examination to the subjects of direct examination, and a violation of this right is reversible error; so, if the cross-examiner would inquire of the witness concerning matters not opened on direct examination, he must call him in his own behalf.
5. WITNESSES ⟸269(4)—CROSS-EXAMINATION.
   In a prosecution for stealing from an express or mail car interstate shipments of money, where the wife of the express messenger testified for the prosecution that, after her husband made a statement to detectives,

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

he came home and told her that the robbery was a fake, and that she got one of the other defendants to tell her about it, cross-examination as to whether her husband told her that he had been promised immunity was proper.

6. CRIMINAL LAW ⟸424(3)—EVIDENCE—ACTS OF COCONSPIRATOR.

In prosecution against two defendants, where they were charged with stealing, etc., and conspiring to steal, from a mail or express car, interstate shipments of money, the admission of testimony by the express messenger, whom it was claimed was a party to the conspiracy, that after the robbery was effected one of the defendants paid him a sum of money as his part, is inadmissible against the other defendant, who was not present at the time.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Homer Heard was convicted of stealing and carrying away from a mail and express car three interstate shipments of money, in violation of Act Feb. 13, 1913, c. 50, 37 Stat. 670 (Comp. St. §§ 8603, 8604), and William W. Dunn was convicted of aiding, abetting, and procuring the commission of the crime, etc., and both were convicted of conspiring to commit the offense above described, and they bring error. Reversed and remanded, with directions to grant new trial.

George W. Murphy, of Little Rock, Ark. (James E. Hogue, Douglas Heard, and E. L. McHaney, all of Little Rock, Ark., on the brief), for plaintiff in error Heard.

Gardner K. Oliphint, of Little Rock, Ark. (Robert L. Rogers, of Little Rock, Ark., on the brief), for plaintiff in error Dunn.

W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark. (W. H. Martin, U. S. Atty., of Hot Springs, Ark., on the brief), for the United States.

Before SANBORN and SMITH, Circuit Judges.

SANBORN, Circuit Judge. The plaintiffs in error, Dunn and Heard, were indicted, convicted, and sentenced in the court below. Their indictment contained two counts, the jury found them guilty on both counts, and the court upon both counts sentenced Heard to imprisonment in the penitentiary for three years, and Dunn to a like imprisonment for a year and a day. The first count of the indictment charged that on April 9, 1914, with intent to convert the money to his own use, Heard stole and carried away from a mail and express car three interstate shipments in three express packages of money of the Chicago, Rock Island & Pacific Railway Company, while they were in the custody of the United States Express Company, in transit from Hot Springs, Ark., to St. Louis, Mo., in violation of Act Feb. 13, 1913, 37 Stat. 670, c. 50 (Comp. St. §§ 8603, 8604), and that Dunn aided, abetted, and procured the commission of that crime by Heard, and after its commission, knowing that Heard had committed it, harbored him and concealed the commission of the crime. The second count charged that on April 1, 1914, Heard and Dunn conspired with William Ahring to commit the crime described in the first count.

[1] The trial proceeded in this way: The United States proved the

shipment of the three packages of money from Hot Springs to St. Louis via the United States Express Company, and the possession thereof by Ahring, its messenger, on their way between the two cities. It then called Ahring as one of its witnesses, who on his direct examination testified that prior to the theft Dunn had suggested to him the holding up of a train, and had told him that he had a man by the name of Heard that he could trust, and had subsequently said that he wanted to pull it off, but that no train was specified, and no agreement was finally reached; that on April 9, 1914, a short time before his car left Hot Springs, Heard crawled into it, and when they were near Benton, or Haskell, Heard took his knife, which was lying there, cut open the lock bag, took out the money packages, took the money out, and put it in his pocket, burned the envelope, put a piece of wood in Ahring's mouth, fastened it with a piece of cloth, put him in a packing box, and locked him in, where the porter found him when the train arrived at Little Rock, and went off with the money. On his cross-examination he testified that about the last of April or the first of May, he made his first statement about this theft to Mr. Farber, the superintendent of the express company, and to other detectives; that he then told them that two men who were strangers to him got into his car at Little Rock, that one of them pulled out a pistol and held it on him, and that they cut open the sack and took the money away from him. Counsel had extracted these facts regarding the first statement about the robbery made by the witness by means of his cross-examination, and was proceeding with it in regular course, when he asked this question:

"Q. Did you tell them that one of the men was tall and dark and wore a cap, but that his face was covered with a handkerchief and you couldn't tell about his features?"

Thereupon the district attorney objected to this question, on the ground that the witness admitted that his first statement was false, and insisted that it made no difference what he said. The court then said:

"There is no use to go into that. You can introduce it against him, if you want to. The objection is sustained, because he states that it was a false statement. You may introduce it afterwards."

Counsel for the defendant Heard excepted and said:

"Unless you let me consider them in the record, I have a few more questions to ask along the same line."

The court answered:

"You may save an exception; the objection is sustained, because he states that the statement is entirely false; that he made the statement, but that it was false."

Counsel for Heard then said:

"I except to the court's ruling, and to the statement of the court also. He has not stated that yet, your honor. He has not got to that."

As to the fact counsel for the defendant was right—the witness had not at the trial then proceeding testified to the falsity of his first

statement, and the court probably fell into its mistake, because he may have so testified at a former trial. It is also true that he did subsequently so testify at this trial. But neither of these facts extracts the serious objection to the prohibition of the cross-examination of the witness as to his contradictory statements in detail of the facts and circumstances of the robbery or larceny. The government had called him as its chief witness, and relied upon him to establish its charge. By thus calling him it had vouched for the truth of the story of the transaction to which he testified, and had subjected him to a fair and full cross-examination upon that subject. It was proper, relevant, and material cross-examination to draw forth from this witness the fact that, when the transaction was recent and his recollection was fresh, he had told a different story, one so inconsistent with that to which he had testified that both stories could not be true. That was material cross-examination, because it at once challenged the credibility of his testimony, and, the more in detail his first story was, the more incredible it rendered his evidence. Neither a witness nor a party may lawfully escape such cross-examination by his mere testimony or admission that the witness has made statements inconsistent with his testimony at the trial and that they were false. Cross-examination may not be shut off in this way. The cross-examiner has the right to prove by his adversary's witness, if he can, what inconsistent statements he has made, not only in general, but in every material detail, for, the more specific and substantial the contradictory statements were, the less credible is the testimony of the witness.

[2, 3] It is no answer to a refusal to permit a full cross-examination that the party against whom the witness is called might have made him his own witness, and might then have proved by him or by some other witness, or by some writing, the facts which the cross-examiner was entitled to draw from the testimony of his adversary's witness. No one is bound to make his adversary's witness his own to prove facts which he is lawfully entitled to establish by the cross-examination of that witness. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called and the cross-examiner has the right to bind his adversary by the truth elicited from his own witness. Wilson v. Wagar, 26 Mich. 457, 458; Campau v. Dewey, 9 Mich. 417, 418; Chandler v. Allison, 10 Mich. 460, 473; New York Mine v. Negaunee Bank, 39 Mich. 644, 660. A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary. Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668, 674–676, 64 C. C. A. 180, and cases there cited; Safford v. United States, 233 Fed. 495, 501, 503, 147 C. C. A. 381. The refusal of the court below to permit counsel for the defendant Heard to draw forth from the witness Ahring by cross-examination the entire statement he first made relative to the

robbery or theft too much restricted that examination and was erroneous.

[4, 5] The United States called as a witness Mrs. Ahring, and she testified that, on the Saturday morning after Ahring made his statement to Farber and other detectives, he came home and told her that the express robbery was a frame-up or fake; that he had gone to Memphis, that the detectives had asked him and he had told them everything. She further testified that on the next day, Sunday, the detectives came to her home, asked her if she would be willing to help them; that she replied that she would on account of her husband; that they wanted to know if she thought that Heard would tell her; that she answered that she did not know, but that she would try; that she would tell him that Ahring had told her, and then she thought that Heard would tell her; that she called Heard to her home, and told him that Ahring had told her that the robbery was a frame-up; that he had told her some, but that she wanted Heard to tell her all, of it, and thereupon he did tell her about it. When, during her cross-examination, counsel for Heard came to the subject of Ahring's conversation with his wife in which he had told her that the robbery was a frame-up and that he had told the detectives everything, this colloquy was had:

"Q. It was on Saturday morning that Mr. Ahring returned home from Memphis, was it not? A. Yes, sir.

"Q. And told you that he had confessed over there? A. Yes.

"Q. Did he tell you that the company or the agents over there to whom he confessed, had promised to give him immunity, or that he would not be punished if Heard or Dunn, or either of them, were convicted? A. No, sir."

Thereupon the court ruled that defendant's counsel by asking this last question had made Mrs. Ahring his witness; that he held that she could not be contradicted any more; that what Ahring told the witness or failed to tell her in that Saturday morning's conversation concerning his interview with those to whom he confessed about their promise of immunity was new matter, which must wait until the prosecution closed, when counsel for the defendant might call Mrs. Ahring as his witness and prove it. To this ruling each of the defendants excepted, and they assign it as error.

The rule on this subject in the national courts is that the party in whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If the cross-examiner would inquire of the witness concerning matters not opened on direct examination, he must call him in his own behalf. Philadelphia & Trenton Railway Co. v. Stimpson, 39 U. S. (14 Pet.) 448, 460, 10 L. Ed. 535; Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668, 674, 64 C. C. A. 180, and cases there cited; Illinois Central Railway Co. v. Nelson, 212 Fed. 69, 74, 128 C. C. A. 525; Harrold v. Territory of Oklahoma, 169 Fed. 47, 52, 94 C. C. A. 415, 17 Ann. Cas. 868.

But a fair and full cross-examination of a witness on the subjects of his examination in chief is an absolute right of the opposing party,

a denial of which is error. The scope of the proper cross-examination is determined by the subject-matters of the direct examination, and not by the precise questions or answers relative to such matters in the direct examination. When a witness is examined in chief regarding a conversation or statement concerning a given subject he may be cross-examined to bring forth the whole of that conversation, its statements and its limitations. Stewart v. United States, 211 Fed. 41, 48, 127 C. C. A. 477; Commercial State Bank v. Moore, 227 Fed. 19, 24, 141 C. C. A. 573; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; Aeolian Co. v. Standard Music Roll Co. (C. C.) 176 Fed. 811, 815. The subject-matter of this cross-examination was what Ahring told his wife about his conversation with those to whom he had confessed the theft on the day before. The United States had opened that subject-matter by introducing the testimony of Mrs. Ahring that he had told her on that Saturday morning that he had confessed to the detectives and had told them everything. This testimony gave the right to the defendants to inquire of Mrs. Ahring, on cross-examination, what he did and what he did not tell her of the conversation with the detectives in which he confessed, until they drew out from her all that her husband told her of that conversation regarding the theft and the confession; and it was permissible in that cross-examination to ask her whether or not he told her things that he did not tell her regarding this subject, as well as things that he did tell her, in order that they might ascertain the exact extent of his communication to her upon these subjects. It was therefore error for the court to limit the cross-examination to the bare statement of the witness in chief that he told her that he had confessed to the detectives and had told her everything, and to refuse to permit defendant's counsel to ask her exactly what he told her he said to the detectives and what he told her they said to him during the confession conversation regarding his conversation, and among other things whether or not he told her that they told him in that conversation that they would give him immunity, if Heard or Dunn, or either of them, were convicted.

[6] It is assigned as error by the defendant Dunn that over his objection and exception Ahring was permitted to testify that, a day or two after the money had been stolen, Heard came to his house, called him into the bathroom, and gave him some money, and said: "Here is your money; I am going to give Dunn $125." The objection was that as against Dunn, who was not present, this testimony was incompetent, because the object of the conspiracy had been accomplished before the conversation took place.

While, in cases of conspiracy, the act of one conspirator in the prosecution of the enterprise for the purpose of attaining its object is evidence against all, the act, declaration, or admission of one conspirator by way of narrative of past facts after the conspiracy has come to an end, either by success or failure in attaining its object, is not admissible against the others. Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Brown v. United States, 150 U. S. 93, 98, 14 Sup. Ct. 37, 37 L. Ed. 1010. The crime denounced by the

act of Congress was the stealing of the money from the express car while the money was in transit therein in interstate commerce. The conspiracy charged was a conspiracy to commit that crime. That crime had been committed, the object of the conspiracy had been completely attained, the money had been stolen, carried away, and appropriated before Heard told Ahring that he was going to give Dunn $125, and a declaration to that effect was not made and could not have been made, either to accomplish the object of the conspiracy or in the prosecution of it. It was not, therefore, admissible in evidence against Dunn. Lonabugh v. United States, 179 Fed. 476, 481, 103 C. C. A. 56.

It is assigned as error that the court admitted as evidence testimony to the effect that, some months before the theft charged, Dunn offered to buy of Ahring a dress, which the latter as express messenger had in his custody, in transit in interstate commerce in the express car. But, while the record is not clear, the court probably excluded this testimony, as it should have done, and doubtless will do at another trial.

The errors which have now been pointed out necessitate another trial in this case, and it is useless to discuss other assignments. Let the judgments against Dunn and Heard be reversed, and let their case be remanded to the court below, with directions to grant a new trial in each case.

EDGAR v. AMES et al. WRIGHT v. SAME. In re OKLAHOMA CITY TIMES CO.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1919.)

Nos. 4938, 5043.

1. BANKRUPTCY ⟸345—BONDHOLDERS—PRIORITY.
In the administration and distribution of the property of insolvent corporations, the claims of subsequent creditors without notice are superior, and entitled to preference in payment over the holders with notice of mortgage bonds of the corporation, whose only consideration was the purchase by the mortgagor corporation of its own stock, either for itself or for another.

2. APPEAL AND ERROR ⟸843(2)—REVIEW—QUESTIONS PRESENTED.
Where the bonds issued by a bankrupt corporation, which were held valid by the trial court, were in an amount more than sufficient to absorb all of the corporate assets, the question of the validity of the bonds found invalid by the court need not be determined on appeal by the trustee on behalf of the general creditors.

3. BANKRUPTCY ⟸355—CONTRACTS ⟸137(1)—SEVERABLE CONTRACTS—BONDS OF CORPORATION.
Valid parts of severable contracts, which contain both valid and void or voidable parts, may be enforced, if the consideration and agreement are tainted with no fraud or immorality, although the void or voidable parts cannot be; hence, where part of the bonds issued by a corporation that later became bankrupt were valid, and supported by a good consideration, such bonds are enforceable, although other bonds given for the purchase of the corporation's own stock were not entitled to priority over claims of subsequent creditors without notice.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. CORPORATIONS ⟸471—BONDS—VALIDITY.
Under Const. Okl. art. 9, § 39, prohibiting the issue of stock, except for money, labor done, or property to the amount of the par value thereof, where a corporation increases its bonded indebtedness, a part of which is for a full and valuable consideration, and part is without such consideration and fictitious, and the real is readily severable from the fictitious increase, the former is valid, though the latter may be void or voidable.

5. BANKRUPTCY ⟸314(1)—STOCK—CONTRACT.
A claim against the estate of an insolvent newspaper corporation for an amount paid to the corporation by one who, through the issuance of corporate bonds, acquired from other stockholders their stock, *held* not a payment to the corporation itself, but a payment for the stock pursuant to the contract, and so the claim was properly disallowed.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

In the matter of the bankruptcy of the Oklahoma City Times Company. The claim of C. B. Edgar was denied, and the claim of C. B. Ames and others, as bondholders, was allowed, and claimant Edgar appeals, and Norman H. Wright, trustee in bankruptcy, also appeals. Orders affirmed.

J. L. Hull, of Muskogee, Okl., and O. E. Shultz, of St. Joseph, Mo., for appellant Edgar.

Keaton, Wells & Johnston, of Oklahoma City, Okl., for appellant Wright.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, Okl., for appellees.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

SANBORN, Circuit Judge. The Oklahoma City Times Company, in April, 1911, was a corporation of the state of Oklahoma, engaged in publishing newspapers in Oklahoma City. D. T. Flynn, C. B. Ames, and B. P. Johnson, owned all its capital stock, the par value of which was $100,000. Two rival newspapers, the Pointer and the Free Press were being published in competition with the Times. Flynn and his associates made agreements with C. B. Edgar that they would sell and transfer to him their $100,000 of stock, would pay certain debts of the corporation, which amounted to $5,000, would pay $15,000 to the Times Company to enable it to buy the Pointer, that for their stock and these payments they should receive $115,000 of the mortgage bonds of the corporation, that the corporation should buy the Free Press and should issue $20,000 of its mortgage bonds to Gaylord & Stafford, the owners thereof, and that Edgar should pay to the Times Company $10,000 in cash. These agreements were performed. In the performance of them the corporation issued its bonds for $135,000, of which Flynn and his associates received $115,000, and Gaylord and Stafford $20,000. The Times Company secured these bonds by a mortgage on its property dated September 1, 1911. On October 12, 1914, the corporation filed its voluntary petition in bankruptcy, and it was adjudged a bankrupt on October 15, 1914. The property of the bankrupt was worth about and no more than $40,000. Its operation by the bank-

ruptcy court incurred a constant loss, and it was soon sold to the holders of the mortgage bonds by order of the court, on condition that they give a bond to pay "all claims, demands, charges, costs, expenses of administration and of the receivership proceedings, that may be adjudged by this court or other court of competent jurisdiction to be prior to the lien of said mortgage or deed of trust or legally payable out of the property of this estate in priority to the lien of said deed of trust." They gave the bond, and the question now is whether certain unsecured creditors of the corporation whose claims accrued after the mortgage was made and recorded are either prior in lien or superior in equitable right to payment out of the mortgaged property to the lien and equitable right of the mortgage bondholders to such payment.

These subsequent creditors, here represented by the appellant, the trustee in bankruptcy, insisted that they were entitled to payment out of the proceeds of the property of the bankrupt, in preference to the bondholders, first, because the consideration of the indebtedness of $135,000 secured by the mortgage was the payment of Edgar's debt to Flynn and his associates, for the transfer of their stock to him; and, second, because a fictitious increase of the indebtedness of the corporation was made by the making of the bonds and mortgage, and was void under article 9, section 39, of the Constitution of Oklahoma. The court below held, first, that $50,000 of the $135,000 mortgage indebtedness, consisting of the $10,000 paid into the treasury of the corporation by Edgar in consideration of the sale and transfer to him of the stock of Flynn and his associates, of the $5,000 of the debts of the corporation Flynn and his associates paid, of the $15,000 they paid and the corporation used to purchase the Pointer, and the $20,000 due on the bonds of the corporation issued to Gaylord and Stafford for the Free Press, was a just and valid indebtedness of the corporation, for which it received a full and valuable consideration, without regard to the transfer of the stock, so that, to that amount and interest thereon, the lien of the mortgage was prior in time and superior in equitable right to payment to the claims of unsecured creditors, and that, as the value of the property of the bankrupt was much less than $50,000, the unsecured creditors were entitled to no payments upon their claims under the terms of the bond or in equity. In the second place, the court below held that to the amount of the $50,000, the indebtedness evidenced by the mortgage bonds did not constitute a fictitious increase of the indebtedness of the corporation in violation of article 9, section 39, of the Constitution of Oklahoma, that full consideration was paid therefor, and that the bondholders were entitled to the preference in payment out of the property of the corporation to this amount over the unsecured creditors. The trustees appealed; the bondholders did not.

[1, 2] As the mortgage indebtedness for $50,000 and interest is more than sufficient to absorb the value of all the property of the bankrupt's estate, it is unnecessary to discuss the correctness of the decision below that as to the $85,000, the only consideration for which was the payment by the corporation of the debt of Edgar to Flynn and his

associates for the transfer of their stock in the corporation to him, the claims of the subsequent unsecured creditors, who became such without notice of the consideration, or of the lack of it, for this $85,000 of indebtedness, were superior in equity and entitled to a preference in payment out of the mortgaged property of the corporation over the claims of the bondholders. Suffice it to say that the rule seems to be well established that in the administration and distribution of the property of insolvent corporations in equity the claims of subsequent creditors without notice are superior and entitled to preference in payment over the holders with notice of mortgage bonds of the corporation whose only consideration was the purchase by the mortgagor corporation of its own stock, either for itself or for another. In re Haas Co., 131 Fed. 232, 65 C. C. A. 218; M. V. Moore & Co. v. Gilmore, 216 Fed. 99, 101, 132 C. C. A. 343; Coleman v. Tepel, 230 Fed. 63, 70, 71, 144 C. C. A. 361; Atlanta & Walworth Butter & Cheese Assn. v. Smith et al., 141 Wis. 377, 382, 123 N. W. 106, 32 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42; Maryland Trust Co. v National Mechanics' Bank, 102 Md. 608, 63 Atl. 70; Hamor v. Taylor-Rice Engineering Co. (C. C.) 84 Fed. 392; In re Fechheimer Fishel Co., 212 Fed. 357, 360, 362, 129 C. C. A. 33.

[3] But the contentions of counsel for the unsecured creditors now are that the inferiority in equity to their claims of the claims of the bondholders to payment of the $85,000 and interest for which the corporation received no beneficial consideration invalidates their claim for preference in payment of the $50,000 and interest secured by the same mortgage for which the corporation received a full and valuable consideration. But valid parts of a severable contract which contains both valid and void or voidable parts may be enforced, if the consideration and the agreement are tainted with no fraud or immorality, although the void or voidable parts cannot be. United States v. Bradley, 35 U. S. (10 Pet.) 343, 9 L. Ed. 448; In re Johnson (D. C.) 224 Fed. 185, 186; Navigation Co. v. Winsor, 20 Wall. 64, 70, 22 L. Ed. 315; Ill. Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 280, 22 C. C. A. 171, 34 L. R. A. 518. The evidence is convincing that there was no intention to defraud creditors or others in the minds of any of the parties to the transaction which resulted in the mortgage for $135,000. All the existing debts of the corporation were then or soon thereafter paid. All the stockholders of the corporation understood, agreed to, and participated in the performance of the contracts which resulted in the mortgage. The transaction, the bonds, and the mortgage were impervious to attack by every one so long as the corporation should remain solvent, and all parties hoped and believed that it would never become insolvent. Nevertheless, because the indebtedness of the corporation was, without any consideration beneficial to it, increased by the $85,000 in bonds issued to enable Edgar to pay Flynn and his associates for their stock, the mortgage was subject to the possibility that the bonds evidencing this increase might become voidable at some future time as to subsequent creditors without notice, in case the corporation should become insolvent. About three years after the transaction, the unexpected happened; the corporation became insolvent. So it is

that the transaction of 1911, and the bonded indebtedness and the mortgage it produced, were free from all taint of fraud or evil intent, and the case falls well within the rule above stated.

The opinions in Jaffray & Co. v. Wolf et al., 4 Okl. 303, 47 Pac. 496, and Clarke v. Lincoln Lumber Co., 59 Wis. 655, 18 N. W. 492, cited by counsel for the trustee, have been read; but the transaction described in the former was tainted with malum in se and that in the latter with malum prohibitum. There was, therefore, no error in the conclusion of the court below that the claim of the bondholders to the payment of the $50,000 and interest was superior in equity to the claims of the unsecured creditors.

[4] Their counsel argued, however, that, notwithstanding the full consideration received by the corporation for this $50,000 of the mortgage debt, the entire debt of $135,000 was void, because its making constituted a fictitious increase of the indebtedness of the corporation in violation of article 9, section 39, of the Constitution of Oklahoma. The portion of that section pertinent to this contention reads in this way:

"No corporation shall issue stock except for money, labor done, or property actually received to the amount of the par value thereof, and all fictitious increase of stock or indebtedness shall be void, and the Legislature shall prescribe the necessary regulations to prevent the issue of fictitious stock or indebtedness."

In support of their position here, counsel cite Webster v. Webster Refining Co., 36 Okl. 168, 128 Pac. 261, 47 L. R. A. (N. S.) 697 and the opinion in that case has received consideration. But it treats only of the issue of stock for property of less value than the par value of the stock, and does not interpret the clause, relevant to the case in hand, that "all fictitious increase of * * * indebtedness shall be void." It will be noticed that, while this section 39 prohibits the issue of stock, except for money, labor done, or property to the amount of the par value thereof, it does not prohibit the issue of bonds, except for such considerations, as many state Constitutions and statutes do. Conceding, without admitting or deciding, that $85,000 of the $135,000 mortgage indebtedness of the corporation was without consideration and constituted a fictitious increase of its indebtedness, nevertheless $50,000 of that $135,000 indebtedness, so far as it constituted any increase of the indebtedness of the corporation, was a real and not a fictitious increase, and as the mortgage indebtedness was evidenced by bonds of denominations of $1,000 each, the real increase of indebtedness was readily severable from the fictitious increase thereof. For example, Gaylord and Stafford, the owners of the Free Press, after considerable negotiation, sold it to the corporation for 20 of the $1,000 mortgage bonds. The legal presumption is that the Free Press was worth $20,000 to the Times Company, there is no evidence to the contrary, the 20 bonds paid for the Free Press are readily distinguishable and severable from the remainder of the $135,000 mortgage indebtedness, and their making and delivery certainly created, not a fictitious, but a real, bona fide and valid increase of the indebtedness of the corpora-

tion, for which it received full value. This is likewise true of all the other items of indebtedness constituting the $50,000. The Constitution does not prohibit a real increase for full consideration of the indebtedness of the corporation, but a fictitious increase only, and as the increase to the extent of $50,000 of the $135,000 indebtedness was real, and not fictitious, that increase cannot, in reason, law, or equity, be held to fall under the ban of the Constitution of Oklahoma.

The unavoidable result is that, where a corporation creates an increase of indebtedness, a part of which is for a full and valuable consideration and is a real increase, and a part of which is without such consideration and is a fictitious increase, and the real increase is readily severable from the fictitious increase, the former is valid, although the latter may be void or voidable under article 9, section 39, of the Constitution of Oklahoma, and the mortgage indebtedness of the Times Company to the extent of $50,000 was valid, notwithstanding that section.

This conclusion is consistent with the treatment by the federal courts of somewhat similar questions in Memphis, etc., Railroad v. Dow, 120 U. S. 299, 7 Sup. Ct. 482, 30 L. Ed. 595; Clark v. Johnson, 245 Fed. 442, 447, 157 C. C. A. 604; Granite Brick Co. v. Titus, 226 Fed. 557, 567, 570, 141 C. C. A. 313.

[5] In a claim against the estate of the bankrupt which Mr. C. B. Edgar filed he insisted that the Times Company was indebted to him for the $10,000 which he paid to it in the performance of the contracts between him and D. P. Flynn & Co., recited at the opening of this opinion. The court below held that under these contracts this $10,000 was a part of the consideration which he paid for the stock of Flynn and his associates that he bought, and that the corporation was therefore not indebted to him therefor, and it refused to allow his claim for it. From the order which disallowed this claim, Mr. Edgar appealed; but a careful consideration of the contracts, the testimony of the witnesses, and the briefs of counsel have left no doubt that the opinion and order of the court upon this subject were right.

Let the order of the court below of December 11, 1916, which disallowed that part of the claim of C. B. Edgar which related to the $10,000 he paid to the Times Company, be affirmed, with costs against him; and let the order of the court below of December 11, 1916, whereby the holders of the mortgage bonds of the Oklahoma City Times Company were adjudged to be entitled to a superior right and an equitable preference in the payment of their bonds and interest over the unsecured creditors, be affirmed also, with costs against Norman H. Wright, the trustee in bankruptcy and appellant.

AMERICAN GLYCERIN CO. v. HILL.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1919.)

No. 5183.

1. EXPLOSIVES ⟸7—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.
In an action for injuries received by plaintiff who was struck by the top of an acid tank or drum which detonated as a result of a fire and explosions in the factory of defendant manufacturing nitroglycerin, whether plaintiff was guilty of contributory negligence in returning to a place in proximity to the tank after the principal explosions *held*, under the evidence, for the jury.

2. NEGLIGENCE ⟸136(26)—JURY QUESTION—DIRECTION OF VERDICT.
It is only when the evidence is of such a character that all reasonable men would say on the facts shown that plaintiff was guilty of negligence that a court is justified in directing a verdict against him.

3. TRIAL ⟸260(1)—INSTRUCTIONS—REFUSAL.
Refusal of requested instructions covered by the charge given is not error.

4. EXPLOSIVES ⟸7—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.
The burden of proving contributory negligence of plaintiff seeking to recover for injuries as result of an explosion is on defendant.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Joseph W. Woodrough, Judge.

Action by Oscar Shriver against the American Glycerin Company. There was a judgment for plaintiff, and defendant brings error; George S. Hill, administrator of the estate of plaintiff, who died after granting of the writ, being substituted as defendant in error. Affirmed.

J. P. O'Meara, Charles E. Bush, and A. F. Moss, all of Tulsa, Okl., for plaintiff in error.

H. H. Montgomery, of Bartlesville, Okl., for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. Oscar Shriver, who, since the granting of the writ of error, has died, the administrator of his estate having been substituted as defendant in error, recovered a judgment in the court below against the plaintiff in error for personal injuries, alleged to have been sustained by him by reason of the negligence of plaintiff in error. The parties will be referred to as they appeared in the trial court.

The complaint alleged that the defendant was engaged on February 24, 1917, and for some time prior thereto, in manufacturing, keeping and storing nitroglycerin and other high and powerful explosives in a factory located about one-half mile west of what is known as the Torpedo Switch; that the plaintiff was employed and engaged on said February 24, 1917, in working for the Paragon Drilling Company and A. C. Siekman in the drilling of an oil or gas well near the said plant of the defendant, as a tool dresser; that the defendant was guilty of carelessness and neglect in the operation and maintenance of said plant. The negligence charged was that it negligently and carelessly removed fire, hot ashes, and coals from its boilers, and placed the same

near inflammable material of the boiler house, by reason whereof the boiler house became ignited, which caused the nitroglycerin and other explosives stored there to explode; that an acid tank, composed of zinc or iron material was thereby exploded, and pieces thereof hurled against the body of the plaintiff, severely injuring him.

The answer, in addition to a general denial, pleaded contributory negligence, by alleging that the plaintiff was at a safe distance from said plant at the time of the ignition and the explosions, but voluntarily, as a matter of curiosity, approached very close to the acid shed of the defendant, and but for that he would not have been injured. There was a reply denying the charge of contributory negligence.

The assignment of errors complains of the refusal of the court to direct a verdict for the defendant, the refusal to give certain instructions asked in behalf of the defendant, and also that the court erred in its charge as to the burden of proof to sustain the plea of contributory negligence.

Did the court err in refusing to direct a verdict for the defendant? It is not seriously contended by counsel for plaintiff in error that the evidence did not warrant a finding that the fire which caused the explosion was the result of the defendant's negligence, as there was substantial evidence of causal negligence in that the defendant permitted the throwing of hot ashes against the wooden side of the boiler house, and that this caused the fire, and the explosions from which the plaintiff received the injuries complained of.

[1, 2] But it is earnestly contended that the plaintiff was guilty of contributory negligence, because, it is claimed, the evidence conclusively established the fact that the plaintiff was in a place of safety and voluntarily went near the fire, with full knowledge that dangerous explosives were in close proximity, and were likely to explode by reason of the fire. The proof does not establish "conclusively," as claimed, that fact. There was substantial evidence that when the plaintiff discovered the fire, he watched it for about ten minutes, and then went away from the buildings that were burning, a distance of one-half to three-fourths of a mile; that as he was walking away he heard three explosions, the last of which was a big one; that when he heard the last one he thought everything had exploded that was explodable, and then with Mr. Cusick and Mr. Johnson he walked back to the vicinity of the burning buildings on his way to the drilling machine where he worked; that as he approached the latter a drum of acid gave way and threw the drumhead against his leg and injured it. Cusick and Johnson went back with him, and were walking along near him when this drumhead struck him. These three men thought it was ordinarily safe for them to go back by the side of these burning buildings. They supposed all explosions were over. Mr. Brenner, another employé, stayed back three-fourths of a mile away because he was afraid there was some danger. Nobody seems to have known that there was danger of the explosion of the drums containing the acid after the big explosion.

It is only when the evidence is of such a nature that all reasonable men, upon the facts shown, would say that the plaintiff was guilty of negligence that a court is justified to direct a verdict against him.

[3] The testimony made it the duty of the court to submit the question of the plaintiff's negligence to the jury. The instructions asked by the defendant and refused were fully covered by the charge of the court. A court is not required to charge the jury in the language asked by counsel, if the requested instructions are included in the court's general charge. Texas & Pacific R. R. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057; Kansas City Southern Ry. Co. v. Clinton, 224 Fed. 896, 902, 140 C. C. A. 340.

The court on the issue of contributory negligence charged the jury:

"That if the plaintiff went over towards his working place, the place where he usually worked, and used such ordinary care as an ordinarily prudent man would exercise, and had such regard for his own safety as an ordinarily prudent man would have, with the knowledge of all of the facts and circumstances that the evidence shows you he did have knowledge of, then he cannot be said to have himself either caused or contributed to his injury. But, on the other hand, if the defendant shows you by a preponderance of the evidence that there was a condition existing there which caused the plaintiff to know and appreciate as a man of ordinary prudence that there was a danger in going there, a danger to his person; that there was a liability of some such thing happening as did actually happen, and that the plaintiff went there in a spirit—or that the plaintiff went there in a spirit of imprudence, lack of ordinary care, willing to take a risk, knowing that there was a risk and still willing to hazzard it, then the plaintiff cannot recover, if a preponderance of the evidence shows you that the plaintiff went there knowing and realizing that there was a danger, but willing to take that risk and danger, then he cannot recover for the happening of something which he was fairly apprised of and appreciated, if that was his situation."

[4] Nor was it error to charge the jury that the burden of proof to establish contributory negligence was on the defendant, and it must establish it by a preponderance of the evidence. That is elementary. Inland & Seaboard Co. v. Tolson, 139 U. S. 551, 557, 11 Sup. Ct. 653, 35 L. Ed. 270; Texas & Pacific R. R. Co. v. Volk, 151 U. S. 73, 76, 14 Sup. Ct. 239, 38 L. Ed. 78; City of Winona v. Botzet, 169 Fed. 321, 329, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

The court committed no error in the trial of the cause, and its judgment is affirmed.

GRACE v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. February 8, 1919.)

No. 3427.

1. TRIAL ⟸171—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.
Where a cause was submitted to the jury on evidence establishing a prima facie case for plaintiff and evidence in contradiction thereof, it was error, on their announcement of inability to agree, to direct a verdict for defendant, especially in the absence of plaintiff and his counsel.

2. APPEAL AND ERROR ⟸280—RIGHT OF REVIEW—ESTOPPEL TO OBJECT.
Where verdict for defendant was directed without motion therefor, and while plaintiff and his counsel were absent by agreement between counsel, defendant is estopped to object that plaintiff did not except at the time in the presence of the jury.

Walker, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action at law by Aaron Grace against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial granted.

The record shows plaintiff in error, hereinafter styled plaintiff, being lawfully and by permission of defendant's agent on and aboard a moving train, was violently thrown off and ejected by the defendant's agents, to his great damage, etc., resulting in his falling under the moving train, being severely injured, mainly by loss of both of his legs. The defendant answered, specifically pleading the general issue and by notice as to evidence to be offered thereunder substantially pleaded that the plaintiff through his own negligence contributed to the injuries sued for.

The case was brought to trial before the court and a jury duly impaneled, and thereupon the plaintiff testified in his own behalf, substantially establishing the facts set forth in his declaration. This was followed with evidence to the contrary on the part of the defendant, mainly denying the facts testified to by plaintiff, and with evidence tending to show contributory negligence on the part of the plaintiff and impeaching the credibility of plaintiff and his witnesses. Then followed counter evidence in rebuttal, impeaching the credibility and character of the defendant's witnesses, and thereafter, according to the bill of exceptions, the following proceedings were had:

"Whereupon, both the defendant and the plaintiff having rested, the court charged the jury in substance that if they believed the testimony of the plaintiff, and believed that the plaintiff had made out his case by the preponderance of the evidence, and that the plaintiff had been thrown from the train, then the jury would find a verdict for the plaintiff in such a sum as would compensate him, etc.; but, on the other hand, it was the duty of the plaintiff to satisfy the minds of the jury by a preponderance of the evidence that his theory of the case was true, and that if he had failed to meet this burden, it was the duty of the jury to find a verdict for the defendant.

"Thereupon, at about 4 p. m., the jury retired to consider of their verdict, and the attorneys both for the plaintiff and the defendant, after having waited in the courtroom for fully an hour in anticipation of the verdict, agreed that the verdict of the jury might be received by the clerk in the absence both of themselves and the court. Plaintiff's attorneys then left for Gulfport. Afterwards, about 7 p. m., the jury notified the clerk that they were unable to agree upon a verdict, and the clerk notified the court of this fact. Whereupon the court came to the courtroom, ordered the jury into their box, ascertained that they were unable to agree upon a verdict, reviewed the facts of the case to them, and then ascertained that they were still unable to agree upon a verdict. Thereupon the court peremptorily instructed the jury to find a verdict for the defendant. All of which proceedings were had and done in the absence and without the knowledge or consent both of the plaintiff and his attorneys, and none of which became known to the plaintiff or his attorneys until the convening of court upon the following morning, when plaintiff was notified what proceedings had taken place, and that the following order had been entered on the minutes, to wit:

"'Aaron Grace v. L. & N. R. R. Company. No. 317.

"'Came the plaintiff in person and his attorneys, and came the defendant by its attorneys, and a jury having been duly selected, and both parties having offered evidence, and the jury, having considered of their verdict, returned into court and reported that they were unable to agree and thereupon the court charged the jury to find for the defendant and thereupon the following verdict was entered: "We, the jury, find for the defendant." And thereupon it is considered, ordered, and adjudged by the court that the defendant go hence without day, and have and recover against plaintiff its costs in this behalf. It is further ordered that plaintiff have sixty days within which to present a bill of exceptions. To all of which proceedings of the court the plaintiff then and there excepted and still excepts.

"'Whereupon counsel for plaintiff prays that this bill of exception may be sealed and signed by the judge of this honorable court, and same is signed and sealed accordingly this the 26th day of March, 1918.

"'H. C. Niles, Judge.'"

Among the errors assigned in this court are the following:

"III. The United States District Court erred in directing a verdict for the defendant. At the conclusion of this trial by the court and jury, the court instructed the jury both pro and con as set out in the bill of exceptions, and thereupon, about 4 o'clock p. m., the jury retired to consider of their verdict, and the attorneys both for the plaintiff and the defendant, after having waited in the courtroom for an hour in anticipation of the verdict, agreed that the verdict of the jury might be received by the clerk in the absence both of themselves and the court. Plaintiff and plaintiff's attorneys then left for Gulfport. Afterwards, about 7 o'clock p. m., the jury notified the clerk that they were unable to agree upon a verdict and the clerk notified the court of this fact. Whereupon the court came to the courtroom, ordered the jury into their box, ascertained that they were unable to agree upon a verdict, reviewed the facts of the case to them, and then ascertained that they were still unable to agree upon a verdict. Thereupon the court peremptorily instructed the jury to find a verdict for the defendant. All of which was done in the absence, and without the knowledge or consent, either of the plaintiff or his attorneys, and none of which became known to the plaintiff or his attorneys until the convening of court upon the following morning, when plaintiff was notified what proceedings had taken place, and that the following order had been entered on the minutes, to wit:

"'Aaron Grace v. L. & N. R. R. Company. No. 317.

"'Came the plaintiff in person and his attorneys, and came the defendant by its attorneys, and a jury having been duly selected, and both parties having offered evidence, and the jury, having considered of their verdict, returned into court and reported that they were unable to agree, and thereupon the court charged the jury to find for the defendant, and thereupon the following verdict was entered: "We, the jury, find for the defendant." And thereupon it is considered, ordered, and adjudged by the court that the defendant go hence without day, and have and recover against plaintiff its costs in this behalf. It is further ordered that the plaintiff have sixty days within which to present a bill of exceptions.'

"The District Court erred in not discharging the jury and entering an order of mistrial. The jury had been out of their box with the case under advisement for several hours, and announced that they were still unable to agree upon a verdict. Thereupon the court promptly instructed the jury to find a verdict for the defendant, instead of discharging the jury and entering an order of mistrial.

"IV. The United States District Court erred in directing a verdict for the defendant when the testimony was directly in conflict, and when the testimony for the plaintiff, if believed by the jury, made out a perfect case for the plaintiff. The plaintiff testified that he was riding upon the defendant's freight train by consent and with permission of the head brakeman; that while he was so riding he was mercilessly ejected from the train while it was running at a rapid rate of speed, contrary to all the laws of decency and humanity. Certain features of the plaintiff's testimony were supported by several other witnesses. This testimony was denied by, and was directly in conflict with the testimony of, the witnesses for the defendant. Instead of leaving the decision of this conflict in the facts to the jury, the court resolved the conflict in favor of the defendant, and instructed the jury to find for the defendant, thereby usurping the province of the jury.

"The United States District Court erred in directing a verdict for the defendant, where there was a material conflict in the testimony as above stated, and violated the right of the plaintiff under the Seventh Amendment to the Constitution of the United States.

"V. The United States District Court erred in directing a verdict for the defendant in the absence both of plaintiff and plaintiff's attorneys. This deprived plaintiff of his right to take a nonsuit. If plaintiff had been present when the court indicated its purpose to direct a verdict for the defendant, it would have been open to the plaintiff to take a voluntary nonsuit, which would have enabled him to make fuller and better presentation of his case, if the facts permitted, at another trial in another suit. But plaintiff and his

attorneys being absent, they were wholly deprived of their right to adopt this course."

George S. Dodds, of Gulfport, Miss., for plaintiff in error.
Gregory L. Smith, of Mobile, Ala., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). [1] As the cause was submitted to the jury upon a prima facie case establishing the plaintiff's claim for damages, and depending for sufficiency wholly upon the credibility given to the plaintiff's witnesses, and also upon conflicting evidence as to contributory negligence on the part of the plaintiff and upon evidence tending to impeach the credibility of witnesses of both the plaintiff and the defendant, and without any motion on either side to direct a verdict, it was clearly erroneous for the court below of its own motion to take the case from the jury by instructing a verdict for the defendant, and requires a reversal.

Particularly is this reversal required because the instruction for a verdict for the defendant was made in the absence of and without the knowledge of the plaintiff and his counsel, thereby depriving the plaintiff of his right to make seasonable objections thereto and reserve a proper bill of exceptions, or of taking a nonsuit at his option.

[2] The defendant's opposition in this court to the plaintiff's relief under this writ of error is that objections were not made in court at the time of the instructed verdict and exceptions reserved in the presence of the jury and before its discharge, and the authorities cited by him are in support of this opposition.

However, as the bill of exceptions granted by the court below shows that the absence of the plaintiff and his counsel was the result of an agreement between the parties, evidently made with the knowledge and consent of the court and with a view to the absence of counsel when the verdict should be received, we are of opinion that the defendant is estopped from invoking the claimed rule in this case.

The fourth and fifth assignments of error are well taken.

The judgment of the District Court is reversed, and the cause is remanded, with instructions to grant a new trial.

WALKER, Circuit Judge, dissents.

CUNARD S. S. CO., Limited, v. SMITH.

(Circuit Court of Appeals, Second Circuit. December 11, 1918.)

No. 83.

1. COURTS ⟸12(4)—FEDERAL COURTS—JURISDICTION.
The federal courts, whose jurisdiction is derived from the Constitution and acts of Congress, have no jurisdiction over an action at law, where both of the parties are aliens.

2. COURTS ⟸23—FEDERAL COURTS—JURISDICTION.
The federal court cannot obtain jurisdiction to hear and decide a case by consent of the parties.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. COURTS ⊂=351½—FEDERAL COURTS—JURISDICTION.
Under Judicial Code, § 37 (Comp. St. § 1019), the federal District Judge should dismiss a complaint on his own initiative, where the court was without jurisdiction, the action being between two aliens, and in event of the District Judge's failure to so act, the complaint could be dismissed by the Circuit Court of Appeals.

4. COURTS ⊂=12(2)—JURISDICTION—ALIENS.
Aliens who are sui juris, except enemy aliens, may maintain in the proper courts of this country actions to vindicate their rights and redress their wrongs.

5. ADMIRALTY ⊂=5—JURISDICTION.
While an admiralty court of the United States is under no obligation to entertain jurisdiction where all the parties are foreigners, it may entertain jurisdiction of a suit between aliens in civil causes of admiralty and maritime jurisdiction, and is inclined to do so when it is necessary to prevent a failure of justice.

6. MASTER AND SERVANT ⊂=217(24)—INJURIES TO SERVANT—ASSUMPTION OF RISK.
An experienced longshoreman engaged in loading buckets of dirt, which were hoisted out of the hold of a vessel and by means of a winch and tackle swung over to a lighter and dumped, who knew there was no landing man to watch for descending buckets, assumed the risk of injury therefrom.

In Error to the District Court of the United States for the Southern District of New York.

Action by Edward Smith against the Cunard Steamship Company, Limited. There was a judgment for plaintiff, and defendant brings error. Reversed without prejudice.

This cause comes here on writ of error to the United States District Court for the Southern District of New York. The plaintiff is a subject of the provisional government of Russia and is a resident of the borough of Brooklyn, city and state of New York. The defendant is a foreign corporation organized and existing under the laws of Great Britain.

The action is brought to recover damages in the sum of $25,000 for personal injuries which he received while employed by defendant as a longshoreman on one of its steamships. At the time of his injury the plaintiff was at work in the lower hold of the ship and was engaged in hoisting a part of the cargo of the vessel out of the hold. He was one of a gang of six men engaged in filling tubs or buckets with dirt, the buckets after they were filled being hoisted by means of a winch and tackle and swung over to a lighter on the side of the vessel where the contents were dumped. The opening of the hatch was about twenty feet square.

The allegation is that while the plaintiff was so engaged the bucket was through defendant's negligence and carelessness suddenly and without warning lowered, and that it struck the plaintiff with great force, permanently injuring his spine and back, as well as his chest and left shoulder, and "permanently injuring him about the head and causing him to suffer from permanent nervous shock and debility." The physician who had charge of his case, and who was employed by defendant to treat its employés, was not called by the plaintiff but by the defendant. He testified that when he concluded his treatment the plaintiff was all right and that he could find no possible limitation of motion. The plaintiff obtained a verdict for $2,000.

There are eleven assignments of error. Among the errors assigned it is said that the court erred in denying the defendant's motion to dismiss the complaint, on the ground that no negligence was proved on the part of the defendant, and also on the ground that the plaintiff was shown to have been guilty of contributory negligence and to have assumed the risk. It is also alleged that the court erred in various parts of the charge, and in certain refusals to charge.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Lord, Day & Lord, of New York City (Thaddeus G. Cowell, of New York City, of counsel), for plaintiff in error.

Edward J. McCrossin, of New York City (Francis Stockton McDivitt, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1-3] The complaint in this case must be dismissed, and for a reason not mentioned at the argument. The complaint discloses on its face that it is one which a federal court is without jurisdiction to entertain. The jurisdiction of these courts is derived from the Constitution and the acts of Congress. No jurisdiction is conferred upon the federal courts of a case in which both of the parties are aliens. Montalet v. Murray, 4 Cranch, 46, 2 L. Ed. 545; Mossman v. Higginson, 4 Dall. 12, 1 L. Ed. 720; Pooley v. Luco (C. C.) 72 Fed. 561; Prentiss v. Brennan, Fed. Cas. No. 11,385, 2 Blatchf. 162. And this complaint shows that the plaintiff and defendant are both aliens. A court of the United States cannot obtain jurisdiction to hear and decide a case by consent of the parties. People's Bank v. Winslow, 102 U. S. 256, 26 L. Ed. 101; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. It was the duty of the District Judge to have dismissed the complaint on his own initiative, even though the defendant did not call the matter to his attention. Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. § 1019), provides as follows:

"If in any suit commenced in a District Court, or removed from a state court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

But, as this was not done by the court below, it must be done by this court.

[4] It does not follow, however, that because the District Court of the United States, as such, had no jurisdiction of this cause on account of the alienage of the parties, the plaintiff is therefore unable to bring suit in any of the courts of this country to determine the merits of the action. For the law is, of course, well established that aliens who are sui juris, except alien enemies, may maintain actions to vindicate their rights and redress their wrongs when brought in the proper courts. It has been held in numerous cases that one alien may sue another alien in the state courts, even on contracts made abroad or for a tort committed in a foreign country. 2 C. J. 1070, 1071. And in the case at bar the tort complained of was committed in the North River, in the borough of Manhattan, in the city of New York.

[5] It may also be said, in passing, that while an admiralty court of the United States is under no obligation to entertain jurisdiction where all the parties are foreigners, yet it also may entertain jurisdic-

tion of a suit between aliens in civil causes of admiralty and maritime jurisdiction and is inclined to do so when it is necessary to prevent a failure of justice and if the rights of the parties would thereby be best promoted. C. J. 1258, 1259, where the cases are collected.

[6] As we must dismiss the complaint, and shall dismiss it without prejudice, we might close this opinion at this point. Nevertheless it may be of service to both parties for us to say that upon this record it appears to us that the plaintiff assumed the risk and that he could not have recovered if the court had had jurisdiction to try the case. The plaintiff's testimony shows that at the time of his injury he was 30 years of age; that he was not inexperienced as for a period of 6 years he had been working on longshore work in the hold of vessels in either loading or discharging cargo. It appears that usually there were "landing" men in the hold, whose duty it was to take charge of the descending buckets and to signal to the hold men when the buckets were coming down, and the plaintiff knew that no such men were present on the night of the injury. The following excerpt from the plaintiff's testimony is important:

"Q. You do not depend on any landing man to tell you when a tub is coming down, do you? A. I looked out for myself.

"Q. You looked out for yourself? A. Yes.

"Q. On this occasion you knew that there was not any landing man there, did you not? A. I knew it.

"Q. And how long had you been working there? A. Since 7 o'clock, 7 to half past 10.

"Q. And you had been working under these conditions without a landing man all that time, had you not? A. That night; yes."

In this case the elements out of which the danger arose were plainly visible. There was nothing present calculated to blind the plaintiff to his danger. The danger involved in working in the hold under the circumstances must have been understood by him every minute of the time he was at work that evening, and he could not have but known that he was liable to receive the injuries which he suffered and for which he seeks to recover. One who under such circumstances works assumes the risks as matter of law. For any person of ordinary prudence knew that to work under such conditions necessarily endangered his safety. Butler v. Frazee, 211 U. S. 459, 467, 29 Sup. Ct. 136, 53 L. Ed. 281.

Judgment is reversed without prejudice.

WARD, Circuit Judge (concurring). Inasmuch as we have dismissed the complaint in this cause because we have no jurisdiction to consider it, and have done so without prejudice, so that the plaintiff may present it to any court which has jurisdiction to dispose of it, I refrain from expressing any opinion upon the merits.

POSTAL TELEGRAPH-CABLE CO. v. CALL, District Judge.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1919.)

No. 3267.

1. RAILROADS ⊜5½, New, vol. 7A Key-No. Series—GOVERNMENT CONTROL—STAY OF ACTIONS—CONDEMNATION OF RIGHT OF WAY FOR TELEGRAPH LINE.
Under Act March 21, 1918, § 10, providing that actions at law or suits in equity may be brought against carriers under federal control and judgments rendered, but no process shall be levied against any property under federal control, an action by a telegraph company to condemn a right of way for a telegraph line along the right of way of a railroad company under federal control will not be stayed because the latter company was under federal control.

2. TELEGRAPHS AND TELEPHONES ⊜26¾, New, 7A Key-No. Series—AUTHORITY OF TELEGRAPH COMPANY UNDER FEDERAL CONTROL.
Though the United States has taken over the operation of telegraph lines, a telegraph company may institute and continue condemnation proceedings to acquire new rights of way; the company's franchise and corporate entity not having been affected by the government's action.

3. MANDAMUS ⊜31—REFUSAL TO PROCEED WITH CAUSE—RAILROAD—FEDERAL CONTROL.
Where the federal District Judge stayed proceedings in an action by a telegraph company to condemn a right of way for its line over a railroad right of way because the railroad was under federal control, *held*, that mandamus to compel the District Judge to proceed with the case will not be denied on the theory that the government might never surrender control of transportation systems, for Act March 21, 1918, § 10, relating to litigation against railroad companies, contemplated no delay in litigation, but merely a stay of process, and, in event private operation of railroads be resumed, it would be to the interest of the telegraph company to have the condemnation action disposed of.

Petition by the Postal Telegraph-Cable Company, a corporation, for writ of mandamus to Hon. Rhydon M. Call, Judge of the United States District Court for the Southern District of Florida. Writ ordered to issue.

Sam R. Marks, of Jacksonville, Fla. (Marks, Marks & Holt, of Jacksonville, Fla., on the brief), for petitioner.

John E. Hartridge, of Jacksonville, Fla., for respondent.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is an application addressed to this court by the petitioner for a writ of mandamus to the respondent, directing him to proceed to hear and determine a controversy pending between petitioner, as plaintiff, and the Florida East Coast Railway Company and the American Telephone & Telegraph Company, as defendants, in the District Court of the United States for the Southern District of Florida, in which the petitioner is seeking to condemn a right of way for a telegraph line, upon and along the right of way of the Florida East Coast Railway Company between East Palatka and Miami, a distance of about 304 miles.

[1] The petition avers that on April 15, 1918, the cause was at is-

sue and came on for trial, and that the defendant railway company then filed a special plea, setting out that its railroad was on December 28, 1917, taken possession of by the President of the United States, through the Secretary of War, and was then being operated by the Director General of Railroads of the United States, and that petitioner's condemnation action should not be permitted to go further without the consent of the Director General. The District Court sustained the plea, and ordered that the further prosecution of the cause be stayed or suspended until the petitioner had procured the consent of the Director General of Railroads or of the War Department, or until such time as the government had surrendered possession of the railroad of the Florida East Coast Railway Company to its owners.

Section 10 of "An act to provide for the operation of transportation systems while under federal control, for the just compensation of their owners, and for other purposes," approved March 21, 1918 (Act March 21, 1918, c. 25 [Comp. St. 1918, § 3115¾i]) is as follows:

"That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. *Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government.* Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. *But no process, mesne or final, shall be levied against any property under such federal control.*"

The pertinent parts are underscored. Its effect is to limit the interference of government control in the prosecution of suits against carriers, whether at law or in equity, to the enforcement of the judgment or decree and not to interfere with the right of the plaintiff to obtain a judgment or decree against the carriers. It permits actions at law or in equity to be brought against the carriers, and judgments to be rendered as now provided by law, and prohibits the carrier from defending upon the ground that it is an instrumentality or agency of the federal government. It provides, however, that the judgment or decree, when obtained, shall not be enforced, as against the property in federal control, by process, mesne or final. We think the express words of the statute require the court to proceed to judgment or decree in any pending cause, and to prohibit any defense being made to the obtaining of the judgment or decree upon the idea that the carrier or its property is in government control or possession.

The United States was not a party defendant in the condemnation case, and could not have been made such except by its consent, and so will not be affected by any decree that may be rendered in that cause, in its absence. Its rights are fully protected by the statutory provision that any decree there rendered is unenforceable while the rail-

road remains in the control of the government, if such a provision was necessary to afford such protection to it.

[2] The control of the United States over the lines of petitioner does not affect its right to institute condemnation proceedings. Petitioner's corporate entity and its franchises were not taken over by the government, but only its existing physical lines of telegraph. This left its right to institute condemnation proceedings and to acquire new rights of way unimpaired.

[3] It is said that the decree, if obtained, will be valueless, until the property is surrendered by the government, which may never occur, and that proceeding in advance of a surrender will prove a futile thing, if there turns out to be no surrender. There is a manifest advantage to the petitioner in being allowed to proceed to judgment now, in that the necessary period for securing a judgment will begin to run from the present time, instead of from the end of government control. If the decree never becomes enforceable against the railway company, no harm will be done it by now proceeding, except the time of counsel and witnesses during the hearing. The delay to the petitioner, if the proceeding is stayed, may be a serious detriment to it and to the public served by it. The statute seems to have been framed with the purpose of preventing government possession from causing delays in litigation, and we think it is properly applicable to this case.

Let an order issue to the respondent, directing him to proceed to hear and determine the controversy, as prayed for in the prayer of the petition.

WELLS v. BROWN et al.*

(Circuit Court of Appeals, Eighth Circuit. January 27, 1919.)

No. 5184.

1. COURTS ⟸359, 365—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—CONSTRUCTION OF WILLS.

In the absence of any question of violation of the federal Constitution or a federal statute, or of commercial law, a will must be interpreted by a federal court in accordance with the law of the state where made, as it existed at the time of testator's death, as evidenced by statute or rules of interpretation of the highest court of the state.

2. WILLS ⟸601(2)—CONSTRUCTION—DEVISE OF REAL ESTATE.

Under Gen. St. Kan. 1909, § 9831, providing that every devise shall be construed to convey all the estate of the testator, unless it clearly appears that testator intended to convey a less estate, where a paragraph of a will conveys all the title to real estate which testator could devise, and gives the devisee absolute power of disposition, a request, contained in a subsequent paragraph, that devisee devise to specified persons what might remain of the property at devisee's death, is ineffective.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by Robert Wesley Wells against Madeleine S. Brown, Robert Ryan Brown, a minor, represented by George T. McDermott, guardian ad litem, and Joseph L. Brown. Decree for defendants, and complainant appeals. Affirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied March 29, 1919.

D. W. Eaton, of Kansas City, Mo. (W. E. Ziegler, of Coffeyville, Kan., and Hyden J. Eaton, of Kansas City, Mo., on the brief), for appellant.

Robert Stone, of Topeka, Kan. (Charles D. Welch, of Coffeyville, Kan., and George T. McDermott and H. O. Caster, both of Topeka, Kan., on the brief), for appellees.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

SANBORN, Circuit Judge. This case properly presents to this court, by an appeal from a decree of dismissal of the complaint of Robert Wesley Wells, the question whether the second and third paragraphs of the will of Laura A. Wells vested on her death an absolute estate in fee in the real estate subject thereto in Eliza J. Wann, with unlimited power of disposition, or a life estate with power of disposition during her life only, with remainder over in that portion of the property which she did not dispose of during her life, to Madeleine S. Wells and Robert L. Wells. The second and third paragraphs of the will, so far as they are material to this issue, read in this way:

"2. I give, devise and bequeath to my mother, Eliza Jane Wann, all my property, real, personal and mixed, of whatever nature and kind whatsoever and wheresoever the same shall be situated at the time of my death, to have and to hold, as her own and exclusive property in case she survives me.

"3. Reposing full faith and confidence in the judgment and discretion of my mother, Eliza Jane Wann, it is my wish and I request that she devise and bequeath whatever remains at the time of her death of the property which she shall have received from me by the provisions of this will as follows:

"That she devise and bequeath one-half of said property to my adopted daughter, Madeleine S. Wells, and one-half to my nephew-in-law, Robert Wesley Wells, or if either be dead, to their surviving issue."

[1] The property devised was situated in the state of Kansas and the testatrix died there on the 5th day of February, 1913. Established rules for the construction by the federal courts of wills of real estate are: (1) That, in the absence of any question of a violation of the federal Constitution or of a federal statute, and in the absence of any question of commercial law, wills must be interpreted in accordance with the law of the state in which they were made, as it is evidenced by its statutes and the rules of interpretation of those statutes and of wills which have been adopted by the highest judicial tribunal of the state (Lucas v. McNeill, 231 Fed. 672, 145 C. C. A. 558); and (2) that a will must be construed according to the law thus evidenced as that law was at the time of the death of the testatrix, in this case on February 5, 1913, and not as it was at any other time prior or subsequent thereto, when the established law differed from that at the time of the death (De Peyster v. Clendining, 8 Paige [N. Y.] 295, 304; Dodge v. Williams, 46 Wis. 70, 106, 1 N. W. 92, 50 N. W. 1103; In re Kopmeier, 113 Wis. 233, 89 N. W. 134, 138; Wilson v. Greer, 50 Okl. 387, 151 Pac. 629, 632; Barber et al. v. Brown, 55 Okl. 34, 154 Pac. 1156).

[2] At the time of the death of the testatrix the statutes of Kansas provided that:

"Every devise of real property in any will shall be construed to convey all the estate of the testator therein which he could lawfully devise, unless it shall clearly appear by the will that the testator intended to convey a less estate." Gen. Stat. Kan. 1909, § 9831.

Many opinions of the Supreme Court of Kansas interpreting wills had been rendered before February 5, 1913, when the testatrix died, and many have been rendered since. Those opinions have been exhaustively reviewed and discussed by counsel in their briefs, and they have received the careful perusal and consideration of the court. They have convinced that, whatever changes or modifications have been wrought since by the decisions or opinions in Bullock v. Wiltberger, 92 Kan. 900, 142 Pac. 950, Morse v. Henlon, 97 Kan. 399, 155 Pac. 800, Postlethwaite v. Edson, 98 Kan. 444, 155 Pac. 802, and Bryant v. Flanner, 99 Kan. 472, 162 Pac. 280, the law of Kansas on February 5, 1913, evidenced by the statute cited and by the opinions of its Supreme Court, rendered prior to that date, was that when a will containing two paragraphs, the first of which, standing alone, was sufficient to convey all the title to the real estate in question which the testator could lawfully devise, and was also sufficient to give the testator the power of disposition thereof, and the second paragraph disclosed an endeavor to diminish that estate, the devise contained in the first paragraph was valid, and that in the second was void, because (1) the first devise could not be lawfully diminished by a subsequent grant or devise to another than the first devisee; and (2) where the first devisee is given an absolute power of disposition, a grant of a remainder over in a subsequent paragraph is ineffective. McNutt v. McComb, 61 Kan. 25, 58 Pac. 965; Holt v. Wilson, 82 Kan. 268, 269, 272, 273, 108 Pac. 87; Thornberry v. Fletcher, 91 Kan. 744, 745, 747, 139 Pac. 391.

The court below tested this will by this law, and reached the conclusion that in view thereof, and of the express provision of the Kansas statutes, that every devise of real property in any will shall be construed to convey all the estate of the testator therein which he could lawfully devise, unless it shall clearly appear by the will that the testator intended to convey a less estate, it could not hold that it clearly appeared from this will that the testatrix intended by its first paragraph to convey less than all the estate she could lawfully devise. No logical or rational way of escape from this conclusion has been found. The devise in the second paragraph of the will, standing alone, was ample to convey all the estate the testatrix could lawfully devise, and it gave the devisee the absolute power of disposition. Therefore, under the law of Kansas as it stood on February 5, 1913, that estate could not be diminished, nor could a remainder over be granted by the subsequent third paragraph of the will, and the decree below is

Affirmed.

STEAMER AVALON CO. v. HUBBARD S. S. CO.
THE GENERAL HUBBARD.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1919.)

No. 3197.

1. SALVAGE ⇐34—AMOUNT OF COMPENSATION—ADEQUACY OF AWARD.
An award of $2,000, salvage to a steamship worth $200,000, for towing another steamship with a broken crank shaft and worth, with cargo, $481,000, from a point 14 miles off the Oregon coast to Astoria, requiring

18 hours, although the weather was fair and there was little danger, *held* inadequate, and increased to $5,000.

2. SALVAGE ⟸24—THEORY AND PURPOSE OF REMUNERATION.

Salvage is both compensation and reward, and, while it should not be extravagant, it should be liberal, to encourage prompt, energetic, and efficient service in the relief of vessels in peril.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Salvage.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit in admiralty by the Steamer Avalon Company against the American steamer General Hubbard; Hubbard Steamship Company, claimant. Decree for libelant, from which it appeals. Reversed.

Ira S. Lillick, of San Francisco, Cal., for appellant.

Edward J. McCutchen, Warren Olney, Jr., and Charles W. Willard, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. [1] About midnight July 24, 1916, the steamer General Hubbard, of the value of $465,000, carrying a cargo of lumber of the value of about $16,000, broke her crank shaft when proceeding southward along the Oregon coast, about 14 miles from Cape Meares. She sent up rockets to attract the attention of the lighthouse keeper at the cape, so that a steam tug might be sent out, whereby a request might be telephoned to the owners at Astoria, to send out a tugboat from Astoria. The steamer Avalon, valued at $200,000, carrying but 20 or 30 tons of cargo, proceeding northward on a voyage to Willapa Harbor, saw the signals and drew near, and, at the request of the captain of the General Hubbard, took the latter vessel in tow, had her in tow 18 hours, and left her at Astoria. The court below found that the services were salvage services, but that they were not attended by any special danger, and that the Avalon was entitled to an award of $2,000 for the service, including the services of her crew.

The appellant, on appeal to this court, contends that the amount awarded by the court below is inadequate. The evidence indicates that there was no danger that the General Hubbard would drift to the shore, since she lay 14 miles therefrom. She carried a deckload of lumber, and it was suggested by the appellant that, in case a northwesterly gale came up, she might drop her deckload and fill with water. But the weather was fair, and the evidence was that at that season of the year little danger was to be apprehended of stormy weather. There was no entry in the logbook of either vessel to indicate any condition of peril. It appears, however, that in entering the Columbia river a strong current was met, which impeded progress, and for half an hour prevented headway. The captain of the Avalon testified as to the danger of this particular part of the operation, and said:

"It would not have taken but very little, and she would have gone on the south jetty, and she would have taken me with her."

The officers of the General Hubbard, however, contradicted this testimony, and the finding of the trial court that no special danger attended the salvage service must be accepted as conclusive on this appeal.

The elements of salvage service here to be considered, therefore, are limited to the labor performed by the salvors, the value of the property which they employed in the service, the value of the property salved, and the degree of danger from which it was rescued. It is evident that a disabled steamship, without wireless equipment, lying in the trough of the sea, unable to keep her head up to the wind, and carrying a deckload 16 feet high, is in some degree of peril. The peril in this instance was diminished by the fact that there was little wind or sea, and there was reasonable expectation of a continuation of favorable conditions, and the steamship lay in an ocean path not infrequently traveled by vessels.

[2] This court has repeatedly applied the rule expressed in Simpson v. Dollar, 109 Fed. 814, 48 C. C. A. 663, where we said:

"No exact criterion can be found for estimating the amount of salvage in any case. The judgments of courts must necessarily differ as to the precise amount to be allowed under given circumstances. Where there has been no mistake in fact, or application of an unwarranted rule of compensation in arriving at the award, and the amount allowed cannot be clearly seen to be inappropriate, the courts on appeal have been reluctant to disturb the decision of the trial court."

But salvage is both compensation and reward, and while it should not be extravagant, or such as to excite greed, it should be liberal, to encourage prompt, energetic, and efficient service in the relief of vessels in peril. Sonderburg v. Towboat Co., 3 Woods, 146, Fed. Cas. No. 13,175; Murphy v. Ship Suliote (C. C.) 5 Fed. 99; The Blackwall, 10 Wall. 1, 14, 19 L. Ed. 870. In the latter case it was said:

"Compensation as salvage is not viewed by the admiralty courts merely as pay, * * * but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property."

Notwithstanding that the services were not perilous in the case at hand, the circumstances present a salvage case of merit, entitling the salvor to a fair reward for efficient and successful services in rescuing property of great value. The sum awarded is so low as to constitute no appreciable reward for salvage. It is little, if any, more than remuneration to the appellant for time, expenses, and the use of means, if we take into account the earning capacity of vessels engaged in the coastwise trade in the summer of 1916. We think the award is so low as to involve a misapplication of the law of salvage, and that a fair award would be not less than $5,000.

The decree is reversed, and the cause is remanded, with instructions to enter a decree for the appellant in the sum of $5,000.

In re PRUSSIAN.

(District Court, E. D. Michigan, S. D. February, 1919.)

No. 3518.

1. BANKRUPTCY ⟸241(1)—EXAMINATIONS BEFORE REFEREE—RIGHTS OF CREDITORS—"PROCEEDING IN BANKRUPTCY."

The examination of witnesses before a referee, under Bankruptcy Act July 1, 1898, § 21a (Comp. St. § 9605), is a "proceeding in bankruptcy" before a court, and every creditor of the bankrupt is a party in interest and entitled to participate therein, and to the presence of counsel in his behalf.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Proceeding in Bankruptcy.]

2. BANKRUPTCY ⟸241(1)—EXAMINATION BEFORE REFEREE—RIGHT OF CREDITOR AS WITNESS TO COUNSEL.

That a creditor is subpœnaed by the trustee for examination before a referee, under Bankruptcy Act July 1, 1898, § 21a (Comp. St. § 9605), does not lessen his right as a creditor to be represented by counsel, nor does the fact that he has not yet proved his claim, nor that his counsel happens also to be attorney for the bankrupt.

In Bankruptcy. In the matter of Meyer Prussian, bankrupt. On review of order of referee. Remanded.

Selling & Brand, of Detroit, Mich., for petitioner.

Henry M. Butzel and B. J. Lincoln, both of Detroit, Mich., for trustee.

TUTTLE, District Judge. This matter is before the court on a petition to review an order of the referee in bankruptcy for this division, excluding from an examination being held under Bankruptcy Act July 1, 1898, c. 541, § 21a, 30 Stat. 551 (Comp. St. § 9605), an attorney who appeared at such examination as counsel for a creditor who had been called by the trustee for examination. The exclusion was based on the ground that such attorney was also counsel for the bankrupt and that therefore his presence would be improper, and on the further ground that as such creditor had not proved his claim in the bankruptcy proceedings he was not a creditor and therefore not entitled to be represented at the hearing. The question certified by the referee is thus stated by him in his certificate:

"The sole question for review, therefore, is: May a witness who is subpœnaed to appear before the referee at the instance of the trustee and for the purpose of inquiring into the conduct, assets, and property of the bankrupt, where the witness, although a creditor, has not filed a claim in the proceedings, be represented by the attorney for the bankrupt, over the protest and objection of the trustee or his attorney?"

[1] Section 21a provides as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt, whose estate is in process of administration under this act."

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

General Order 4 (89 Fed. iv, 32 C. C. A. viii) provides as follows:

"Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the Circuit Court or District Court."

General Order 22 (89 Fed. x, 32 C. C. A. xxv) provides, among other things, as follows:

"The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law."

Reading these provisions together, it seems plain that an examination under section 21a is a legal proceeding in court involving the rights of both the bankrupt and his creditors. The objects of such a proceeding are, of course, to assist the trustee to discover concealed assets of the bankrupt, to ascertain whether the bankrupt has given preferences to any of his creditors, to learn whether the bankrupt has been guilty of acts which would prevent him from obtaining his discharge in bankruptcy, and, in general, to aid the trustee to recover, for the creditors, any property to which they are entitled, to protect their rights in the bankruptcy proceedings, and to assist the court in administering the estate of the bankrupt. Cameron v. United States, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448; Ulmer v. United States, 219 Fed. 641, 134 C. C. A. 127 (C. C. A. 6). This examination is a proceeding in bankruptcy before a court, in which witnesses are examined and cross-examined, as in ordinary trials in law or equity. It is a more or less public proceeding. In re Greenbaum, 249 Fed. 468, 161 C. C. A. 426 (C. C. A. 6).

It seems, therefore, clear that every creditor of the bankrupt is a party in interest to such proceeding and entitled to participate therein and to the presence of counsel on his behalf. Remington on Bankruptcy (2d Ed.) vol. 2, § 1574; Good v. Kane, 211 Fed. 956, 128 C. C. A. 454 (C. C. A. 8); General Order 4; General Order 22.

[2] One of the fundamental rights of every person compelled or entitled to appear in court to defend himself or his property is the right to be attended by counsel. Creditors, therefore, having interests in bankruptcy proceedings vitally affecting themselves and their property certainly should not be deprived of this fundamental and valuable right. The fact that a creditor entitled to thus appear and be represented by counsel at this examination is summoned to attend as a witness surely cannot so affect the situation that a creditor who might otherwise have attended the hearing with counsel loses this right merely because, instead of appearing voluntarily, he attends in response to a subpœna. No good reason for this distinction has been presented to me and I can perceive none.

Nor does the fact that a creditor has not actually proved his claim render him any the less a creditor of the bankrupt within the meaning of the Bankruptcy Act. In re Jehu (D. C.) 94 Fed. 638; In re Walker

(D. C.) 96 Fed. 550; In re Kuffler (D. C.) 153 Fed. 667; In re Rose (D. C.) 163 Fed. 636; Beaven v. Stuart, 250 Fed. 972, —— C. C. A. ——.

Furthermore, this right of the creditor in the present case to have counsel present at his examination before the referee, cannot, in my opinion, be lost or affected by the fact that his attorney happened also to be the attorney for the bankrupt. It appears from the record that the attorney who represented the creditor upon this hearing had been his attorney for some time previously, and there is no claim, or evidence tending to support an inference, that there was any collusion between the creditor and the bankrupt, or any lack of good faith on the part of the attorney in question. No authority has been cited, and I have discovered none, holding that a party, if entitled to counsel, cannot be represented by a particular attorney simply because the latter happens to be also attorney for another party in the same case, and even though such other party did not have any right to be represented by counsel.

The only instance in which the court would have a right to be concerned with the question whether one attorney could properly represent more than one client interested in the same cause is when in fairness to the clients the retainers are inconsistent and the same attorney could not fairly and honestly serve both clients. No such question is here presented. I am satisfied that no authority can be found holding that an attorney cannot serve as many clients as desire to employ him in the same proceeding, unless such retainers become unprofessional, because they place the attorney on opposite and inconsistent sides of a contention, so that he cannot be fair with all of his clients. There is nothing to prevent a creditor from joining his cause with that of a bankrupt. If such a creditor and a bankrupt see fit to do that, and, knowing the full situation, employ the same counsel, there is nothing improper about it. The question of the propriety of such a course is one for the clients directly concerned, and does not involve or concern other parties to the contest.

It is therefore unnecessary to consider, and this court does not decide, whether this attorney, if appearing as counsel for the bankrupt, would have been entitled to be present at this examination.

It is urged with much earnestness that to permit the presence of counsel, who is also attorney for the bankrupt, at such an examination, would tend to defeat the very object thereof, by permitting the bankrupt to obtain information as to the testimony given at the examination, and thus enable him to cover up his tracks and evade justice. Any such argument, however, should be addressed to the tribunal which made this law, and not to the court, whose only duty and power in this connection is to construe the law so made.

The contention really amounts to this, that the examination provided by section 21a should be held to be a secret inquisition, at which only certain persons may be present. Aside from the inherent difficulty in determining just who might and who might not attend such examination, it is not clear by what authority a trustee in bankruptcy, or even the referee or court, could convert this bankruptcy proceeding, held in a court, with witnesses sworn and testifying, subject to exam-

ination and cross-examination in conformity with the rules of law, into a secret session at which certain parties, having rights which may be affected by the questions asked or the answers given at the hearing, may be compelled to attend, but from which their counsel, and other parties having rights involved in such proceeding, together with their counsel, may be excluded. Counsel have not pointed out any provision in the Bankruptcy Act justifying such a construction of the statute or rules applicable, and I know of none. The provisions already mentioned seem to clearly indicate that a contrary construction is the proper one.

I cannot resist the conclusion that the referee erred in excluding from this examination, under the circumstances presented by the record, counsel for this creditor, and the cause must be remanded for further proceedings not inconsistent with this opinion.

HUTTON et al. v. TERRILL.

(District Court, S. D. New York. August 23, 1918.)

1. INTERNAL REVENUE ⊂⊃4—CONSTRUCTION OF STATUTE.
An act providing for an internal revenue tax must be construed as a revenue act, although it may have other objects in addition to that of raising revenue.

2. SALES ⊂⊃412—COTTON FUTURES ACT—ACTION ON CONTRACT—PLEADING.
A failure to comply with the provisions of Cotton Futures Act, §§ 3, 4 (Comp. St. §§ 6309c, 6309d), requiring contracts of sale of cotton for future delivery to be in writing and stamped, is matter of defense, in an action on the contract, to be pleaded by way of answer.

3. BROKERS ⊂⊃58—COTTON FUTURES ACT—VALIDITY OF CONTRACT.
The provisions of Cotton Futures Act, §§ 3, 4 (Comp. St. 1916, §§ 6309c, 6309d), imposing an excise tax on contracts of sale of cotton for future delivery, "made at, on, or in any exchange," and requiring such contracts to be in writing, or evidenced by a memorandum showing names and addresses of seller and buyer, do not contemplate the making of contracts otherwise than in accordance with the usual rules of exchanges, and a contract is not invalid because made by a broker in his own name, on his own credit, and without at the time disclosing the name of his principal.

At law. Action by Edward F. Hutton and others against Archibald S. Terrill. On motion by plaintiff for judgment on the pleadings, after demurrer by defendant. Motion granted, with leave to answer.

Millard F. Tompkins, of New York City, for the motion.
C. C. Daniels, of New York City, opposed.

MAYER, District Judge. The action is to recover $12,620, with interest, brought by plaintiffs, who are brokers and members of the New York Cotton Exchange. The first two causes of action are for moneys expended for defendant's use and at his request in purchases and sales of cotton for future delivery upon the New York Cotton Exchange; statements rendered defendant of such transactions, partial payments made, and promises to pay the balance being pleaded.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The first two causes of action are identical in form, except that in the second cause of action the sale by plaintiffs of the cotton purchased by them for defendant's account was made after notice, because plaintiffs' margin was exhausted, and defendant, after notice of the sale, ratified and confirmed the same and promised to pay the balance. The third cause of action is upon an account stated for the balance upon a further statement rendered.

The complaint in all its essential allegations is practically identical with the complaint in Springs v. James, 137 App. Div. 110, 121 N. Y. Supp. 1054, affirmed 202 N. Y. 603, 96 N. E. 1131. The sole ground for the demurrer is that the complaint fails to show that the provisions of what is known as the United States Cotton Futures Act, approved August 11, 1916 (39 Stat. 476, c. 313 [Compiled Statutes c. 8B, § 6309a]), were complied with, in that—

(a) It fails to allege that the stamp tax of two cents for each pound of cotton provided for in the Cotton Futures Act was paid in connection with the purchases and sales of cotton for the defendant's account.

(b) It fails to allege that the contracts for the cotton purchased and sold were in writing.

(c) It alleges that the purchases were made in the plaintiffs' own name, without disclosing the name of their principal, the defendant.

The present act became law on August 11, 1916, and provides, inter alia:

"That this act shall be known by the short title of the 'United States Cotton Futures Act.' * * *

"Sec. 2. That, for the purposes of this act, the term 'contract of sale' shall be held to include sales, agreements of sale, and agreements to sell. * * *

"Sec. 3. That upon each contract of sale of any cotton for future delivery made at, on, or in any exchange, board of trade, or similar institution or place of business, there is hereby levied a tax in the nature of an excise of 2 cents for each pound of the cotton involved in any such contract. * * *

"Sec. 4. That each contract of sale of cotton for future delivery mentioned in section three of this act shall be in writing plainly stating, or evidenced by written memorandum showing, the terms of such contract, including the quantity of the cotton involved and the names and addresses of the seller and buyer in such contract, and shall be signed by the party to be charged, or by his agent in his behalf. * * *

"Sec. 12. That no contract of sale of cotton for future delivery mentioned in section three of this act which does not conform to the requirements of section four hereof and has not the necessary stamps affixed thereto, as required by section eleven hereof shall be enforceable in any court of the United States by, or on behalf of, any party to such contract or his privies."

Comp. St. §§ 6309a–6309d, 6309m.

It is for alleged failure to comply with the provisions supra that defendant seeks to avoid liability.

The present act differs from the Act of August 18, 1914 (38 Stat. 693, c. 253), only in that the provision of the previous act imposing a tax of two cents per pound on orders given to purchase or sell cotton not of a certain standard, is omitted in the present act, which confines the tax to the cotton contracts themselves.

The previous act had been held unconstitutional by Judge Hough,

because, although a revenue measure, it did not originate in the House of Representatives. Hubbard v. Lowe (D. C.) 226 Fed. 135.

[1] While it is plain that the act had, for its purpose, objects other than or in addition to raising revenue, it must be construed as a revenue act. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 62 L. Ed. 1061, Ann. Cas. 1917D, 854; Hubbard v. Lowe, supra; Lowe v. Farbwerke-Hoechst Co., 240 Fed. 671, 153 C. C. A. 469. If not so construed, then some of the provisions of the act might be regarded as unconstitutional.

Bearing in mind the foregoing, the alleged infirmities of the complaint will be considered in the order above recited.

[2] (a) The failure to allege the payment of the stamp tax. Passing by, without deciding, plaintiffs' contentions that there is no allegation to justify the inference that the cotton sold was of the grade or standard taxable, and that the provisions of section 12 apply only to an action to recover on the contract itself, as distinguished from an action to recover moneys expended for another's account, the demurrer is not good as a matter of pleading. It will be noted that the statute does not make the contract void, but only not enforceable in the courts of the United States. What the statute thus provides amounts, at best, to a defense or bar to recovery, and must be pleaded by way of answer. Bean v. Flint, 204 N. Y. 153, 97 N. E. 490.

(b) The failure to allege that the contracts were in writing must also be pleaded as a defense. Crane v. Powell, 139 N. Y. 379, 34 N. E. 911; Matthews v. Matthews, 154 N. Y. 288, 48 N. E. 531.

[3] (c) The complaint sets forth that the purchases were "made in said plaintiffs' own name and without disclosing defendant's name." This brings up acutely for construction section 4 of the act, supra. It must be remembered that section 4 refers to contracts of sale of cotton for future delivery, mentioned in section 3, and section 3 refers to contracts "made at, on, or in any exchange, board of trade, or similar institution or place of business. * * *"

Being a revenue measure, the purpose of sections 3 and 4 must be assumed to be the safeguarding of the government in the observance and collection of the tax. When plaintiffs made purchases on the Cotton Exchange, they were obviously the persons to be charged under the statute, so far either as the government or the seller was concerned. It must be assumed that the statute was enacted, in this regard, to prevent tax evasions, and not to affect contractual relations. Any other construction, if permissible, could only be justified (if at all) by a clear requirement that brokers on the Exchange could not, in effect, do business on their own credit and responsibility. Of course, the only way in which business on exchanges can be done is to deal with a member of the Exchange. Such member is subject to rules and supervision. No one would think ordinarily, in the quick and important transactions on exchanges, of taking the time to investigate the responsibility of the broker's customer or principal; and yet, if the Exchange member is not the "party to be charged," for the purposes of section 4, that result is what the statute would ultimately require.

Some contrary views seem to have been expressed by the District

Court for the Western District of Arkansas, with which I find myself unable to agree, on the grounds stated, as well as on other grounds, which could be elaborated, if necessary. I think, however, that any doubt (if such there be) should be resolved by the court of first instance in favor of the existing method of doing business on the Cotton Exchange, rather than to have any disturbance at this time. The business, as well as other problems with which the country is dealing, are sufficiently difficult without adding to them, and, if the conclusions here arrived at should be erroneous, it will be time enough to correct them when and if the questions here suggested are presented to the appellate courts.

Motion granted, with costs, with leave, however, to defendant to answer over, without costs, within fifteen days.

BROWN v. SPELMAN et al.

(District Court, E. D. New York. May 17, 1918.)

ARMY AND NAVY ⊂⊃20—DRAFT—AUTHORITY OF LOCAL BOARD.

As under Presidential Regulations, § 61, promulgated under the Selective Service Act (Comp. St. 1918, §§ 2019a, 2019b, 2044a–2044k), a local board, whenever there is a claim made that through error or fraud a person is registered who is not subject to registration, can only require such person to submit his claim in writing and transmit the same to the adjutant general of the state, mandamus or certiorari will not lie to compel the local board to strike from the draft list the name of one who claimed to have registered through error; it not appearing that he had submitted his claim in writing for transmission to the adjutant general.

At Law. Application by Sam Brown for writ of certiorari or mandamus, directing James J. Spelman and others, as members of Local Board for Division 35, Borough of Brooklyn, City of New York, State of New York, to strike the name of applicant from the registration lists of the Local Board, created under the Selective Service Act. On motion for preliminary writ of mandamus or certiorari and for prohibition. Denied.

See, also, 254 Fed. 215.

Solomon S. Schwartz, of Brooklyn, N. Y., for plaintiff.

Melville J. France, U. S. Dist. Atty., of Brooklyn, N. Y., for defendants.

GARVIN, District Judge. This is an application for a writ of certiorari or mandamus, directing the defendants, and each of them, to strike the name of the plaintiff from the registration lists of one of the local boards, created under an act of Congress known as the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2019a, 2019b, 2044a–2044k]), and asking that a writ of prohibition be issued prohibiting the defendants from certifying the plaintiff to military service. The defendants are the members of local board for division 35 of the city of New York. The plaintiff claims that on

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the 5th day of June, 1917, he was over the age of 31 years; that he then appeared before the registration board for the 158th precinct, county of Kings, of the state of New York, and inquired of said board whether he should have to register under the Selective Service Law; that some members told him that he would not have to register, but that the chairman or registrar of the board told him that he must be registered, and that if the board subsequently ascertained that registration was unnecessary under the law plaintiff's name would be taken from the list; and thereupon plaintiff registered. Subsequently plaintiff was required to present himself for a physical examination, and was found eligible for military service. A questionnaire was then filled out by plaintiff and filed with local board 35, by whom he was classified in class A–1.

Plaintiff thereafter applied to the defendants to cancel his registration, and the defendants have declined so to do. He then requested to be heard and bring witnesses, but the defendants still refused to give him a hearing. Thereafter he applied to the adjutant general of the state of New York to have his registration canceled, and his application has been denied.

Section 61 of the regulations promulgated by the President November 8, 1917, under authority of the act of Congress approved May 18, 1917, known as the Selective Service Law, provides as follows:

"Section 61. *Cancellation of Registration of Persons Not Subject to Registration.*—Whenever a claim shall be made to a local board that, through error or fraud, a person is registered who is not subject to registration the board shall require the person to submit his claim in writing, together with such proof as he may care to offer. The local board shall forward the claim and the proof with its finding of fact and recommendation to the adjutant general of the state, who shall examine the proof, and, if he is of the opinion that the person was not subject to registration, shall direct the local board to cancel the registration and amend its records accordingly."

There is nothing to indicate that the plaintiff has complied with this section. It is plain that the regulations intend to impose upon local boards the duty of transmitting to the adjutant general of the state of New York any written claim and such proof as relates to it, if offered by the registrant, who claims that he has been registered by error or fraud and is not subject to registration. Upon receipt of such claim in writing the local board can do nothing except forward it, with its finding of fact and recommendation, to the adjutant general of the state, and await instructions from the adjutant general. The papers do not show that the local board has disregarded the regulations.

The motion for a preliminary writ of mandamus or certiorari, and for a writ of prohibition, is denied.

RHUBERG v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. February 24, 1919.)

No. 3196.

1. ARMY AND NAVY ⟸40—ESPIONAGE ACT—PROSECUTION FOR VIOLATION—EVIDENCE.
On trial of a defendant for violation of Espionage Act, § 2 (Comp. St. 1918, § 10212c), by making statements intended and calculated to obstruct the recruiting and enlistment service, evidence of statements made by him before the United States was at war, tending to show his attitude toward Germany and this country, and limited to that purpose, *held* properly admitted.

2. ARMY AND NAVY ⟸40—ESPIONAGE ACT—PROSECUTION FOR VIOLATION—VARIANCE.
An averment in an indictment for violation of Espionage Act, § 2 (Comp. St. 1918, § 10212c), as to obstructing recruiting, etc., that certain statements were made by defendant in the presence of two persons named, is supported by evidence that they were made in the presence of one of them.

3. ARMY AND NAVY ⟸40—ESPIONAGE ACT—VIOLATION—"OBSTRUCT RECRUITING OR ENLISTMENT SERVICE."
A person obstructs the recruiting and enlistment service, within the meaning of Espionage Act, § 2 (Comp. St. 1918, c. 10212c), if he interferes with or renders it more difficult, and it is not necessary to establish a violation of the act to prove that he actually prevented enlistments or recruiting.

4. ARMY AND NAVY ⟸40—ESPIONAGE ACT—INDICTMENT FOR VIOLATION.
Indictment under the Espionage Act, § 2 (Comp. St. 1918, § 10212c), for obstructing the enlistment and recruiting service, *held* sufficient.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Criminal prosecution by the United States against Julius Rhuberg. Judgment of conviction, and defendant brings error. Affirmed.

Ridgway & Johnson and G. G. Schmitt, all of Portland, Or., for plaintiff in error.

Bert E. Haney, U. S. Atty., and Barnett H. Goldstein, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The indictment in this case contained four counts, each charging a violation of the Espionage Act. Act June 15, 1917, c. 30, 40 Stat. 217–219. The third count was dismissed before trial. Upon the trial the jury found the defendant not guilty as to counts 1 and 2 of the indictment, and guilty as to count 4. The fourth count charges:

"That at and during all the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States was then and is now at war with the Imperial German government, said state of war having been on said 6th day of April, 1917, duly declared by Congress and duly proclaimed by the President of the United States of America, in the exercise of the authority vested in them as by law provided.

"That Julius Rhuberg, the above-named defendant, on, to wit, between the

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*Rehearing denied May 12, 1919.

1st day of June, 1917, and the 1st day of January, 1918, the exact dates and places being to the grand jury unknown, in the county of Sherman, state and district of Oregon, and within the jurisdiction of this court, then and there being, with the intent then and there on the part of him, the said defendant, to obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States, did then and there, knowingly, willfully, unlawfully, and feloniously obstruct the said recruiting and enlistment service of the United States, to the injury of the service of the United States, that is to say:

"That Julius Rhuberg, the said defendant at the times and place aforesaid, and to effect the purpose and object as aforesaid, did then and there speak, debate, and agitate to and in the presence of William Mitchell and Luther Davis, and others to the grand jurors unknown, in substance and to the following effect, to wit:

"(1) That the moneyed men had caused the United States to enter the war against Germany.

"(2) That Germany was in the right and the United States was in the wrong, and that he, the said defendant, hoped Germany would win, and that Germany was sure to win.

"(3) That the best thing that they (meaning the said men of registration age and subject to draft) could do when in battle would be to put up their hands and let the Germans take them prisoners.

"(4) That one German could lick ten Americans.

"(5) That the United States was so slow that Germany would have it whipped, before it, the United States, got ready for war.

"(6) That the United States had no business in the war and ought not to have gone in it.

"And further, he, the said defendant, did then and there, in the manner aforesaid, and to effect the object and purpose aforesaid, state, declare, and depose to the persons aforesaid certain filthy statements, declarations, and utterances, the exact words, terms, and language of which are too filthy, vile, and scurrilous to be here set out and made a part of the records of this court, but which in substance were epithets and terms that were contemptuous, defamatory, and insulting to the institutions, laws, and policies of the United States government, and which were then and there intended and calculated to bring discredit upon the military institutions of the United States and to encourage and procure the disobedience to and violation of the existing laws and policies of the United States relating to the prosecution of its war with Germany, all of which statements, declarations, and utterances, as aforesaid, so then and there made by the defendant, as aforesaid, were made with the intent then and there on the part of him, the said defendant, to prevent, hinder, obstruct and delay the recruiting and enlistment service of the United States, to the injury of the United States and to discourage those desirous of enlisting in the military service of the United States and to cause disobedience and violation of the existing laws of the United States relative thereto, and which said statements, declarations, and utterances so made by the defendant as aforesaid, did obstruct the recruiting and enlistment service of the United States to the injury of the service of the United States."

In support of this charge, Luther Davis, one of the persons to whom the defendant is alleged to have made the statements set forth in the indictment, testified upon the trial:

That he "was 22 years of age; * * * had married the 28th of October, 1916, before the draft law went into effect. That he had registered in June, 1917, and had been classified. * * * That he was subject to call, and had the same position as every one else until the last classification. That he had known the defendant about three years. * * * That the discussion he had with defendant after the United States entered the war was at the Mackin place, at the home of the defendant, where the witness had gone with his wife for some vegetables in November, 1917. That they had gone into the front room of the Mackin house, where they saw on the wall the Kaiser's pic-

ture and one German flag. That there was a little boat on the table under the German flag and the Kaiser's picture, which had three American flags on it."

Questioned as to what conversation took place at that time, the witness testified:

That the defendant was telling about fighting in the Franco-Prussian war and what a fine army Germany had; that we had no business in the war, had no call whatever to be in the war; that the moneyed men, and men of the shipping interests, and men around these big steel factories in the East, making munitions, were the men that had brought us into the war. Defendant, speaking of the sale of Liberty Bonds told witness that he would not advise any man that did not have a surplus amount of money to invest in Liberty Bonds, for in a couple of years they would go down—they probably would not be worth 25 per cent. under par; that he would advise witness not to enlist, not to get into the army until after he was drafted; that if a bullet did not kill him, he would die of sickness on account of so many dead people; that defendant knew that witness had registered and was subject to draft; that the effect of these conversations prior to the war upon witness was to cause him to begin to think Germany was in the right, that the United States was not neutral in sending ammunition to the Allies, and that the sinking of the Lusitania was justifiable.

Being asked, "Now, what effect did the conversations of Rhuberg have with you subsequent to our entrance into the war?" the witness answered, "It didn't have much of any; that didn't." Being further questioned, "What was the reason of the change?" the witness answered, "Well, other people talked to me; different people around; I quit visiting Borstels, and other people got talking to me, and I got it out of my head; it put me to thinking." Answering a question of the court, witness testified that defendant appeared to be very much in earnest at the time of his last conversation with him about the war, and appeared to try to impress upon the witness what he said.

The witness, being further examined, was asked on cross-examination:

"Now, these statements that he made to you that you speak of, after we came into the war, they didn't influence you in any way, or deter you from enlistment, did they?"

Witness answered:

"No, sir; they didn't keep me from enlisting, but still it made me feel bad. Q. You hadn't intended or expected to enlist had you? A. No, sir. Q. Nothing he said influenced you in the matter, or changed your intentions in any way as regards going into the service? A. Well, if I hadn't been married, it probably would have. Q. But you were married? A. I was; yes. Q. And had no intention of going until you had to? A. No, sir. Q. The only reason you didn't go was because of your wife and your baby? A. Yes, sir."

[1] In the spring of 1917, and before the United States went into the war, the witness had discussed the war with the defendant, at which time the defendant said:

"That the English got ammunition from America, and Germany couldn't get anything; that we were sending ammunition to kill the Germans with and had no business doing that; that the United States had no business interfering with the Allies, and that we never had been neutral; that Germany was a fine country, far superior to the United States; that you had more freedom, could get anything you wanted there, whisky, or wines, or anything you

wanted; that you couldn't get anything you wanted here any more; that he had been in the German army about three years, and had been in the Franco-Prussian war; that the training of the German army was far superior to the American army; that he was in the German cavalry training and told what a fine horse he had, and what fine training he went through; that defendant told him of Mr. Vol Borstel seeing some American troops in The Dalles, and that they handled a gun like a kid would. He then said that Germany was perfectly right in sinking the Lusitania; that ships carrying contraband of war, with passengers on them who had no more sense than to ride in time of war, ought to be sunk; that if this country got into the war Germans in this country would rebel against this government; that this country was in no shape to fight the German government; that we were so slow that Germany would have the Allies licked before we got ready to fight. and then come to the United States; that Germany was in the right, and she was bound to win; that the German government always took the right side to everything; that they never lost a war, and they never would."

It is contended by the plaintiff in error that the court erred in permitting the witness to testify to the last-mentioned statement made by the defendant prior to the entry of the United States into the war. The court instructed the jury that this evidence had been admitted for a special purpose, and consideration of it would be confined to that purpose only, viz.:

To show so far as it has a tendency in that direction, the bent of mind and attitude of this defendant, whether more favorably disposed towards Germany than to this country, and the effect such attitude, whatever it was, may have had upon his subsequent acts and demeanor, as an aid for determining with what intent he used the language imputed to him by the indictment, if it appears that he uttered the same or some substantial part thereof.

The defendant took the stand in his own behalf and denied in a large measure the utterances imputed to him, and as to others he disclaimed any wrong or disloyal intention. In determining the credibility of his statements, the court instructed the jury to take into consideration the testimony of the government which tended to his inculpation, his former history and deportment, his bent of mind, so far as was disclosed by the testimony, and the defendant's predilection, if any, whether favorable or unfavorable to this government, and what leaning, if any, he had towards Germany as against this government in the present crisis, or whether his present leaning was one of loyalty to this government, and from all this, together with all the other testimony in the case bearing upon the subject of inquiry, ascertain and determine, by a calm, fair, and impartial inquiry and investigation, uninfluenced by any present passion or prejudice, the truth of the charge made against the defendant.

This evidence of statements of the defendant made prior to the entry of the United States into the war, thus restricted and limited by the court was clearly admissible under a well-known rule of evidence upon that subject. Jones on Evidence, par. 142; Jones v. United States, 179 Fed. 584, 103 C. C. A. 142; Williamson v. United States, 207 U. S. 425–451, 28 Sup. Ct. 163, 52 L. Ed. 278.

[2] It is also contended that there should have been a directed verdict in favor of the defendant, because of the alleged variance between the charge contained in the fourth count, "that * * * the defend-

ant did then and there speak, debate, and agitate to and in the presence of William Mitchell and Luther Davis and others," making the statements heretofore mentioned as having been made after the entry of the United States into the war, and the evidence in support of the charge that the statement was made to Davis only. The number of persons to whom the statement was made did not change its character, or the intent and purpose of the defendant. If the statement was an obstruction to the recruiting or enlistment service of the United States, to the injury of the service of the United States, it was as much so when made to one person as when made to more than one. Its criminal character is determined by the intent and purpose of the person making the statement, and not by the number of persons to whom it was made. The failure to prove that Mitchell was present at the time the statement was made to Davis did not prejudice the defendant in any way, and is not a variance under the rule. Bennett v. U. S., 194 Fed. 630–633, 114 C. C. A. 402, affirmed by the Supreme Court in 227 U. S. 333–338, 33 Sup. Ct. 288, 57 L. Ed. 531; Jones v. U. S., 179 Fed. 584–593, 103 C. C. A. 142.

[3] It is further contended that the court should have directed a verdict in favor of the defendant for the reason that there was no proof of the actual obstruction by the defendant of the recruiting or enlistment service of the United States, to the injury of the service or of the United States. The defendant requested the court to instruct the jury that there must have resulted from the statements of the defendant some injury to the recruiting or enlistment service of the United States, and that, as the government had not shown that such statements did in fact result in any injury, either to the recruiting or enlistment service of the United States or to the United States, the verdict should have been directed for the defendant. The question whether the statement of the defendant did result in an obstruction to the recruiting or enlistment service of the United States, to the injury of the service, or to the United States, was clearly a question of fact, to be determined by the jury from all the surrounding circumstances and reasonable inferences to be drawn from established facts under proper instructions from the court. Judge Wolverton instructed the jury upon this feature of the case as follows:

"To obstruct in its broad sense means to hinder, to impede, to embarrass, to retard, and, as used in the indictment, it means active antagonism to the enforcement of the act of Congress; that is, the act providing for the recruiting and enlistment service of the United States. The word does not mean as here used to wholly impede or to block the way. It is sufficient that the act tends to hinder or to make it harder or more difficult for the government to progress with the work of recruiting or enlistment of men into the service. Whatever has this effect works to the injury and damage of the government. The injury follows as the necessary and logical effect and sequence of the act of retarding or making it harder or more difficult for the government to act and carry forward the work of recruiting and enlistment. No other or more specific injury to the United States than this is necessary or required to be shown.

"Having defined these offenses, so denounced by statute, you will appreciate how essential it is for the successful prosecution of the war that none of these evils shall possess the men of the country subject to the selective draft and that no obstruction shall be interposed in any way to impede, re-

tard, hinder, or make it harder or more difficult for the government to recruit and enlist men in the military service; hence there is great and wholesome reason for the statute, and the reason for its rigid enforcement is just as potent and overpowering. Nothing should interfere with the military and naval forces of the United States, nor with the work of recruiting or enlistment of the men that go to make up such forces. Any means employed by which to cause the evils enumerated, or any one of them, is denounced. You will note that the term 'willfully' is employed in the statement of the statute as to what will constitute the offense. This means that the acts complained of must have been done with knowledge on the part of the defendant of what he was doing, and that he, having such knowledge, intentionally did the acts and intended thereby, and had such purpose therein, that the result of doing such acts would be to cause insubordination, disloyalty, or refusal of duty in the military service, or would tend to impede or hinder the recruiting and enlistment of men into the service, to the injury of the United States."

It is contended on behalf of the defendant that the government was required to prove that the defendant's statement accomplished an actual obstruction as distinguished from an attempt to obstruct and proof of injury resulting therefrom to the service or to the United States. In support of this contention, the attention of the court is called to the fact that the act under consideration was amended by the Act of May 16, 1918, c. 75, § 1, 40 Stat. 553, Comp. St. 1918, § 10212c (Public No. 150, 65th Congress), so that the clause of the statute under consideration now reads:

"Whoever * * * shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States."

This amendment was only one of many provisions amending the statute relating to various acts obstructing the government in the prosecution of the war, and was evidently intended to overcome certain technical objections, and enlarge the scope of the statute, so as to include every possible obstruction that might be interposed against the efforts of the government to prosecute a successful war. But it does not follow that the facts in this case did not bring it within the terms of the original statute. We think they did. The loyalty of Davis to the government and his spirit of patriotism was clearly diverted and obstructed by the defendant's statement that "we had no business in the war, no call whatever to be in the war," and his advice to witness "not to enlist, not to get into the army until after he was drafted." All this had its effect upon Davis, and it was not until after he had talked with other people that he came back to his true course.

The decision of Judge Bourquin in U. S. v. Hall (D. C.) 248 Fed. 150–153, upon a similar state of facts, does not convince us to the contrary, and an examination of the various cases where this question has been considered reveals the fact that nearly all the District Judges, where this statute has been under consideration are in accord with Judge Wolverton's instructions to the jury in this case. These cases are reported in Bulletins issued by the Department of Justice, as follows: Bulletin No. 4 (U. S. v. Daniel H. Wallace); Bulletin No. 15 (U. S. v. C. H. Pierce [D. C.] 245 Fed. 878); Bulletin No. 49 (U. S. v. Kate O'Hare); Bulletin No. 53 (U. S. v. Orlando Hitt); Bulletin No. 55 (U. S. v. Perley Doe); Bulletin No. 56 (U. S. v. W. B.

Tanner); Bulletin No. 76 (U. S. v. S. J. Harper); Bulletin No. 78 (U. S. v. Leonard Foster); Bulletin No. 79 (U. S. v. C. H. Waldron); Bulletin No. 81 (U. S. v. J. H. Wolfe); Bulletin No. 82 (U. S. v. Gistave Pundt); Bulletin No. 83 (U. S. v. Harold Mackley); Bulletin No. 85 (U. S. v. Henry Fredricks); Bulletin No. 86 (U. S. v. H. M. Hendrickson); Bulletin No. 89 (U. S. v. Conrad Kornmann); Bulletin No. 90 (U. S. v. Joseph Zittel); Bulletin No. 106 (U. S. v. Rose Pastor Stokes); Bulletin No. 108 (U. S. v. Gustave Taubert); Bulletin No. 109 (U. S. v. Emiel Herman); Bulletin No. 112 (U. S. v. Dick Windmueller); Bulletin No. 120 (U. S. v. J. I. Graham); Bulletin No. 122 (U. S. v. Amos Hitchcock).

In the Second Circuit, in Masses Pub. Co. v. Patten, 246 Fed. 38, 158 C. C. A. 250, L. R. A. 1918C, 79, in the Third Circuit in United States v. Krafft, 249 Fed. 919, —— C. C. A. ——, in the Fourth Circuit in Kirchner v. United States, Bulletin of Department of Justice No. 174, in the Eighth Circuit in O'Hare v. United States, 253 Fed. 538, —— C. C. A. ——, and in Doe v. United States, 253 Fed. 903–906, —— C. C. A. ——, the Circuit Courts of Appeals in these circuits affirm judgments where the objections were of the same character here presented.

[4] It is contended that the court was in error in overruling defendant's motion in arrest of judgment on the ground that the indictment failed to allege the intended recruiting or enlistment in the military or naval forces of the United States of William Mitchell or Luther Davis, and for the further reason that the indictment failed to charge defendant with knowledge or notice of their intended enlistment or recruiting in such service. That statute does not require such allegations in the indictment or such proof as elements of its violation. The indictment follows the words of the statute with such statement of facts and circumstances as sufficiently identify the acts charged as an offense against the defendant. This is all that is required.

The refusal of the court to grant a new trial is an objection, as has been repeatedly stated, that can only be made in this court as a ground for reversal when there was no evidence to support the verdict. There is no such ground for reversal in this case.

The judgment of the court is affirmed.

BURGESS SULPHITE FIBRE CO. v. GAGNE.

(Circuit Court of Appeals, First Circuit. February 12, 1919.)

No. 1363.

1. MASTER AND SERVANT ⟸150(5)—INJURY TO SERVANT—UNSAFE PLACE TO WORK.
   The use by a manufacturing company of removable steps leading down to the floor of a boiler room from an outer door, without warning to employés that they were removable and were frequently removed for cleaning the floor, *held* negligence, which rendered it liable for injury to an employé who unknowingly stepped through the door when they were not in place.
2. MASTER AND SERVANT ⟸201(7)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.
   That negligence of a fellow servant may have contributed to injury of an employé does not relieve the master from liability for his own negligence, which was the primary cause.
3. MASTER AND SERVANT ⟸291(1)—INJURY TO SERVANT—INSTRUCTIONS.
   Instructions in an action for injury to a servant *held* not erroneous, in view of the evidence.

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action at law by George H. Gagne against the Burgess Sulphite Fibre Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George F. Morris, of Lancaster, N. H. (Sullivan & Daley, of Berlin, N. H., and Drew, Shurtleff, Morris & Oakes, of Lancaster, N. H., on the brief), for plaintiff in error.

Alexander Murchie, of Concord, N. H. (Hollis & Murchie, of Concord, N. H., on the brief), for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is a writ of error from a judgment recovered by George A. Gagne in the District Court for New Hampshire against the Burgess Sulphite Fibre Company in an action for personal injuries sustained December 27, 1910, while in the employ of that company. The plaintiff is a citizen of New Hampshire and the defendant a corporation organized under the laws of the state of Maine.

In its assignments of error the Fibre Company complains that the court erred in denying its motion for a directed verdict, in the admission of certain testimony, in instructions given to the jury, and in refusing a requested instruction.

At the defendant's request the plaintiff was ordered to specify the acts of neglect on which he relied, and in compliance therewith stated:

"The plaintiff's injury was caused by the absence or insufficiency of certain steps and the insufficiency of a certain door leading into the wood boiler room from the gangway. The defendant failed to furnish the plaintiff a safe place to work and also failed to make reasonable rules and regulations."

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] The plaintiff was employed by the defendant as its chief engineer and the evidence disclosed that his duties required him to supervise the operation and repair of all the engines of the company througout its extensive plant; that among the engines under his supervision was a forced draft engine, located in what was known as the wood boiler room; and that it was while he was on his way to this engine that he was injured. The direct route for him to reach this engine was through a passageway between the boiler room building and the time office building, leading to a gangway or loading platform, and thence through a door and down some steps into the boiler room. He was entering this door at the time he was injured. It was a door commonly used by the employés of the company for entering and leaving the boiler room. It was a blind door—that is, it had no window in it—and swung inwardly. It was rigged with a pulley attachment carrying a heavy weight to keep it closed. From the threshold of the door to the floor of the boiler room was a drop of 18 to 24 inches, and wooden steps with two risers had been placed there. They were unsecured, and at the time of the accident had been removed. When the plaintiff undertook to enter the boiler room, he grasped the handle of the door and gave a hard push. At the same time a workman from the inside gave the door a pull, causing the plaintiff to enter more quickly than he had anticipated; and instead of his foot meeting the steps, which had been removed, it struck the floor below. He retained his grasp on the handle without falling, but was swung around in such a manner as to wrench his leg and back and displace his sacro-iliac joint, causing a severe injury. The plaintiff did not know that the steps had been removed, or that they were so constructed that they might be removed. Although they were fairly heavy steps, they were not fastened, and were often removed on Sundays for the purpose of taking out ashes that accumulated on the floor of the boiler room around the steps; but plaintiff did not know this. The accident occurred on Tuesday. The preceding day the mill was not in operation, as it was set apart for celebrating Christmas.

In view of the state of the proof, we think the jury might properly find that the defendant was at fault in failing to provide permanent steps, or, in case they were to be removed, in failing to establish reasonable regulations for the safety of its employés; that the plaintiff was without fault and did not assume the risk; and that the cause of his injury was the defendant's failure in the particulars above mentioned.

[2] The defendant complains that the court erred in refusing to give the following instruction to the jury as to the removal of the steps:

"If you find it was removed by the negligence of a fellow servant, and by that I mean any employé of the defendant, the plaintiff cannot recover."

This request was properly refused for the reason that it assumed that the evidence did not warrant the jury in finding the defendant at fault, even though the steps had been removed through the negligence of a fellow servant. The fact that negligence of a fellow serv-

ant may have contributed to cause the accident would not excuse the fault of the defendant (Matthews v. Clough, 70 N. H. 600, 49 Atl. 637; Vaisbord v. Mfg. Co., 74 N. H. 470, 473, 69 Atl. 520); and, there being evidence from which the jury could find that the defendant was negligent, the request could not properly have been given.

[3] The defendant also contends that the court erred in charging the jury as follows:

"If you come to the question in respect to the plank steps, the first question that would naturally arise would be whether the plaintiff under the circumstances was in the exercise of due care. I do not think you will have much trouble on that phase of the case, because the plaintiff himself says that he had never seen the steps out of place, that he was going along in the usual way, acting upon the idea that the situation was safe, and that as he opened the door, somebody pulled on the other side at the same time and that he stepped down and fell, because there was no step on which his foot would rest and hold his weight. While I am not going to say that you should find that question of fact one way or another, there is no substantial controversy about it and you probably will have no difficulty in finding that he was in the exercise of reasonable care if the situation was as he explained it. If you should find—and I leave it to you to find whether he was in the exercise of due care as he approached this door—then the question will be, Was the step there?"

The ground of exception to this portion of the change was that it did not leave open the question whether any one pulled the door from the inside at the time the plaintiff entered and whether in consequence of that he fell without seeing where he was going. To meet defendant's objection in this respect, the court further charged the jury as follows:

"Counsel for the defendant thinks that I stated his contention incorrectly in respect to the plaintiff's care. He thinks that I did not state his position correctly in saying that there was no substantial contention that the plaintiff was careless. I did not intend to say that. I meant to say that upon the evidence you would probably not be troubled much upon that question, provided the story of the plaintiff as to his approach was accepted as the correct one, and that is all the evidence there is on that branch of the case, and I think that is what I did say, but Mr. Morris thinks that I said that there was no substantial contention against that. He says that he does contend, and argues that the plaintiff was careless, in the first place, that the plaintiff did not fall as he said he did, and if he did fall that he was careless in not looking, and even if the steps were not there that due care required that he should have looked before opening the door and stepping; so I leave the question with you to determine it."

To the latter statement of the court the defendant also excepted, on the ground he had there told the jury that all the evidence there was on this branch of the case was, what the plaintiff had stated. We think that the first instruction complained of, if erroneous in any respect, was fully taken care of when the court later told the jury that the defendant did contend that the plaintiff was careless and pointed out the particulars wherein it so contended. Although the court commented upon the weight of the evidence bearing upon the question of contributory negligence, he nevertheless expressly left it for the jury to say whether the plaintiff was in the exercise of due care as he approached the door; and we do not think that they were misled when, in undertaking to explain his previous charge, he said:

"I meant to say that upon the evidence you would probably not be troubled much upon that question [the plaintiff's care], provided the story of the plaintiff as to his approach was accepted as the correct one, and that is all the evidence there is on that branch of the case."

For the jury heard all the evidence and the only direct evidence bearing upon the question of his approach to the door came from the plaintiff.

As bearing upon his conduct after the accident, the plaintiff was asked the following questions:

"Q. What did Dr. Abbott do for you? A. Took an X-ray; took the bandage off first, and then took an X-ray. Q. X-ray of what, your leg? A. Yes. Q. Then what did he do? A. He said there was nothing doing; keep quiet. He said you can go back home. Q. What did Dr. Abbott advise you to do, Mr. Gagne? (Exception.) A. He told me he could do nothing for me. The only thing for me to do was to keep quiet until your leg get well. (Exception to refusal to strike out the answer.) Q. What did you do after being so advised by Dr. Abbott? A. I came back to Berlin, N. H., home. Q. Did Dr. Marcou treat you then? A. Yes; I stayed in the house for a few days, and then I went back to see Dr. Marcou. I stayed home a few days, and then went back again to see Dr. Marcou. Q. And under Dr. Marcou's advice what did you do? A. Dr. Marcou advised me to keep quiet. (Exception.) Q. What did Dr. Marcou advise you to do? A. Dr. Marcou said keep away from the mill, don't work; you have got to keep quiet, or else your leg will never be well. (Exception.)"

The court instructed the jury that this testimony was not to be accepted by them as evidence of the nature of the plaintiff's injury; that it was only admitted for the purpose of showing that the course of action he took after the accident was under the advice of a physician. It is evident that the witness was illiterate, and that counsel were undertaking to have him state whether what he did after he was injured was in pursuance of and reliance upon the advice of a physician. If the answers are capable of a different interpretation, we think the jury could not have so understood them, especially after having been specifically instructed by the court as above stated. The presumption is that they followed the instructions.

The judgment of the District Court is affirmed, with costs in this court to the defendant in error.

PETERSON et al. v. NOOTS et al.

NOOTS v. PETERSON et al.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1919.)

No. 3213.

1. SHIPPING ⟸25—BILL OF SALE—CONTRACT FOR BUILDING SHIP.
Where the contract for the building of a ship provided that the vessel and all materials therein should be the property of the purchaser at all stages of construction, a bill of sale executed to him by the builders after completion was without consideration or effect.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. SHIPPING ⊂⊃26—CONTRACT FOR BUILDING SHIP—DELAY IN DELIVERY—"FORCE MAJEURE."

Delay in delivery of a ship by the builder, caused by the breaking of the ways when she was launched, *held* not due to "force majeure," as defined and excepted by the contract.

3. SHIPPING ⊂⊃26—CONSTRUCTION OF SHIP—CONTRACT FOR BUILDING SHIP "AND DELIVERY."

In a contract for building of a ship, providing for liquidated damages for delay in delivery "unless by causes within the terms of this contract and delivery of the engines by" the builders thereof, the words "and delivery" cannot be construed to mean "or nondelivery," so as to bring that cause within the exception.

In Error and Cross-Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action at law by G. Noots against Andrew Peterson, the Aberdeen Shipbuilding Company, and the Seattle National Bank. From the judgment, defendants Peterson and the Aberdeen Shipbuilding Company bring error, and plaintiff assigns cross-error. Affirmed.

The plaintiffs in error were defendants to the action, which was brought upon a contract entered into November 25, 1916, between Peterson, who was a shipbuilder of Aberdeen, state of Washington, by which he agreed to build a twin-screw schooner for the plaintiff Noots, according to certain plans and specifications and subject to certain specified conditions. In the contract Peterson was designated as builder, and Noots as purchaser. It provided that the builder should procure a surety bond in the sum of $18,500, conditioned for the faithful performance of all of the terms and obligations of the contract, and, being unable to give the bond, it was agreed between the parties that $10,800 should be retained out of the initial payment due the builder, and $7,620 should be retained out of the second payment due him under the contract, which moneys should be and were deposited with the Seattle National Bank in lieu of the bond, and an escrow memorandum entered into reciting that the bank should hold the same as security to the purchaser for the faithful performance of the contract on the part of the builder, and that "ninety days after the completion of said vessel, which completion shall be evidenced by and only by the certificate of the Bureau Veritas, the said bank shall pay said sum of $18,500 to said Andrew Peterson, unless before that time the purchaser shall have commenced in the proper court an action asserting a claim for damages for some breach of said construction contract by the builder, and given notice to the bank of such suit, in which event the bank shall still retain said sum to be disposed of in accordance with the outcome of such suit." That money is still on deposit with the bank, for which reason it was made a party to the action.

By the terms of the contract the vessel was to be delivered July 15, 1917, and in the event of the failure to deliver it on that day, it was provided that the builder should pay to the purchaser $100 a day as liquidated damages, unless the delay was excused under the terms of the contract. The vessel was not delivered to the purchaser until January 11, 1918. Prior to the making of the contract, Noots had entered into a contract with J. H. Hansen Company for the purchase of the engines for the vessel, to be delivered by that company June 7, 1917, and had paid on account thereof to the Hansen Company $9,120, which contract Noots, at the time of entering into the contract with Peterson on November 25, 1916, had assigned to Peterson, who agreed to make the balance of the payments to the Hansen Company for the engines. Subsequently Peterson assigned the construction contract to the defendant Aberdeen Shipbuilding Company, a corporation organized by him, which corporation finished and delivered the vessel. The action was brought against both Peterson and the shipbuilding company to recover liquidated

damages at the rate of $100 per day for the 179 days' delay in the delivery of the ship and against the Seattle National Bank, the escrow holder, against which the plaintiff asked a direction that it pay the amount held by it in escrow.

The bank filed an answer, admitting its possession of the money under the escrow agreement, and it was agreed between the litigant parties that the court should fix in its judgment the liability of the bank between them.

The answer of the defendants Peterson and Aberdeen Shipbuilding Company admitted the execution of the construction contract, as well as the date of the delivery of the vessel, but denied that the delay in such delivery was without excuse, or that it was due to their negligence. In addition they set up three affirmative defenses, the first of which alleged that, some time prior to the delivery of the vessel, the plaintiff notified the defendant shipbuilding company that he would not accept delivery of the vessel and pay the last installment of its purchase price unless, among other things, it executed to the plaintiff a bill of sale of the vessel; that on the 11th day of January, 1918, the shipbuilding company delivered to the plaintiff a bill of sale of it in consideration of its acceptance by the plaintiff in complete fulfillment and discharge of all the terms and conditions of the construction contract, and that the plaintiff on that day accepted both the bill of sale and the schooner itself.

The second affirmative defense alleged that the engines were not delivered by the Hansen Company as provided by its contract with the plaintiff until August 18, 1917, by reason of which the defendants could not deliver the vessel to the plaintiff until the expiration of a reasonable time thereafter; that on July 12, 1917, there was a strike and industrial disturbance in the yard of the defendant shipbuilding company, of which the plaintiff was duly notified, and that such disturbance delayed the delivery of the vessel for a period of 20 days. It further alleged that on August 1, 1917, a second strike and industrial disturbance occurred, of which the plaintiff was duly notified, and that by reason of that disturbance delivery of the vessel was delayed for a period of 60 days.

The third affirmative defense alleged that the defendants attempted to launch the vessel September 20, 1917, in the presence of the duly authorized agent of the plaintiff, but that the launching ways broke, without fault on the part of the defendants, and that by reason of such accident the vessel was not actually launched until September 28, 1917, and that due to that accident the vessel was damaged and partially destroyed, within the meaning and intent of paragraph 4 of the construction contract, and that it was necessary to take the vessel to Portland, Or., for the purpose of drydocking and repairing it; that the vessel was insured against damage by launching or accident during the process of construction, as provided in said paragraph 4 of the construction contract; that after such launching accident the defendants diligently prosecuted the reconstruction and repairing of the vessel: and that the delay in its delivery was unavoidable and without fault on the part of the defendants.

After trial a verdict was returned in favor of the plaintiff for the sum of $7,100, upon which judgment was entered in that sum, with costs, and by which the defendant bank was directed to pay that amount to the plaintiff and the remainder of the escrow money to the defendant Aberdeen Shipbuilding Company.

The case is brought here upon writ of error.

James Kiefer, of Seattle, Wash., for plaintiff.

Bridges & Bruener, of Aberdeen, Wash., for defendants.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] The court below by its rulings eliminated from the case the bill of sale of the vessel, its recitals and effect—denying requested instructions of

the plaintiffs in error in relation thereto. The court also directed the jury to disregard everything regarding the launching accident and to confine their consideration to the facts regarding the delay in the delivery of the vessel and the causes thereof.

The action of the court respecting the bill of sale and the launching accident were excepted to by the defendants and have been duly assigned as error. In so far as concerns the former, the argument of the plaintiffs in error is that the construction contract did not require of them such an instrument, but that the plaintiff, having demanded and accepted it, is bound by all of the terms and conditions thereof. The record shows that the bill of sale was signed and acknowledged on behalf of the shipbuilding company January 10, 1918, and that on the same day the plaintiff, through his duly appointed agent, delivered to the defendants this communication:

"Seattle, Washington, Jan. 10, 1918.

"To Andrew Peterson and to Aberdeen Shipbuilding Company, Successor to Andrew Peterson, Aberdeen, Wash.—Gentlemen:

"The undersigned, purchaser under that certain contract made November 25, 1916, between Andrew Peterson and the undersigned purchaser for the construction of one twin-screw wooden auxiliary schooner, hereby tenders to you payment of the sum of $37,000, being the final balance due on said vessel, and offers to take possession of her; and you are hereby notified that by so doing the undersigned does not waive, but expressly insists upon, his right to claim the liquidated damages of $100 per day in accordance with paragraph 13 of said contract, and the undersigned hereby gives you notice that he claims and demands the sum of $20,859.80 for liquidated damages for delay of 179 days in the delivery of said vessel beyond the 15th day of July, 1917, in accordance with said paragraph 13 of said contract; and this payment is made without waiver of or prejudice to said claim, and which payment is made under and in pursuance of paragraph 12 of said contract.

"G. Noots,
"By Ch. Jolivet, His Agent."

The bill of sale which accompanied the delivery of the vessel is as follows:

"Know all men by these presents, that Aberdeen Shipbuilding Company, a corporation of Aberdeen, Washington, hereinafter called the grantor, for and in consideration of the sum of one ($1.00) dollar, lawful money of the United States of America, the receipt whereof is hereby acknowledged, and in consideration of the acceptance of this instrument by G. Noots, represented by Ch. Jolivet, hereinafter called the grantee, in complete fulfillment, satisfaction, and discharge of all the terms and conditions, on the part of the builder to be performed, of that certain contract made on the 25th day of November, A. D. 1916, by and between Andrew Peterson, shipbuilder, of Aberdeen, Washington, and G. Noots, represented by Chas. Jolivet, for the construction of one twin-screw wooden auxiliary schooner, which contract was by the said Andrew Peterson duly assigned to Aberdeen Shipbuilding Company, a corporation, does herewith grant, bargain, sell, transfer, and set over unto the said grantee all its right, title, claim, and interest in and to that certain one twin-screw wooden auxiliary schooner designated as 'Suzanne,' now lying in the waters of Grays Harbor, in the county of Grays Harbor, state of Washington, together with all tackle, apparel, furniture, and equipment of said vessel. The said grantor does hereby covenant to and with the said grantee that said vessel is free from all liens and incumbrances, and that all bills for labor and materials which have gone into and have been made a part of said vessel have been duly and fully paid. The said grantee by the acceptance of this instrument does take possession of said vessel in accordance with the purport of this instrument."

The contention of the plaintiffs in error is that the recitation in the bill of sale, that it was accepted "in complete fulfillment, satisfaction, and discharge of all the terms and conditions" of the construction contract to be performed by the builder, operated to defeat any recovery by the purchaser for delay in the delivery of the vessel. We think a sufficient answer to the contention is that by the seventh clause of the construction contract it was expressly agreed:

"That said schooner shall at all times be the property of the purchaser in all stages of construction and that all material purchased and delivered in the yard for it or appropriated to the construction of it shall become the property of the purchaser by such delivery and appropriation, subject to a lien by the builder for any unpaid installment of the purchase price."

In view of those provisions of the contract, the payment by the purchaser of the balance due from him perfected his title to the vessel, and the bill of sale was therefore without effect, as well as without consideration.

[2] We are also of the opinion that the court below was right in its holding that the breaking of the launching ways was not one of the acts the parties to the construction contract provided should operate as an extension of the time fixed for the delivery of the vessel. That provision is as follows:

"If prompt delivery of said schooner is prevented by 'force majeure,' then the time for delivery of said schooner shall be extended correspondingly. The term 'force majeure' shall mean acts of God, strikes, lockouts (reasonably justified) or other industrial disturbances, war, blockades, insurrections, epidemics, landslides, lightning, earthquakes, arrest and restraints of rulers and people, explosions, fires, floods, and other like causes. No delay in the delivery of the vessel will be justified under the term 'force majeure,' excepting so far as the builder shall have notified the purchaser in writing at the beginning of such delay and the particulars thereof and at the termination thereof stating the duration thereof."

Waiving the question as to whether the actual knowledge of the agent of the purchaser should be held to take the place of the written notice the contract declared should be given by the builder to the purchaser, we think the launching accident cannot be properly regarded as coming within the words "other like causes," added to the specifically described acts declared to operate as an extension of the prescribed time of delivery, for the reason that the parties specifically provided in the contract for insurance against any and all damage arising from the launching of the vessel, and specifically provided, in effect, that the builder should bear all charges for such insurance.

It is further contended by the appellants that the delay in the completion and delivery of the vessel was due to a delay in the delivery of the engines therefor, and that for the latter delay Noots was responsible. We do not so understand the contract of the parties. The construction contract in its fourteenth subdivision expressly recited the fact that Noots, therein designated as "purchaser," had made a contract with the builders of the Skandia engine for the engines required for the schooner contracted for, and had paid thereon $9,120, which contract he assigned to Peterson, designated in the con-

struction contract as "builder," the latter assuming the payment of the balance due for the engines according to the terms of the contract between Noots and the Hansen Company, and which sum of $9,120 was allowed as a part of the $20,000 payment required to be made on the signing of the construction contract.

We find in the latter contract not only no guaranty by Noots of the delivery by the Hansen Company of the engines within the time specified in the contract between him and that company, but no provision even tending to show that any of the parties had any such understanding. On the contrary, subdivision 9 of the construction contract expressly declares that—

"The builder shall take from the manufacturer of the Skandia engines the usual guaranty as to material, workmanship and fuel consumption, which shall run in favor of the builder and his assigns. Such guaranty shall be by the builder assigned and delivered to the purchaser."

The clause just quoted is quite inconsistent with the theory that Noots guaranteed the delivery of the engines at any specified time, or at all; indeed, any more than that he guaranteed the material of which they were constructed, or their workmanship or fuel consumption.

[3] The further contention on the part of the plaintiffs in error that they were not made liable for any damage growing out of the nondelivery of the engines within the time specified for such delivery, based upon subdivision 13 of the construction contract, is, we think, also untenable. That provision is as follows:

"13. It is agreed between the parties hereto that if said schooner shall not be ready for delivery on July 15, 1917, and shall not be delivered on that date, unless by causes within the terms of this contract and delivery of the engines by the J. H. Hansen Company on the 7th of June, 1917, as defined by their contract, that the builder shall pay and will pay to the purchaser the sum of one hundred ($100.00) dollars per day for each and every day that such delivery shall be delayed beyond July 15, 1917, or beyond such postponed date of delivery as may be fixed by and within the terms of this contract, as liquidated damages for the loss of the use of this said schooner, and if the said builder shall deliver the said schooner before the 15th day of July, 1917, the purchaser will pay to the builder the sum of one hundred ($100.00) dollars per day for each and every day elapsing between the date of delivery and the said July 15, 1917."

It is insisted that the true and only meaning of the foregoing paragraph is that, if the defendants should fail to deliver the vessel by July 15, 1917, they would pay the purchaser $100 for each and every day that such delivery should be delayed beyond that specified day, unless such failure was the result of some act falling within the terms of the construction contract, "or by failure to receive delivery of the engines on June 7, 1917." Neither the clause last quoted nor anything of like effect is found in the construction contract, and it need hardly be said that courts have no authority to make contracts for parties. The agreement of these parties was that the delivery of the vessel July 15, 1917, might be excused and the time extended "by causes within the terms of this contract and delivery of the engines by the J. H. Hansen Company on the 7th of June, 1917, as defined by their contract." The words "and delivery" in the clause last quoted may have been intended for "nondelivery," in which event provision would

have been made for the contingency of delay in the delivery of the engines; but the parties themselves did not so declare, and we do not think the court has the power to make, by construction, that contract for them.

The points made on behalf of the cross-plaintiff in error have been carefully considered, and we are of the opinion that they are without substantial merit.

The judgment is affirmed.

OREGON-WASHINGTON R. & NAV. CO. v. ROYER.

SAME v. WASSON et al.

(Circuit Court of Appeals, Ninth Circuit. January 6, 1919.)

Nos. 3203, 3204.

1. WATERS AND WATER COURSES ⟸179(6)—OVERFLOW—ACTION FOR DAMAGES. Evidence *held* to warrant submission to jury of question whether water which injured plaintiff's lands where obstructed by defendant's railroad embankment was from a natural watercourse or merely surface water.
2. WATERS AND WATER COURSES ⟸38—WHAT CONSTITUTES "WATER COURSE." The facts that water flowing down a channel comes from melting snow, and that there is a flow for only a few months in the spring, do not necessarily take away the character or elements of a "water course," where there is a well-defined and accustomed channel.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Water Course.]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Actions at law by Preston Royer and by W. J. Wasson and Mabel Wasson against the Oregon-Washington Railroad & Navigation Company. Judgments for plaintiffs, and defendant brings error. Affirmed.

A. C. Spencer and C. E. Cochran, both of Portland, Or. (James E. Fenton, of Portland, Or., of counsel), for plaintiff in error.

M. A. Langhorne, E. M. Hayden, and F. D. Metzger, all of Tacoma, Wash., and Lon Boyle, of Prosser, Wash., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. These were actions by landowners, plaintiffs below, against the railroad company, defendant below, to recover damages for injuries to property resulting, as alleged, from an overflow of the lands of the plaintiffs, caused by the construction of an embankment by the railroad company over and across an alleged water course known as Spring creek, and by placing in the alleged bed or channel of the alleged creek a pipe or drain which was insufficient to carry off the waters that flowed down through the creek at certain seasons of the year. The railroad company denied all damage, and, after trial to a jury, verdicts and judgments were in favor of plaintiffs, and the railroad company sued out writs of error. As the two cases

were tried together, and present the same legal questions, they may be conveniently considered in one opinion.

[1] The contention of the railroad company, as embodied in a request for an instruction, is that the only justifiable conclusion from the evidence is that what the plaintiff below called the channel of Spring creek is nothing more than a drain for surface water resulting from melting snow in the drainage area above the lands affected, and that, except from the waters of such melting snow, Spring creek in its channel carries no water, and is dry for 11 months of the year, and that as a legal consequence the surface water became a "common enemy," against the flowage of which the landowner was obliged to defend himself. But the District Court declined to sustain such a position, and submitted the case to the jury upon the theory that Spring creek is a natural water course, and that the railroad company was bound to construct a culvert or to make other adequate provision to permit the passage of the waters flowing down at times of all ordinary freshets, but was not bound to anticipate or provide against unprecedented or unexpected floods. To test the ruling of the court, it becomes necessary to get a clear understanding of the physical situation.

At the time of the damage to the property of the plaintiffs below, the railroad ran westerly between Walla Walla and North Yakima, Wash., over and across a part of the land of the plaintiff Wasson and north of and near the land of the plaintiff Royer.

Spring creek has its origin in the Rattlesnake Hills, some 15 or 16 miles northwest from the lands of the plaintiffs. The upper limits of the head are in sections 25, 11, and 24; the creek runs generally southeasterly at the head, and bears southwesterly for 3 or 4 miles, then southeasterly for about 2 miles into the Yakima river. The general lay of the land from where Spring creek has its origin is rolling, but the creek is in a canyon for 14 or 15 miles, and until a short distance from the railroad right of way, where the ground spreads out flat; the point at which the creek begins to widen being about the north line of the southeast quarter of the southeast quarter of section 20. Up to that point the channel, though irregular in width and depth, is well defined, and drains 20,000 or 25,000 acres; the water coming down from various gulches into the Spring creek gulch. The bed of the creek is bridged at several places where the county roads cross it.

The resident engineer of the railroad company testified that he was well acquainted with the immediate country involved, and had prescribed the size of the culvert which was put in, and believed that a 48-inch diameter was sufficient to carry off the "normal flow of surface water that came down." He said that from the county road south of Starkey's place, which is in the southeast quarter of the southeast quarter of section 20, and in the course of Spring creek, there was a small rock dam, in addition to several other small obstructions in the channel above the Sunnyside dam, which was approximately 40 feet high; that after the water passed over the wasteway it came down in such volume "that the original channel was so small as to be unable to carry the water, and it overflowed and spread out over the land, forming two channels in Mr. Starkey's field, one marked on the map

(which was introduced in evidence) 'original channel,' and the other 'overflow channel.'" He described the water as passing on down to the next 40 below, which would be the southeast quarter of the southeast quarter of section 20, and said that "the channels came together again as a main channel, with the exception of the water spreading out to a considerable extent on the ground," that the water overflowed the greater part of the Starkey land, running entirely out of the channel, and then, as it flowed to the south line of section 20, it struck the other dam, which had been put in north of the county road, and again spread out.

The fall from the source of the creek to where it crosses the railroad right of way is something over 2,000 feet. The only outlet from the valley is under the railroad tracks. The water which is caused by snow melting in the hills only flows during the spring. The amount of snow during a season varies from nothing to 18 inches. During seasons when the snow melts gradually, and there is no frost in the ground, the water is absorbed, and there is none in the creek, and when the ground is frozen, and the snow in the hills is melted by a chinook wind, there is water in the creek.

At the point where Spring creek runs under the right of way of the railroad company there has been a fill on each side of the creek, 6 to 8 feet deep. The fill extends from the creek about 600 feet east of the county road in section 28, where it passes from an embankment to a slight cut. The drain under the railroad track and within the right of way consisted of one 48-inch corrugated metal culvert, which was about 4 feet below the top of the track. When this culvert was put in, the engineer inquired of the residents then thereabouts as to the usual flowage of water down Spring creek, and also examined the land toward the foot of the Rattlesnake Hills, and estimated the flowage to be about 20 second feet.

About January 20, 1916, there were from 12 to 16 inches of snow. There was not much snow on the level lands, except where drifted into depressions, but in the hills there was a great deal. The ground was frozen, and the snow did not melt until the chinook wind commenced on January 20th, blowing only during the daytime, and lasting until January 23d. The snow melted very rapidly, causing a sudden rush of waters, which, when they arrived at the embankment of the railroad, destroyed the roadbed for a great distance, broke through a stretch of railroad track, went over the ties, and washed a deep hole through the railroad into the lands of plaintiffs.

On January 23d there was an additional snowfall of about 15 inches, and the channel of Spring creek was practically drifted full of snow. A second chinook wind came and partly melted the snow, and the snow and water together started to flow down; the snow congealing at the railroad track and forcing the water to spread. The results of the storms were overflows caused by the railroad embankment.

We think that the court was right in holding that under the facts Spring creek was a natural water course. The water which flowed through it came from snow melting in high hills, and for several miles flowed naturally through a well-defined channel between banks, down

to the point just above plaintiffs' lands, where dams or like artificial obstructions checked the course of the waters, and thus caused them to overflow their accustomed channel and to spread out, in part, into another channel, and to overflow the lands northwest of plaintiffs' lands, only, however, to flow together again in a single main channel, before reaching the railroad culvert, and thence to flow naturally to the Yakima river.

[2] The facts that the water which went down the channel came from melting snow, and that there was a flow for but a few months in the spring, do not necessarily take away the characteristics or elements of a water course. In Reynolds v. McArthur, 27 U. S. (2 Pet.) 417, 7 L. Ed. 470, the Supreme Court recognized that a stream could acquire the name of a river in the channel of which at some seasons no water flows. In Borman v. Blackmon, 60 Or. 304, 118 Pac. 848, the court held that a stream fed by melting snows, which at regular seasons descends through long, deep gullies upon lands below, and on its onward flow carves out a distinct and well-defined channel, "which even to the casual glance bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial," is a water course. Justice Burnett, for the court, in applying these elements, said:

"After the stream has dried up, we can go upon the ground and say, 'Here it flowed; here is the track of the water; in this course the stream habitually runs.' This happens on the watershed in question, not from a cloudburst, but occurs every spring from the descent of the melted snow. The water of all streams is derived, directly or indirectly, from surface water which falls, in the beginning, from the clouds; but, whenever in its journey to the sea it flows in one continuous, well-marked channel, it becomes a water course, provided this regularly recurs at every returning season."

In Jaquez Ditch Co. et al. v. Garcia et al., 17 N. M. 160, 124 Pac. 891, the court quoted with approval from Harrington v. Demaris, 46 Or. 111, 77 Pac. 603, 82 Pac. 14, 1 L. R. A. (N. S.) 756, where it was held that a stream does not cease to be a water course, and become mere surface water, because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks, before flowing again in a definite channel. In that case, after a careful review of many cases, it was held that where surface water in a region of bluffs seeks outlet through a gorge or ravine during the rainy season, and by its flow takes a definite and natural channel, and has always done so from time immemorial, such accustomed channel through which the water flows has the elements of a natural water course, although the flow of the water is not continuous and the size of the stream is small.

Walker v. New Mexico & Southern Pacific R. Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837, cited by plaintiff in error herein, is referred to as seeming to be in conflict with the rule applied by the court; but it is pointed out that in the Walker Case the obstruction or embankment complained of was 4 miles from the mouths of the arroyo, and that the water after leaving the arroyo, spread out and became surface or flood water.

In Kroeger v. Twin Buttes R. Co., 14 Ariz. 269, 127 Pac. 735, Ann. Cas. 1914A, 1289, it was held that, where there was surface water which passed in its natural course, not over, but by, the plaintiffs' land on either side, and where at a point beyond it was intercepted by a railroad embankment, the railroad company not having constructed culverts capable of letting the water pass through, and there was an accumulation of water, which was backed up onto plaintiffs' higher land, the railroad company became liable. The court also referred to Walker v. New Mexico & S. P. R. Co., supra, but distinguished that case from the one at hand by emphasizing the fact that the Walker Case was one where there was surface water flowing from the plaintiffs' lands onto the defendants' lands, whereas in the case for decision the water was surface water cast back from off the defendants' lands onto the plaintiffs' lands.

A like distinction is to be applied in our case, where the waters were cast from the lands of the railroad company onto the plaintiffs' lands, over which they were not accustomed to flow. Of course, the facts of each case must be carefully considered; but, as bearing more or less closely upon the present questions, we cite Cairo, V. & C. R. Co. v. Brevoort (C. C.) 62 Fed. 129, 25 L. R. A. 527; Barnes v. Sabron, 10 Nev. 217; Quinn v. C., M. & St. P. R. Co., 23 S. D. 126, 120 N. W. 884, 22 L. R. A. (N. S.) 789; Kinney on Irrigation and Water Rights, § 207; Weil on Water Rights, pp. 354, 355; Rohsnagel v. N. P. R. Co., 69 Wash. 243, 124 Pac. 900; Noyes v. Cosselman, 29 Wash. 635, 70 Pac. 61, 92 Am. St. Rep. 937; Dahlgren v. C., M. & St. P. R. Co., 85 Wash. 395, 148 Pac. 567.

In Bonthuis v. Great Northern R. Co., 89 Wash. 442, 154 Pac. 789, cited by the plaintiff in error, the facts were very different from those with which we have to deal herein. The court there decided nothing more than that recovery for obstructing a stream by negligently allowing débris to flow down and to dam the creek at a point opposite the intake, and overflowing the lands of plaintiff, could not be had, where the plaintiff's evidence as to the accumulation of the dam was exceedingly vague. The legal rule that the company had a primary right to hurry the outflow of surface waters from its own property was held applicable.

Trigg v. Timmerman, 90 Wash. 678, 156 Pac. 846, L. R. A. 1916F, 424, also relied upon by plaintiff in error, is to be distinguished, in that there the court decided that an upper proprietor could by means of drainage ditches conduct and hasten the flow of surface waters naturally draining into a gully, provided it did not increase the quantity of water naturally reaching the lands of a lower proprietor. The facts, however, were so unlike those now before us, that the case cannot be regarded as fixing a rule to govern the present case.

It is further contended by the plaintiff in error that evidence shows the railroad culvert was sufficient to pass the usual amount of water resulting from melting snow, and that therefore there would be no liability for damages to property because of the culvert being insufficient to carry off the waters of an extraordinary and unexpected flood. The evidence, however, did not warrant such a conclusion, and the court

expressly charged that the first question for the consideration of the jury was whether the railroad company made adequate provision for the free passage of all water which might ordinarily be expected to flow through the water course in question. This instruction, when considered with the one to which we have already referred, wherein the court charged that the railroad company was not bound to anticipate or provide against unprecedented or unexpected floods, made the law plain in respect to the obligation of the railroad company.

It is said that the complaints in these actions were drawn upon the theory that the injury sustained by the plaintiffs below was the result of an overflow of surface waters. We are clearly of the opinion, however, that under the allegations of the complaint that Spring creek is a natural water course, with a natural channel, wherein the waters flow in their accustomed way, plaintiffs were entitled to litigate the questions of the right of the railroad company to collect water behind its embankment and to discharge it in a concentrated body upon the lands of the defendants in error.

Other points are of minor importance. They have been considered, but are not well founded.

The judgments are affirmed.

SHAFFER v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. February 10, 1919.)

No. 3220.

1. ARMY AND NAVY ⟸40—ESPIONAGE ACT—USE OF MAILS.
   It cannot be said as matter of law that use of the mails by defendant when the United States was at war in distributing copies of a book in which the author asserted that patriotism was murder and the spirit of the devil, that the war was wrong and its prosecution a crime, was not their use for transmission of nonmailable matter willfully intended and calculated to obstruct the recruiting and enlistment service, which constituted an offense under Espionage Act, tit. 12, § 3 (Comp. St. 1918, § 10401c).
2. WAR ⟸4—ESPIONAGE ACT—UNLAWFUL USE OF MAILS.
   Evidence *held* to sustain a conviction for use of the mails for transmission of matter declared nonmailable by Espionage Act, tit. 12 (Comp. St. 1918, §§ 10401a–10401d).

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Criminal prosecution by the United States against Frank Shaffer. Judgment of conviction, and defendant brings error. Affirmed.

The plaintiff in error was convicted under a count of an indictment which alleged in substance the following: That on March 7, 1918, when the United States was at war with the Imperial German Government, the defendant did willfully, knowingly, unlawfully, and feloniously use and attempt to use the mails and postal service of the United States for the transmission of matter declared to be nonmailable by the act of Congress approved June 15, 1917 (40 Stat. 230, c. 30, tit. 12 [Comp. St. 1918, §§ 10401a–10401d]), in this:

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied June 2, 1919.

That he did then and there willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the post office of the United States at Everett, Wash., an envelope bearing the address of "H. H. Bettinger, Granite Falls, Washington," and containing a book and publication containing matter advocating and urging treason and forcible resistance to the act of Congress approved May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. §§ 2044a–2044k]), and urging and attempting willfully to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, and urging and attempting willfully to obstruct recruiting and enlistment in the service of the United States, to the injury of said service and of the United States, which said book was entitled "The Finished Mystery," pages 247 to 253 whereof are particularly filled with treasonable, disloyal, and seditious utterances, among other things setting forth the following:

"Standing opposite to these Satan has placed three great untruths, human immortality, the Anti-Christ, and a certain delusion which is best described by the word patriotism, but which is in reality murder, the spirit of the very devil. It is this last and crowning feature of Satan's work that is mentioned first. * * * If you say it is a war of defense against wanton and intolerable aggression, I must reply that every blow which we have endured has been primarily a blow directed, not against ourselves, but against England, and that it has yet to be proved that Germany has any intention or desire of attacking us. * * * The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches."

William R. Bell, of Seattle, Wash., for plaintiff in error.

Robert C. Saunders, U. S. Atty., Clarence L. Reames, Sp. Asst. Atty. Gen., and Hinman D. Folsom, Jr., Attorney for Department of Justice, all of Seattle, Wash., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). Error is assigned to the refusal of the court to instruct the jury to return a verdict in favor of the defendant. That assignment presents two questions: First, does the book constitute nonmailable matter, within the definition of the act of Congress approved June 15, 1917? and, second, was there absence of evidence to show that the plaintiff in error used or attempted to use the mails of the United States for the transmission of the book?

[1] The plaintiff in error contends that the publication complained of contains no false statement, but only the opinion of the author of the book that patriotism is identical with murder and the spirit of the devil, that war is a crime, and the argument that it was yet to be proved whether Germany had any intention or desire of attacking the United States. It is true that disapproval of war and the advocacy of peace are not crimes under the Espionage Act; but the question here is not whether the publication contained expressions only of opinion, and not statements of fact, but it is whether the natural and probable tendency and effect of the words quoted therefrom are such as are calculated to produce the result condemned by the statute.

The act of June 15, 1917, declares to be nonmailable every letter, book, etc., "of any kind in violation of any of the provisions of this act." The act mentions, among other things, the willfully causing or attempting to cause insurrection, disloyalty, mutiny, or refusal of

duty in the military or naval forces, or willfully obstructing the recruiting or enlistment service of the United States. We think it should not be said, as a matter of law, that the reasonable and natural effect of the language quoted from the publication was not to obstruct—that is, not to impede, retard, or render more difficult—the recruiting or enlistment service, and thus to injure the service of the United States. Printed matter may tend to obstruct the recruiting and enlistment service, even if it contains no mention of recruiting or enlistment, and no reference to the military service of the United States. It is sufficient if the words used and disseminated are adapted to produce the result condemned by the statute.

The service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country. The greatest inspiration for entering into such service is patriotism, the love of country. To teach that patriotism is murder and the spirit of the devil, and that the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war.

[2] The evidence that the plaintiff in error used, or caused to be used, the mails of the United States in the transmission of copies of the book, is in substance the following:

On March 29, 1918, 124 copies of the book were found concealed at his home. He and his wife had been engaged in distributing the books for 4½ months prior to that date, and in that period she had sold and distributed 100 copies, and her husband 25 copies. A number of the books were sent by mail. The wrappers of six of the books so sent by mail were introduced in evidence. An agent of the Department of Justice testified that the plaintiff in error admitted to him that he had written some of the addresses on the books and had directed his wife to write some of them. The books so transmitted in these wrappers were sent C. O. D., and on the wrappers the name of the plaintiff in error was marked as the sender. Several were refused by the persons to whom they were sent, and were returned by mail to the plaintiff in error.

The plaintiff in error, testifying on his own behalf, stated that he knew that his wife was mailing out the books, and that his name was on the return card on the books, because he was the treasurer of the association which owned the books, and that the money orders in payment for the books were handed to him as such treasurer. Mrs. Shaffer testified that she and her husband "were engaged together in this common enterprise"; that when books were sent C. O. D., and accepted, sometimes the return money would be received by her; but that, when the money came in her husband's name, he would get it. Neither she nor her husband testified that the latter had not mailed such books.

This evidence was clearly sufficient to go to the jury on the question whether or not the plaintiff in error used the mails in the distribution of the book. It shows that he and his wife were jointly engaged in the enterprise, and that he authorized her to write the addresses on

the wrappers by which the books were sent out by mail, and by which the books were returned to him by mail in case they were not accepted by the persons to whom they were sent. It tends to show that he used the mails, and that, even if he personally mailed none of the books, he aided, abetted, and induced the commission of the offense, and was therefore a principal under section 332 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. § 10506]). Burton v. United States, 142 Fed. 57, 61, 73 C. C. A. 243; Chambers v. United States, 237 Fed. 513, 524, 150 C. C. A. 395.

It is argued that the evidence fails to show that the plaintiff in error committed the act willfully and intentionally. But there is enough in the evidence to show the hostile attitude of his mind against the prosecution of the war by the United States, and that the books were intentionally concealed on his premises. He must be presumed to have intended the natural and probable consequences of what he knowingly did. The instructions of the court to the jury are not before us, and we must assume that the court properly submitted to the jury under the evidence the question of the intent and purpose of the plaintiff in error.

The judgment is affirmed.

WILLIAMS v. BOSWELL, U. S. Marshal.

MILLS v. SAME.

(Circuit Court of Appeals, Fifth Circuit. January 31, 1919.)

Nos. 3281, 3282.

CRIMINAL LAW ⊂=242(4)—REMOVAL OF ACCUSED TO OTHER DISTRICT FOR TRIAL —INDICTMENT.

Indictments *held* sufficient to charge petitioners with a conspiracy to violate the Reed-Jones Amendment to the Post Office Appropriation Bill of March 3, 1917 (Comp. St. 1918, § 8739a), by the unlawful transportation of intoxicating liquors in interstate commerce, so as to warrant their removal from Georgia to Florida for trial.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Petitions by J. J. Williams and E. P. Mills for writs of habeas corpus for discharge from the custody of N. H. Boswell, United States Marshal for the Southern District of Florida. From judgments denying the writs, petitioners appeal. Affirmed.

The following is the opinion of Call, District Judge:

Four persons, A. D. Wright, Gabe Lippman, E. P. Mills, and J. J. Williams, each filed his petition for a writ of habeas corpus seeking to be discharged from the custody of the marshal of this district. The petitions in each case allege, and the marshal's returns show, that he holds each of the defendants by virtue of commissioner's commitments for removal to the Southern district of Georgia.

The proofs introduced before the commissioner on the hearing were certified copies of indictments found in the Southern district of Georgia, the warrants of arrest issued thereon, and the admission of the defendants of their identi-

ties. One indictment is against Wright for aiding and abetting, a copy of which is made a part of his petition. Four indictments are against Lippman, one for aiding and abetting and three for conspiracy. Six indictments are against Mills, three for aiding and abetting and three for conspiracy. Two indictments are against Williams, one for conspiracy and one for aiding and abetting.

The charging part of these several indictments, except the names of the defendants and dates, are the same. The cases of these petitioners may therefore be considered together, and the decision of one will govern the others.

The attack made upon all the indictments is that no violation of law is stated.

The statute involved in these indictments is the Reed-Jones Amendment to the Post Office Appropriation Bill of March 3, 1917, c. 162, 39 Stat. 1069. The portion applicable reads as follows:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce except for scientific, sacramental, medicinal and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished as aforesaid." Comp. St. 1918, § 8739a.

Then follows some provisos which are not material to this investigation.

There is no question but that this law was adopted to prevent the violation of the prohibition laws of the states and territories through interstate shipments of liquor for beverage purposes. Nor can it be questioned, I think, that an indictment to charge a violation of this act must by apt words show that the liquor shipped in interstate commerce was intended for use in the state prohibiting the manufacture or sale for beverage purposes.

It is contended for the petitioners that none of these indictments do make this charge. The indictment in the Williams case, taken as an example, is as follows:

"That heretofore, to wit, on the second day of March, in the year of our Lord one thousand nine hundred and eighteen, one J. J. Williams, * * * all late of said division and district, unlawfully, knowingly, and feloniously did within said division and district, and within the jurisdiction of this court, conspire, combine, confederate and agree together to commit an offense against the United States; that is to say, to cause intoxicating liquors to be transported in interstate commerce from Jacksonville in the state of Florida to Beaulieu in the county of Chatham, state of Georgia, the laws of which state of Georgia did prohibit the manufacture and sale therein of intoxicating liquors for beverage purposes, said intoxicating liquors not then and there to be transported for sacramental, medicinal, mechanical or scientific purposes, as they, the said conspirators, then and there well knew."

It is insisted that there is no charge contained in these indictments that the liquor agreed to be transported in interstate commerce was finally destined for Beaulieu, but, admitting the truth of the allegation, it might still be a shipment passing through the dry state to a state allowing the sale and manufacture of intoxicating liquors. This contention does not seem to me to be tenable. It is charged that the conspiracy was to ship liquors from Jacksonville in Florida, to Beaulieu in Georgia. If the proof should show that the agreement was to ship liquors through Beaulieu to some other point, the defendants would be entitled to have a peremptory instruction for acquittal. The language used must receive a reasonable construction, and a construction of the language used making it apply to a through shipment would in my judgment be unreasonable.

The destination of the shipment would have been no more definite had a consignee, with his resident in the prohibition state, been named, than is expressed by the language of the indictment.

It is also insisted that it is not sufficient for the indictment to state that said liquors were not to be transported for sacramental, etc., purposes, but that the purpose should have been stated. The indictment negatives the only legal purposes for which the liquor could have been shipped. If shipped for any purpose other than those enumerated in the statute, the shipment is illegal and an agreement to do so is a criminal conspiracy. As I understand the

argument of counsel, it is contended that, because the act in question was intended to prevent the violation of the prohibition laws of the states through interstate shipments of liquor, therefore it is necessary for the indictment to allege that the liquor so shipped was for beverage purposes, and the negativing of the lawful purposes for which liquor could be shipped into the prohibition state is not sufficient. That contention is disposed of by what I have said above.

What I have said above, I think, disposes of the main objections to the conspiracy indictments. Any minor objections which go to the form of the indictment rather than to the substance are to be determined in the court where they were found. Haas v. Henkel, 216 U. S. 481, 30 Sup. Ct. 249, 54 L. Ed. 569.

What I have said in regard to the conspiracy indictments disposes of the main objections urged against the aiding and abetting indictments. It is, however, further urged against these indictments that, since section 332 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. § 10506]) makes the aider and abettor a principal, it is not sufficient to charge him in the language used in these indictments. The language used in these indictments is that usually set forth in the forms to charge one with aiding and abetting, and this was held sufficient in Coffin v. U. S., 156 U. S. 448, 15 Sup. Ct. 394, 39 L. Ed. 481. But it is not necessary for me to decide upon the sufficiency of the aiding and abetting indictments except in the Wright case.

It is also urged that these indictments and admission of identity are not sufficient to make a case of probable cause, which is all that is necessary to authorize a commitment for removal. This contention is disposed of by Price v. Henkel, 216 U. S. 491, 30 Sup. Ct. 257, 54 L. Ed. 581.

The writs of habeas corpus will be, therefore, dismissed, and the petitioners remanded to the custody of the marshal.

It will be so ordered.

Charles M. Cooper, Chas. P. Cooper, and J. J. G. Cooper, all of Jacksonville, Fla., for appellant Williams.

Miles W. Lewis, Wm. A. Hallowes, Jr., Chas. M. Cooper, Chas. P. Cooper, and J. J. G. Cooper, all of Jacksonville, Fla., for appellant Mills.

H. S. Phillips, U. S. Atty., of Tampa, Fla., and Fred Botts, Asst. U. S. Atty., of Jacksonville, Fla., for appellee.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PER CURIAM. The above-entitled cases, involving practically the same issues, were tried and disposed of together in the lower court, and, although brought here separately for review, were argued and submitted together.

We have considered the records, the briefs submitted, the authorities cited, and the elaborate opinion of the trial judge fully considering and discussing the issues presented.

From our examination, we conclude that the only question raised and necessary for our consideration and decision in these cases is whether the indictments found by the grand jury of the Eastern district of the state of Georgia sufficiently charge the appellants with a conspiracy to violate the laws of the United States to warrant appellants' removal from Florida to Georgia for trial.

Under the authorities cited by the trial judge and during the argument of the case, we are fully satisfied that the indictments are sufficient.

The judgments are affirmed in both cases.

SERVEL v. JAMIESON et al.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1919.)

No. 3200.

1. TENDER ⟸13(1)—SUFFICIENCY—TENDER OF CHECK.
   The tender of a check in payment of money is of no effect, where objection is made to that medium of payment.
2. SALES ⟸191—MEDIUM OF PAYMENT—WAIVER.
   The fact that the owners, on signing a contract for the sale of sheep for future delivery, accepted a check for the advance payment, did not bind them to accept a check in final payment.
3. SALES ⟸196—MEDIUM OF PAYMENT—WAIVER.
   Where there was evidence tending to show that defendants, on the last day for performance of a contract for the sale of sheep to plaintiff, after the sheep had been weighed, avoided plaintiff's agent, who sought to make payment, until after bank hours, and then refused to accept a check or draft, it was error to direct a verdict in their favor in an action for breach of contract.
4. TENDER ⟸5—WAIVER—PREVENTING MAKING OF TENDER.
   A tender is waived where the person to whom it is to be made in any way obstructs or prevents a tender.

In Error to the District Court of the United States for the District of Montana; George M. Borquin, Judge.

Action by Zavier Servel against G. R. Jamieson and Mathieson Murray, partners as Jamieson & Murray. Judgment for defendants, and plaintiff brings error. Reversed.

The plaintiff in error brought an action against the defendants in error to recover damages for their failure to deliver sheep in accordance with the terms of a contract made March 14, 1917. The parties will be named plaintiff and defendants as in the court below. The contract provided that the defendants should sell and deliver to the plaintiff all their wether lambs produced in the year 1917, delivery to be made between the 25th and the 29th days of September, 1917, exact day to be at the option of the plaintiff, and at certain places named, in the state of Montana. The plaintiff was to pay therefor the sum of 10 cents per pound. The plaintiff paid at the date of the contract $3,000 as part of the purchase price, and agreed to pay the remainder "at the time and upon the delivery" of the lambs. The contract further provided: "And it is further mutually agreed by and between the parties hereto that time is of the essence of this agreement, and that upon the expiration of the time for delivery as herein provided, the rights of said party of the second part [the plaintiff] hereunder shall cease and terminate, and he shall have no right, claim, or interest in or to said sheep after the expiration of said period of time."

One Stitt, as agent for the plaintiff, for the purpose of receiving the lambs and paying therefor, went to Glasgow, Mont., the home of the defendants, on September 25, 1917, and the next day the parties commenced weighing the lambs. The lambs were weighed at different points, and the work was finally completed at 8 o'clock in the morning of the 29th. The defendant Jamieson then took Stitt in his automobile to Glasgow, where they arrived at 1 o'clock in the afternoon. Jamieson then said that Murray was at Nashua and that they should go to Nashua for settlement. Stitt went to Nashua by train, he understanding that Jamieson was to come by automobile. Stitt reached Nashua at 2 o'clock and searched for Murray, but he was not there. He thereupon secured an automobile and went back to Glasgow, arriving there at 4 o'clock p. m. He there met both the defendants on the street, and told them he was ready to settle for the lambs. Murray asked him how he wanted to pay

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for them, and he answered that he would give them a check, to which Murray replied, "If you haven't got the currency, you can't have the lambs, and if you have you can, but we won't accept a check." Stitt told him that he did not have $30,000 with him, but he could get it if it was necessary, and said that he had always bought lambs by check, and had never given currency before. He told them that his check was good, that he would wire his bank and have them guarantee it, and offered to leave the sheep with them until he got the money. He also offered to draw a draft upon Hatcher & Snyder, and stated that they would pay it. He also said that he would get currency as soon as it could be transmitted by wire. The banks were then closed, as it was Saturday. The defendants said that the time was up and that he could not have the lambs.

Stitt offered to prove that he had made arrangements with the bank at Ft. Morgan, Colo., for the payment of any check he might draw on it, and to prove that he would have produced the currency for payment as soon as it could be procured by telegraph from that bank, and that he would have done so, had the defendants not told him that it would be useless, and he offered to prove that that bank had telegraphed its guaranty to pay his check, and that the defendants admitted on Sunday, September 30, that they had received a telegram from the Montana National Bank, at Billings, Mont., guaranteeing the payment of any draft he might draw on Hatcher & Snyder. He also offered to prove that on the 30th he served notice on the defendants that he would procure legal tender on Monday morning as soon as the banks were open, and that he would compensate the defendants for any damage they might suffer by reason of holding the sheep until that time. He further offered to show that it was the custom in all parts of Montana, and in the Northwestern States generally, among sheep men, to pay for their purchase of sheep by means of a check or draft. Objections to all these offers of proof were sustained, and exceptions were taken. The market value of the lambs at that time was 15 cents a pound.

The plaintiff demanded judgment against the defendants for $15,666.20, the difference between the contract price and the value of the lambs at the time when delivery was to be made, and also for the sum of $3,000, which was paid at the time of making the contract. At the conclusion of the plaintiff's testimony the court instructed the jury to return a verdict for the defendants.

F. B. Reynolds, of Billings, Mont., for plaintiff in error.

Norris, Hurd & McKellar and Edwin L. Norris, all of Great Falls, Mont., for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] We think that the defendants stood strictly within their right in refusing the check which was tendered by Stitt. It is the well-settled rule that the tender of a check in payment of money is of no effect in cases where objection is made to that medium of payment. 38 Cyc. 146; Volk v. Olsen, 54 Misc. Rep. 227, 104 N. Y. Supp. 415; Rumpf v. Schiff (Sup.) 109 N. Y. Supp. 51; Barbour v. Hickey, 2 App. D. C. 207, 24 L. R. A. 763; Collier v. White, 67 Miss. 133, 6 South. 618; Aldrach v. Light, Power & Ry. Co., 101 S. C. 32, 85 S. E. 164; Moore v. Twin City Ice & Cold Storage Co., 92 Wash. 608, 159 Pac. 779, Ann. Cas. 1918D, 540. Nor should it be held that the defendants, by accepting a check for the payment made at the time of entering into the contract, bound themselves to accept a check at the final performance thereof, or waived their right to demand that the final payment be made in currency. The case is unlike Gunby v. Ingram, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232, where a

series of payments of interest on a mortgage had been made by check, and it was held that the tender of a check for another installment was sufficient to prevent the exercise of an option to declare the whole debt due. In the present case the defendants might well accept a check for the first payment, for they parted with no right of possession of the property contracted to be sold, but when it came to the final payment and the delivery of the property to the plaintiff to be taken out of the state, they were entitled to demand that they be paid in money, and not by a check upon a bank in a sister state.

[3, 4] Time was expressly made of the essence of the contract, and by the agreement of the parties the contract was to be fully performed on September 29, 1917. This was not done, but there was testimony tending to prove that on September 29, after the lambs had been weighed at 8 o'clock in the morning, the defendants avoided the plaintiff's agent and delayed meeting him for the final settlement until after 4 o'clock in the afternoon. A tender is waived where the person to whom it is to be made "in any way obstructs or prevents a tender." 38 Cyc. 135; Hunt on Tender, § 52; Schaeffer v. Coldren, 237 Pa. 77, 85 Atl. 98, Ann. Cas. 1914B, 175. In view of these features of the evidence and the plaintiff's offer of proof, from which the jury might have found that, but for such delay, the currency might have been obtained to make payment on that day, we think it was error to direct the jury to return a verdict for the defendants.

The judgment is reversed, and the cause is remanded for a new trial.

KOKE CO. OF AMERICA et al. v. COCA-COLA CO.*

(Circuit Court of Appeals, Ninth Circuit. February 24, 1919.)

No. 3012.

TRADE-MARKS AND TRADE-NAMES ⊜85(1)—RIGHT TO PROTECTION—MISREPRESENTATIONS BY COMPLAINANT.

The Coca-Cola Company *held* chargeable with such deceptive, false, fraudulent, and unconscionable conduct in the advertising and sale of its product as precludes a court of equity from granting it any relief in the protection of its trade-mark or business.

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Suit in equity by the Coca-Cola Company against The Koke Company of America, The Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas. Decree for complainant, and defendants appeal. Reversed.

For opinion below, see 235 Fed. 408.

Richard E. Sloan, of Phœnix, Ariz., and Austin B. Littleton, of Chattanooga, Tenn. (Littleton, Littleton & Littleton, of Chattanooga, Tenn., of counsel), for appellants.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 249 U. S. —, 39 Sup. Ct. 493, 63 L. Ed. —.

William K. White, of San Francisco, Cal., Harold Hirsch, of Atlanta, Ga., Joseph E. Morrison, of Phœnix, Ariz., and Edward S. Rogers and Frank F. Reed, both of Chicago., Ill., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. Our conclusion in this case, after a careful examination of it, may be very briefly stated. The suit was brought to obtain an injunction, preliminary and perpetual, an accounting for profits, and for the recovery of damages against the defendants thereto, upon the ground of their alleged joint and several infringement of the complainant's trade-mark "Coca-Cola," and for unfair competition on the part of the defendants. After long preceding use of it, the trade-mark was registered in the United States Patent Office on January 3, 1893, under the act of Congress of March 3, 1881, and was also registered under the subsequent act of Congress of February 20, 1905, entitled "An act to authorize the registration of trade-marks used in commerce with foreign nations, among the several states of the United States, and with the Indian tribes, and to protect the same." A very large amount of testimony was taken in the case, from which the court below found as a fact that the preparation manufactured and sold by the defendants to the suit was in imitation of that of the complainant, and that the name under which it was so manufactured and sold—"Koke"—was selected for the purpose of reaping the benefit of the reputation and advertising of the complainant, and because it would permit the defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of the complainant was copied and imitated, and the barrels in which defendants' products were shipped were colored as nearly like those of complainant as possible.

Upon the record we would not be justified in holding that the trial court reached the wrong conclusion in that respect, and if that were the only point in the case would readily affirm the interlocutory decree appealed from. But it is the well-established law, as held by the Supreme Court in the case of Worden v. California Fig Syrup Co., 187 U. S. 516, 528, 23 Sup. Ct. 161, 164 (47 L. Ed. 282) that "when the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark or in his advertisements and business, be himself guilty of any false or misleading representations; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity; that where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained."

Many cases will be found referred to by the court in its opinion in that case in support of it, and by reference to 38 Cyc. 700, 704, 797, there will be found many others to the same effect. The evidence, we think, leaves no room for doubt that the appellee's very extensive

business conducted under the name "Coca-Cola" is not entitled to protection at the hands of a court of equity: First, because it shows that in the beginning, and for many years thereafter, the coca of which its compound was in large part made contained the deadly drug cocaine, and the caffeine, which constituted the other main ingredient, was derived mainly, and, indeed, almost exclusively, not from cola nuts, but from tea leaves. Yet the labels with which the preparation was adorned contained pictures of coca leaves and cola nuts, and was widely advertised and sold, first, under the name of "Coca-Cola Syrup & Extract," next as "Coca-Cola Syrup," and finally as "Coca-Cola," as a "valuable brain tonic," an "ideal nerve tonic and stimulant," as a cure of "headache, neuralgia, hysteria, and melancholy," and "of nervous afflictions," under which representations a tremendous consumption was built up, and under which large numbers of the appellee's customers still consume the mixture, although long prior to the bringing of the present suit the drug cocaine was practically eliminated from the drink, and the caffeine, of which it has since been mainly composed, still comes mainly, if not entirely, from other sources than the cola nut. We find such conduct on the part of the appellee to be, in fact, such deceptive, false, fraudulent, and unconscionable conduct as precludes a court of equity from affording it any relief.

Accordingly, under the rule and the decisions of the Supreme Court in the cases of Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282, and United States v. Coca-Cola Co., 241 U. S. 265, 36 Sup. Ct. 573, 60 L. Ed. 995, Ann. Cas. 1917C, 487 (decided subsequent to all the cases upon which the judgment of the court was based), we see no escape from the conclusion that the judgment appealed from must be reversed, and the cause remanded, with directions to the court below to dismiss the bill, at the complainant's cost.

Accordingly it is so ordered.

INSURANCE PRESS v. FORD MOTOR CO.

(Circuit Court of Appeals, Second Circuit. November 13, 1918.)

No. 37.

COPYRIGHTS ⊂=87—INFRINGEMENT—DAMAGES.

Owner of a copyrighted article, reproduced by defendant and circulated free in advertising matter without knowledge of complainant's rights, *held* entitled to a small award of damages for the infringement.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Insurance Press against the Ford Motor Company. From the decree, complainant appeals. Affirmed.

The opinion of Augustus N. Hand, District Judge, in the District Court, is as follows:

The defendant printed in a booklet which it circulated among agents and owners of its automobiles an article entitled "Nerve," copyright of which

belonged to the complainant. This had a large circulation, but was distributed as advertising matter, and not sold, and the publication by the defendant in which the article appeared has now been discontinued. The complainant had sold a few copies of the single article which it had printed, and appears to have made a profit during the first year of the publication of about $260. The complainant waives any right to an accounting for profits, which doubtless could not be established, and seeks to recover for infringement of its copyright under the penal clause of the act.

I think it probable that the defendant was to some extent benefited by the use of the complainant's article, and it is not improbable that the complainant lost some chances to make sales by reason of the large circulation the article had in the automobile trade. While I am satisfied that the defendant was entirely innocent in the publication, and took the article from a copyrighted magazine with the permission of that magazine, nevertheless there was plainly a technical violation of complainant's rights, and I think some damages should be awarded. The amount is undoubtedly speculative, but the case is just one of those cases which I think are intended to be covered by the statute, where no exact amount could ever be worked out under strict rules of evidence upon an accounting. Hendricks Co. v. Thomas Publishing Co., 242 Fed. 37, 154 C. C. A. 629.

I feel reasonably sure that the complainant has suffered a very small amount of damages, and that the defendant has secured a very trifling advantage by the publication of the article in the automobile trade, and under the circumstances, shall award the sum of $250 to the complainant, in addition to costs and a counsel fee of $100.

The decree should also provide for an injunction.

Otis & Otis, of New York City (A. Walker Otis, of New York City, of counsel), for appellant.

Crisp, Randall & Crisp, of New York City (W. Benton Crisp and Cyril F. Dos Passos, both of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

CUNNINGHAM PIANO CO. v. ÆOLIAN CO.

(Circuit Court of Appeals, Third Circuit. January 31, 1919. Rehearing Denied March 26, 1919.)

No. 2418.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PIANO PLAYER.

The Young patent, No. 692,968, for controller for mechanical musical instruments, *held* valid and infringed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by the Æolian Company against the Cunningham Piano Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 251 Fed. 301.

Hector T. Fenton, of Philadelphia, Pa., for appellant.

George D. Beattys, of New York City, and Joseph C. Fraley, of Philadelphia, Pa., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. By the decree of the District Court, claims 1 and 2 of Letters Patent No. 692,968, dated February 11, 1902, issued to complainant as assignee of the inventor, Francis L. Young, for an Improvement in Controllers for Mechanical Musical Instruments, were held valid and infringed. We affirm the decree on the court's opinion (D. C.) 251 Fed. 301, without doing more than to state very generally the feature of the case which has most impressed us.

The invention of the patent relates to mechanical musical instruments such as the "pianola," and more particularly the "piano player," wherein musical notes are automatically sounded by pneumatic mechanism actuated by a traveling sheet of perforated paper. The state of the art—that is, the point which the art had reached and at which it had stopped just before the patentee entered it—records the advance of a remarkable though imperfect mechanical musical instrument. The organization of this instrument contained, first, means for the mechanical sounding of musical notes, governed in their production and duration by the other mechanical means of a traveling sheet of perforated paper; and second, means for giving artistic effects to the sounds thus mechanically produced, by controlling their speed and volume. The latter means embraced a number of parts termed "controllers." Though connected with the sound producing mechanism, these were operated, not mechanically, but manually by the performer, and were the particular instruments the performer used to control variation in sound volume and time and thereby to give to a musical composition the artistic interpretation he desired. Without controllers, the instrument produced an unmusical jumble of sounds. With controllers, the production was musical according to the skill with which the performer moved the controllers and governed the artistic effects of time and sound. One unskilled in music could render very little real music from the sounds with which the mechanism supplied him. Skill of a musician in some measure was required for the production of music.

Obviously, instruments with a musical range limited to musicians more or less skilled were limited in their sale. To broaden the commercial field, manufacturers found it necessary to qualify the unmusical as musical performers by affording them a modicum of skill that could be easily acquired. With this in view, they printed instructions on the margin of the perforated music sheet so as to convey to the mind of the performer, as the music sheet traveled into view, the musical effects which were appropriate at the moment when later the sheet passed over the point at which its perforations called forth sounds. These instructions consisted of words familiar to ordinary music, such as, "accel," or "ritard," when they related to speed or tempo effects; and "piano," or "forte," when they related to sound volume or dynamic effects. Webber, No. 452,203.

Numerals also were printed in vertical alignment on the margin of the sheet or on the body of the sheet out of alignment. These numerals corresponded to others on a dial placed conveniently within the range of the performer's vision. They indicated the tempo; and as

they moved on the sheet toward the sound actuating board, the performer could obtain the appropriate speed or time by moving a controller-connected pointer to the appropriate numeral on the face of the tempo indicator. Chase, No. 571,746; 638,955; Richards, No. 653,529.

In addition to these instructions there were others, the most useful perhaps being a line printed lengthwise the traveling sheet but shifting across its face, from side to side, technically known as the "expression line." This line—the invention of Webber, Letters Patent No. 452,203—was not truly sinuous in the sense of bending in and out in a wavelike course, but shifted its direction abruptly and at angles. In its position and change of direction, this line denoted generally but not precisely the appropriate sound volume and its changes, and when followed by the eye, it carried to the mind of the performer some measure of the artistic interpretation as to loud and soft sounds and as to changes from one to the other which the musical composition called for. The Webber line was an interpretative guide. Whatever its merits, it was only a guide. The musical interpretation it conveyed to the performer was capable of reproduction by him only according to his skill in following the line with his eye and mind —in reading what the line imparted—and in manipulating the controllers in a way to produce the effects the line intended.

It thus appears very clearly that the art, when Young entered it, called for some musical knowledge and some musical skill on the part of the performer to render artistically a musical composition mechanically sounded. It is equally clear that the art enabled him to render music only according to his own skill, or, at most, only according to his skill in reproducing the interpretation of another so far as that interpretation was shown by words, numerals and by the Webber expression line and its angles.

The conception of Young, the patentee, also contains a line, but a line different in character and function. In the line of the invention, nothing is left to the skill or interpretation of the performer in supplying musical effects when the line changes its position and direction. The performer does not have to read it. The purpose of the invention, therefore, is to facilitate, continuously and without breaks, the rendering or "shading" of music whose notes are mechanically sounded, so that a person who has *no* musical knowledge and who is *without* artistic skill in any degree can reproduce a musical composition of high order, not with tolerable fidelity, but exactly as the skilled pianist had played it and interpreted it.

What Young did was to extend the tempo controller mechanism over the traveling sheet and fasten a pencil to it. When he played the piano, the sheet moved against the pencil, which drew a line lengthwise the sheet and throughout the musical composition. This line varied in direction with each variation of musical effect given by the performer. The changes of direction were not sudden, abrupt, or angular, as in Webber, but were bending and sinuous, and it was found that in the sinuosities of the line were exactly recorded every variation of tempo expression. What Young achieved was to im-

press upon a musical composition, and upon every note of it, his interpretation and his artistic conception of its musical effects and to embody them in the line thus drawn. These recorded effects may be either of time or sound volume according as the controller mechanism is adapted to one or the other. What Young gave the art was an idea made practical by mechanical means, whereby the interpretation of a master performer, or even of the composer, can be exactly reproduced with its precise artistic effects by an unskilled performer merely following the line impressed upon the sheet, not by his eye or by his mind, but physically by a pointer attached to the controller mechanism and extending over the music sheet. Young's line became the expression pathway of the master performer, and so long as one follows it without wandering, he will reproduce the master's actual performance. The skill of a great artist can thus be caught on the sheet, there impressed and preserved and be reproduced by anyone, anywhere, and for all time.

The defendant says that invention was not involved in this. We think it was. In the first place, it was a true discovery. It involved uncovering a thing, which, while long capable of being done, was never before thought of. It also afforded a medium or means for bringing the discovery into practical action, and put it into the hands of others, there to be turned to pleasurable and profitable uses. Young's thought that a line might be made to record a master's interpretation of a musical composition, and that anyone, however unskilled, who follows that line physically can reproduce the music of the master just as the master had rendered it, was not his invention. That was his discovery. It was, however, the soul of his invention. The very simple means of a pointer connected with the controller and extending over the music sheet to the line, by which his discovery was brought into action, did not, when standing alone, involve invention. But when this means, simple though it was, was employed to bring into being and put to use the substance of the discovery, the two together, the great and the little thing, constitute invention. Young's thought without the pointer is nothing more than an interesting discovery, and is not patentable. Morton v. New York Eye Infirmary, 5 Blatchf. 116, Fed. Cas. No. 9,865; Miami Copper Co. v. Minerals Separation, Limited, 244 Fed. 752, 157 C. C. A. 200. The pointer without the thought is a useless piece of metal. The world may use one without the other at will; but it is the use of both together that Young taught the art, and of which the unskilled who are anxious to produce music, as well as the skilled who are ambitious to perpetuate their fame, have availed themselves in amazing numbers.

We realize that the issues of validity and scope of the claims in suit, and consequently the issue of infringement, present aspects which admit of extended technical discussion; but as our reasoning follows that of the learned trial judge as shown in his opinion, and as our judgment on all issues is the same as his, we find it unnecessary to do anything more than direct that

The decree below be affirmed.

HOMER BROOKE GLASS CO. et al. v. HARTFORD-FAIRMONT CO.

(District Court, D. Connecticut. February 18, 1919.)

No. 1465.

PATENTS ⊂=328—INFRINGEMENT—MACHINE FOR CUTTING MOLTEN GLASS.

The Brooke patent, No. 723,983, for an automatic device for cutting or separating a flowing stream of molten material, particularly glass, *held* not infringed by a machine having a distinctly different principle of operation.

In Equity. Suit by the Homer Brooke Glass Company and the Owens Bottle Machine Company against the Hartford-Fairmont Company. Decree for defendant.

Frederick P. Fish, of Boston, Mass., and Charles Neave, of New York City, for plaintiffs.

John P. Bartlett and Thomas Ewing, both of New York City, for defendant.

THOMAS, District Judge. This is the usual bill in equity, alleging that letters patent No. 723,983 were granted to Homer Brooke on the 31st day of March, 1903, upon an application filed March 5, 1898, and charging the defendant with infringement, and praying for an injunction and an accounting. The defenses are invalidity and noninfringement.

The invention, as stated in the specification, relates to—

"devices for cutting or separating molten material, and especially is designed for cutting a stream of flowing molten glass into unformed molten masses of predetermined quantity and distributing the same into suitable receptacles."

The bill charges infringement of claims 1, 2, 3, 4, 5, 6, 7, and 9, but at final hearing counsel for plaintiffs withdrew consideration as to claims 1, 2, 6, 7, and 9, and now relies on claims 3, 4, and 5, which are as follows:

"3. An automatic device for cutting or separating a flowing stream of molten material into unformed molten masses, the same comprising a cutting knife and means for moving the same, and means for discharging the said molten masses into suitable receptacles.

"4. An automatic device for cutting or separating a flowing stream of molten material into unformed molten masses of predetermined quantity, the same comprising a knife and means for moving the same, a plurality of receptacles, and means for discharging the said molten masses into said receptacles.

"5. An automatic device for cutting or separating a flowing stream of molten material into unformed molten masses, the same comprising a knife and means for moving the same, a plurality of receptacles, means for discharging the said molten masses into said receptacles, and means for intermittently moving said receptacles into position to receive the cut-off masses."

In a suit brought by the Homer Brooke Glass Company against the Schram Glass Manufacturing Company (249 Fed. 228, 161 C. C. A. 264), the Circuit Court of Appeals for the Seventh Circuit has held the claims here in issue to be valid, and the decision in that case is

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

sufficient answer to that portion of the defendant's answer which alleges invalidity, especially in view of the fact that no new evidence of such controlling importance as to compel a different conclusion has been here offered in support of the alleged invalidity. So that infringement is the only question to be here discussed and decided.

The decision here to be given will be contained in the answers to two questions: First, Does the defendant treat a flowing stream of molten glass? and, second, Does the defendant's cutting device cut, support, and discharge, or cut and discharge, the cut-off portion of the molten masses? These questions will be considered in their order.

We can do no better here, in explaining briefly the purpose of the Brooke device and the difficulties of prior methods in manufacturing glass which Brooke sought to overcome, than to quote from the opinion of Judge Evans in the Schram Case, supra. On pages 228 and 229 of 249 Fed. (161 C. C. A. 264, 265) he said:

"The patent to Brooke relates to an apparatus for cutting and distributing molten materials, particularly glass, and is of particular value to the manufacturer of fruit jars, bottles, and other similar glass objects used by the public in large quantities, the cost of which constitutes an important factor in their successful manufacture. While the art of making glass articles is old, it was, prior to Brooke's device, deficient in a particular, an understanding of which is better obtained by a brief general description of the art to which it relates. In making articles of molten glass prior to this discovery, a considerable quantity of the molten material was taken from a furnace to a mold by a workman, called a gatherer, who, by the use of a 'punty' rod, injected into and twisted around in the molten mass in the furnace, first collected and then transferred it to a position over a mold of predetermined size into which the glass ran from the rod. Another workman stood by, and with shears cut this string or stream of flowing glass when directed. The gatherer then twisted his rod, so as temporarily to prevent glass falling off and until another empty mold was supplied, and then the operation was repeated. Machines for receiving this product, containing molds of predetermined capacity, were in common use, and, not infrequently, easy and ready method of substitution of one mold for another was provided. Some devices for receiving the molten mass in the mold, and for the prompt exchange of the molds, were patented, and at least one must be especially considered—the patent to Steimer, No. 549,404, issued November 5, 1895.

"Brooke's contribution to the art consisted in producing an apparatus that would better, more rapidly, and more economically convey the molten mass from the furnace to the mold. Instead of the interrupted flow of glass, and the delayed method of transferring with a punty rod this substance from the large reservoir to the mold, in use prior to this discovery, appellee's device permitted the glass to flow continuously from the furnace, and the severing knives were made to act automatically, and means for supporting the severed stream were provided; the accumulated flow being poured into the opening of the next presented mold."

On page 230 of 249 Fed. (161 C. C. A. 264) will be found a clear and brief description of the operation of the Brooke device, so that it is not necessary now to do more than refer to it; but from the brief description, as well as the description of the operation of the Brooke device disclosed by the specification, it is clearly apparent that a continuously flowing stream of glass, flowing by gravity, is the kind and character of stream which Brooke handles in the patent in suit.

The stream of flowing molten material and the stream of flowing molten glass are frequently referred to in the specification. The mech-

anism embraces an automatic device for cutting a flowing stream of molten glass, means for discharging the same, and means for shifting the molds to receive the severed glass, and reference in the specification is made a number of times to the cutting knives acting upon the flowing stream. The specification finally concludes by saying:

"Of course it will be understood that I do not limit myself to the precise construction of devices here illustrated, as I consider myself to be entitled to broadly cover all means for cutting or separating *a stream of flowing molten material into unformed* molten masses and *discharging* the cut-off portions."

The claims in suit are for an automatic device for—

(3) "Cutting or separating a flowing stream of molten material."
(4) "Cutting or separating a flowing stream of molten material."
(5) "Cutting or separating a flowing stream of molten material."

The claims not in issue are also directed to the same mechanism fed in the same way and they refer to—

(1) "An unsupported freely-flowing stream."
(2) "An unsupported freely-flowing stream."
(6) "A flowing stream."
(7) "A continuously flowing stream."
(8) "A continuously flowing stream."
(9) "A continuously flowing stream."
(10) "A continuously flowing stream."
(11) "A continuously flowing stream."
(12) "A continuously flowing stream."
(13) "A continuously flowing stream."
(14) "A continuously flowing stream."

So the evidence is conclusive that Brooke was engaged in solving the problem respecting the best method for handling and cutting off a stream of molten glass, steadily and continuously flowing from one receptacle to another without break or interruption, the flow of which is prompted or induced by no other means than the force of gravity.

It appears that the difficulty in the manufacture of glasswares and the efficient and economical handling of molten glass has been a problem which the manufacturers have endeavored to solve, and no doubt this problem has presented many engineering difficulties. The molten glass is viscous, and difficult to handle mechanically. Brooke solved the problem by treating or handling successfully the continuously flowing stream of molten glass.

The defendant claims that it also has solved the problem, only in an entirely different way and upon an entirely different engineering theory. It claims that its machine in no way treats or handles a continuously flowing stream, or a flowing stream, or stream of molten glass. It claims that its problem of engineering proceeds along entirely different lines and ideas, apart and entirely distinct from the principle disclosed in the Brooke patent. It claims that its machine more nearly approaches the hand punty method, in that a separate gather is obtained, somewhat similar to the gob or gather obtained under the old hand punty method, and thus a better result is obtained in the finished product. The defendant claims that it does not treat a flowing stream, but rather a gather or gob, a distinct entity, with each

cycle of operation of its machine, and that its engineers entirely abandoned the Brooke idea, and developed an entirely new principle.

The evidence is conclusive that the Brooke cutting device and the defendant's machine are radically different in theory and in operation, and they certainly are in no way similar in appearance or operation. In the Brooke device the molten glass is allowed to escape through a hole in the bottom of the furnace, and it flows continuously without any interruption as soon as the plug is withdrawn to allow the molten glass to escape from the furnace through the conduit and eventually to the molds, and this flow is continuous until the operation is stopped by inserting a plug to stop the flow.

But in the defendant's machine there is no hole in the bottom of the furnace to allow a stream to flow by gravity. The molten glass is held within the furnace and cannot escape until mechanically propelled over the lip of the dam by means of the paddle, because the crest of the spout is above the normal level of the molten glass in the tank. The spout is peculiarly constructed in order to aid in giving desired preformation to the gob. The spout is filled at each dip of the paddle. When the machine is put in operation, the paddle must make more than one stroke in order to get the full amount of glass over the dam, because there is glass always sticking to the paddle, and the walls of the spout and one paddle stroke will not supply the requisite gather or gob to hang off from the end of the spout. But, after the paddle and spout are once covered with glass, a separate stroke of the paddle is required for each separate batch delivered. The paddle does not deliver enough glass into the spout in a single stroke for two successive batches. There will be some glass left hanging in the spout after a paddle stroke, the same as there is some glass left on the end of a punty rod after the gather on the end of it has been cut with the shears.

The paddle is attached to the operating mechanism of the machine, and its operation is timed by means of gears and cam shafts. The paddle adjustment determines the amplitude of the stroke, and this varies accordingly as the article to be manufactured is large or small, requiring a large or small batch of molten glass to make it, and thus, in some respects, approaches the old hand punty method, or it is arranged so that a longer or shorter time may elapse between the delivery of the paddle-dipped glass to the spout and the severing thereof below the end of the spout, so that without change of weight of gob, if a relatively long time elapses, the gob will be long, and if a short time elapses, the gob will be short.

The gob is thus made to hang off the end of the spout, as it does off the end of a punty rod, until in connection with the amount delivered, the *walls* of the spout and the relation of the most forward position of the paddle to the shear movement, the *gather* acquires the desired preformation. After the predetermined quantity of molten glass is thus forced or pushed over the dam, the gather or batch is cut off by means of knives coacting and quickly severing the gob, and these knives in no way support, or even tend to support, the molten glass as it is severed by the knives, so quick is their operation.

The paddle then resumes its backward movement, and in doing so draws backward with it this viscous material, and nothing is dropping or flowing from the lip of the dam, but a small portion is supported on the lip of the dam, which becomes part of the next gather or batch, when the paddle pushes it over the dam during the next cycle of operation. This operation is repeated, and each cycle of operation produces a separate and distinct batch of molten glass.

Moreover, the evidence is conclusive, and it is not disputed, that the level of the molten glass in the furnace is always below the level of the dam, so that no glass can flow over the dam, and none passes over the dam, except as the paddle, in performing its functions in the cycle of one complete operation, pushes a predetermined quantity over the dam; and this is, as I view it, a separate gob or gather, is not a flowing stream, and in no way an operation similar to that employed by Brooke. The engineering is along different lines. It avoids the theory adopted by Brooke. It does not treat a "stream"—"a flowing stream"—a "continuously flowing stream." It deals with a separate entity, and that entity is the batch which is pushed over the lip of the dam by the paddle in its downward, forward, and backward movement in performing the work which devolves upon it. The severed mass then finds its way, by force of gravity, through a trough to the proper mold, where it is pressed into whatever article is being manufactured.

Having thus disposed of the first question respecting the flowing stream of molten glass, let us proceed to discuss and decide the second question presented.

If by any manner of means this molten glass going over the dam of the defendant's machine be construed to be a stream, still the defendant does not infringe, because the cutting knives on the defendant's machine perform one function only. They cut. They do nothing more. They perform, as nearly as possible, the function of the shears used in the old hand punty method. They do not support or husband the flowing glass, nor do they in the least discharge the cut-off portion. Under the theory which the defendant employs to cut the molten glass, the action of cutting must be and is nearly instantaneous. To be exact, the proof shows the time consumed in the cutting to be $^1/_{20}$ of a second, and the time required for the complete cycle of operation of the machine to be 2 seconds, during $1^{19}/_{20}$ seconds of which the shears are at rest.

The plaintiff's cutting operation involves more than mere cutting. In describing this operation in the Schram Case, supra, on page 230 of 249 Fed., on page 266 of 161 C. C. A., Judge Evans said:

"The cutting knife 23 is cup-shaped, one side of which is provided with a cutting edge 24. Another knife which moves in the opposite direction, consists of blade 27, carried on the edge of an arm, extending from the hub (the arm and hub not being shown in the figure), all working automatically. When the constantly flowing stream of glass has filled the mold, the two blades come together as shown in B, the stream is cut, and the knife passes to the position C. While the glass is momentarily supported in the cup-shaped receptacle, as shown in Figure C, an empty mold is being brought into position underneath. In D, the tilting operation has been completed and the molten glass has been discharged from the receptacle into the mold underneath. The knife and

the cup-shaped receptacle then resume their normal position by the action of gravity. The molten mass proceeds to flow into the mold next succeeding."

On page 1, line 58, in the specification of the patent in suit, the patentee says:

"The upper series of knives consist of cup or trough shaped receptacles having a cutting edge and are designed to *cut* the stream of flowing molten glass *and* momentarily *lift* the same *and discharge* it into a receptacle beneath."

Respecting the claim based upon this construction, the patentee says:

"What is claimed as new is:
(3) "An automatic device for cutting * * * a flowing stream, * * * the same comprising
"(a) A cutting knife;
"(b) Means for discharging the molten mass."
(4) "An automatic device for cutting * * * a flowing stream, * * * the same comprising
"(a) A knife;
"(b) Means for discharging the molten mass."
(5) "An automatic device for cutting * * * a flowing stream, * * * the same comprising
"(a) A knife;
"(b) Means for discharging the molten mass."

A careful examination of all the evidence, therefore, discloses that the knives of the patent in suit cut, support, and discharge. From the claims in suit it appears that the knives cut and discharge. From the operation of the device it appears that the knives cut, support, and discharge.

It is conceded that the knives cut. The cup-shaped knife supports the flowing stream while other operations of the machine are taking place and while the stream continues to flow. After supporting the stream—even momentarily, as Judge Evans finds in the Schram Case—the cup-shaped knife discharges the accumulation into the mold underneath. So it appears that the conclusion is imperative that the knives, when the machine is operating practically must support the stream during the interval of the mold shift, and that what is thus caught or husbanded must be discharged into the mold, and the cup-shaped knife performs this function.

The defendant's mechanism neither supports nor discharges. It simply cuts. There is no support. There is no discharge in which the knives play any part. Instantly on being cut, the severed portion falls by gravity onto a swinging trough, and the cut-off portion is automatically deposited in molds presented to receive it.

I can no better state my own views and conclusions respecting the patent in suit than to incorporate in this opinion the concluding paragraph of the defendant's brief as expressing briefly and tersely these views and conclusions:

"A fair review of the patent in suit, the art relating thereto, and the testimony in this case demonstrates a distinct departure by defendant's machine from the machine of the patent in suit—a departure in construction and in mode of operation. Defendant's entire system is a different system from that of the patent in suit, founded on a different conception as to the way

automatically to handle glass, worked out by a different method of automatic molten glass delivery, and involving apparatus different in construction. Brooke had his old flowing stream delivery patented apparatus. He was yoked to a flowing stream feed, and got up the apparatus of his patent in suit to handle a flowing stream feed. But defendant's engineers, after study of the situation, purposely and for sound physical reasons, turned away from the fundamental idea of Brooke. To them that did not seem to be the best way automatically to feed molten glass. They determined that they wanted a feed that would afford delivery to the shears of a preformed gob—not an unformed mass cut off from a flowing stream. So they invented and brought to successful commercial practice their unique machine, which forces masses of glass by separate paddle strokes into a specially designed spout, where the mass may stretch down, as from a punty end, and form a gob, never permitting the mass to break out of control into a flowing stream. The gob, preformed as a gob, is automatically cut off from the mass hanging from the spout as, prior to Brooke, it had been automatically cut from the mass hanging from the punty."

Further discussion seems unnecessary. The defendant does not infringe. The bill may be dismissed, with costs to abide the event.

WEBSTER ELECTRIC CO. v. PODLESAK et al.

(District Court, N. D. Illinois, E. D. February 13, 1919.)

No. 553.

1. PATENTS ⟸191—NATURE OF GRANT.
   A patent conveys to the patentee only the negative right of exclusion, not the natural original right to make, use, and sell the device covered by it.
2. PATENTS ⟸212(2)—LICENSES—RIGHTS ACQUIRED BY LICENSEE.
   A licensee under a patent obtains only immunity from an injunction suit against him by the patentee or owner.
3. PATENTS ⟸202(1)—LICENSE—CONSTRUCTION.
   Under a shop license granted by patentees to complainant for the term of the patents, with the sole right to maintain infringement suits and a limited right to grant licenses, reserving to patentees only the right "to themselves make, use, and sell the inventions," such reserved right was not assignable, and did not pass by an assignment of the patents.
4. PATENTS ⟸112(4)—PRIORITY OF INVENTION—DECISION ON APPEAL FROM PATENT OFFICE.
   While decisions of the Court of Appeals of the District of Columbia in interference proceedings are not conclusive in the courts, they are presumptively correct on questions of fact, and not subject to collateral impeachment, except for gross mistake or fraud.
5. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ELECTRICAL IGNITION DEVICE.
   The Kane patent, No. 1,280,105, for electrical ignition device for internal combustion engines, claims 3, 7, and 8, *held* valid and infringed.
6. PATENTS ⟸125—VALIDITY—DELAY IN ISSUANCE.
   Mere delay between the application and issuance of a patent does not affect the validity of the patent.
7. PATENTS ⟸328—INFRINGEMENT—ELECTRICAL IGNITION DEVICE.
   The Podlesak patents, reissue No. 13,878 (original No. 1,055,076) and No. 1,101,956, for electrical ignition devices, *held* infringed.

In Equity. Suit by the Webster Electric Company against Henry J. Podlesak, Tesla Emil Podlesak, the Sumter Electrical Company, and the Splitdorf Electric Company. Decree for complainant.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Williams, Bradbury & See and Jerome N. Frank, all of Chicago, Ill., and Livingston Gifford, of New York City, for plaintiff.

Charles C. Bulkley and Gann & Peaks, all of Chicago, Ill., and Sturtevant & Mason, of Washington, D. C., for defendants Sumter Electrical Co. and Splitdorf Electric Co.

Henry Joseph Podlesak, of Chicago, Ill., pro se.

William D. Thompson, of Racine, Wis., and William L. Hall, of Chicago, Ill., for defendant Tesla Emil Podlesak.

SANBORN, District Judge. Original and supplemental bills for patent in infringement and unfair competition. Suit was commenced October 12, 1915, and the supplemental one October 25, 1918. The patents involved are as follows:

No. 13,878 (reissue), to Emil Podlesak, February 9, 1915.
No. 1,055,076 (original), to Emil Podlesak, March 4, 1913.
No. 947,647, to Henry J. and Emil Podlesak, January 25, 1910.
No. 948,483, to the same persons, February 8, 1910.
No. 1,003,649, to the same persons, September 19, 1911.
No. 1,022,642, to Henry J. Podlesak, April 9, 1912.
No. 1,056,360, to Henry J. and Tesla E. Podlesak, March 18, 1913.
No. 1,098,052, to Emil Podlesak, May 26, 1914.
No. 1,098,754, to Emil Podlesak, June 2, 1914.
No. 1,101,956, to Emil Podlesak, June 30, 1914.

The supplemental bill is for infringement of the patent to Edmund J. Kane, No. 1,280,105, September 24, 1918, application Feb. 2, 1910. These patents all relate to current generators for ignition applied to internal combustion hit and miss engines, and improvements.

The validity of the Podlesak patents was not a matter of controversy on the trial, by reason of the fact that the plaintiff and the corporate defendants are licensees or assignees of the Podlesak patents, and hence are estopped to question their validity. Thus the controversy involved the construction of the two license contracts, Exhibits C and D, explained later, as well as the validity of the Kane patent, brought in by supplemental bill. The contracts referred to, with two others, are in substance as follows:

By Exhibit A, license agreement of November 2, 1908, the Podlesaks give to plaintiff's predecessor the exclusive license to make, use, and sell within the United States, for the term of any patents which might be granted, applications No. 76,559, 413,068, 413,069, and 413,070, and convenanting that, while the license was in force, they would not grant, permit, or encourage others to make, use, or sell the inventions. It was agreed that the agreement should extend to and be binding upon the heirs, assigns, and legal representatives of the Podlesaks and the successors and assigns of the corporation. It is claimed by defendants that this agreement was revoked some time before February 5, 1914, when Exhibits C and D were made.

Exhibit B, August 17, 1912, is a contract between the Podlesaks, dividing their interests among themselves in the patents in question, and serial No. 618,483.

By license agreement, Exhibit C, February 5, 1914, the Podlesaks granted to plaintiff the exclusive right to make, use, and sell the inven-

tions described as Nos. 947,647, 948,483, and 1,003,649 within the United States for the patent terms, covenanting that they would not, while the license was in force, make, use, or sell the inventions, or permit, grant, or encourage others to do so. The same provision as to assignment was also contained in this license.

By the shop-right agreement, Exhibit D, February 5, 1914, the Podlesaks made a contract with plaintiff, reciting that they were owners of patents Nos. 1,022,642, 1,055,076, and 1,056,360, and applications Nos. 734,143, 668,153, and 639,738 and that plaintiff desired to secure a shop right and license to make, use, and sell the inventions in the United States for the life of the patents, and that it was therefore agreed that the Podlesaks granted to plaintiff a shop right and license to make, use, and sell the inventions described in the patents and applications in the United States for the terms of the patents.

The corporation further agreed that it would use the devices made under this shop license only in connection with or for repairs to the devices mentioned in Exhibit C, and if made or sold not as a part of such devices the corporation would pay royalty, 5 per cent. of gross receipts. The licensors agree "that they will not, while this license to the party of the second part is in force, give or grant shop licenses to make, use, or sell the herein said inventions, expressly reserving, however, the right to themselves to make, use, and sell the herein said inventions"; this agreement to be terminated upon the termination of Exhibit C.

The same clause as to assigns is contained in this paper as in Exhibit A. By clause 8 of Exhibit D it is provided that the plaintiff with the written approval of the Podlesaks, may grant shop licenses, to makers of or dealers in gas engines or gas engine accessories, embodying the inventions of patents 1,022,642 and 1,055,076 (the latter being for a bracket to mount the magneto upon the engine), on the same terms as to use only in connection with the inventions licensed in Exhibit C.

By the ninth paragraph it was provided that the plaintiff "shall not permit or encourage other parties to manufacture, use, or sell devices covered by hereinbefore mentioned patents or patents that may be granted on herein said applications," except as above provided as to licenses to engine builders or dealers.

In the second paragraph it is agreed that both parties should assist each other in procuring patents, and in any suit or proceeding brought under any of the patents or for their infringement; but the Podlesaks should not be required to bear any expense in any such suit, and they appointed the attorney for the plaintiff as their agent or attorney for the purpose of joining them as complainants in any such suit for infringement, without expense to the Podlesaks, who were to be exempt from liability for damages and costs in such suits, which were to be assumed by the plaintiff.

A further agreement, made January 20, 1915, Exhibit E, changes the royalty and contains the same agreement as to assigns. The Podlesaks having on September 4, 1915, assigned all these patents to the Sumter and Splitdorf Companies, and the contracts, Exhibits C and D, the construction of the license agreements becomes very important.

It should further appear that Emil Podlesak entered the employment of plaintiff's predecessor August 10, 1909, for the purpose of experimenting in magnetos, and if patents should be obtained on his inventions relating to the magneto then in use they were to be assigned to plaintiff's predecessor. In May 18, 1910, a second contract was made, providing that Podlesak should give his entire time to the development of magnetos for the use of which a royalty was to be paid; and by a third agreement, made March 3, 1913, reciting that Podlesak was employed by plaintiff, and that it desired to secure for its benefit and use such improvements in ignition apparatus as he might from time to time develop and that any patents obtained by him thereon should be assigned to plaintiff. This contract was to run until March 3, 1916. Podlesak ceased to be employed under this contract May 14, 1915. Under these contracts Emil Podlesak was successively an employé, superintendent, works manager, and secretary of plaintiff corporation. These employment contracts, so far as they relate to the ownership of patents, were superseded by Exhibits C and D above stated.

The meaning or construction of Exhibit C is entirely clear. The Podlesaks reserved no interest of any kind in any of the patents licensed and had nothing to assign to the Splitdorf Company, except the right to the royalties secured by the contract and the legal title to the patents. That is all the assignee took by the assignment. There is no controversy on this point. The second contract, Exhibit D, however, is not so plain.

[1-3] A patent conveys to the patentee only a negative right of exclusion, not the natural original right to make, use, and sell the device covered by it. A licensee by the license obtains only immunity from an injunction suit brought against him by the patentee or owner. Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; Hartman v. John D. Park & Sons (C. C.) 145 Fed. 358; C. & A. Ry. Co. v. Pressed Steel Car Co., 243 Fed. 883, 156 C. C. A. 395 (Seventh Circuit). So by the first clause of the contract the plaintiff obtained immunity from suits by the Podlesaks against it, but left them free to grant licenses to others, except so far as the plaintiff was authorized to grant licenses to engine builders and dealers in engines or accessories, such as the Splitdorf Company. The right of exclusion of others, which is the right, dominion, or monopoly secured by the patents, was thus parceled out, divided or partitioned as follows: The Webster Company had the right to exclude every one but their engine builder or accessories dealer licensees and the Podlesaks. By the second paragraph the plaintiff might sue for infringement and control of the litigation, and by paragraph 8 grant licenses to a limited class, reserving royalties to itself. Excluding for the moment the later provisions of paragraph 1, quoted above, the patentees might grant licenses, except to the limited class referred to. But by paragraph 1 they covenanted that they would not exercise this right; "that they would not give or grant shop licenses to make, use, or sell the herein said inventions, expressly reserving, however, the right to themselves to make, use, and sell the herein said inventions." Then by the final clause the contract was made to extend to and be binding upon assigns, etc.

The vital question, therefore, is: Did the patentees have the right to assign the reserved right or power to make, use, and sell, in view of all the recited provisions? It will be noticed that they retained no power of exclusion whatever; that was in the plaintiff. Their patent rights were gone, but the Webster Company yielded to them the right to go into business. They did not avail themselves of this; but, if they had done so, and a competitor had infringed, it seems clear that they could not have maintained an infringement suit, since that right was in the Webster Company alone. But not to place too much weight on a technical point, Is the provision for assignment at all consistent with their agreement not to make shop licenses, or with the clause giving the right to the plaintiff to license to makers of and dealers in engine accessories? The patentees have assigned the patents to the defendant companies, members to which plaintiff was authorized to grant licenses, and those companies are now exercising shop rights under the assignment, apparently in the face of the agreement that the patentees would not authorize this, and that the plaintiff might do so.

The only way to harmonize all the contract provisions is to regard the right of the patentees to assign as limited to the bare legal patent title and the right to royalties, accounting, and inspection, and that the words "to themselves" should read "to themselves only." Thus all the provisions are made consistent inter se, and an inequitable result prevented. The patentees have received $95,416 in royalties under Exhibit C, covering six years, or $16,000 a year. They could well afford to stay out of the risks of business. To attempt to authorize a formidable competitor like the Splitdorf Company, one of the very dealers to whom plaintiff was given the right of license, after the plaintiff had built up an enormous business, to profit by that business, is utterly foreign to the spirit and purpose of the contract. The assignment should be restricted to the legal title and right to royalties, accounts, and inspection, and the power of the plaintiff to sue for infringement without joining the assignees be recognized. Whether the right of inspection of plaintiff's books should be regulated, so as to prevent a competitor from learning the customers and business secrets of the plaintiff, should be postponed until the decree is settled.

The case of Waldo v. American Soda Fountain Co. (C. C.) 92 Fed. 623, is distinguishable, because the general clause making the contract extend to assigns could not possibly reach any assignable interest, except that to which the court applied it.

The Kane and Milton Patents. Both these patents were produced in plaintiff's shop by its employés and with its facilities. It owns the patents, and by its outlay and business management has made them of great value. It could have sued on both of them in the alternative, and thus escaped the burden of establishing the priority of either. Having sued on Kane, it must technically show its priority; but it has always owned both, and has given them almost all of their value.

It is indeed true that Kane must be shown to have been the prior inventor, by proof beyond reasonable doubt. This is required by the law, and the evidence must be clear and convincing. Milton's British appli-

cation was filed first, and Kane's at a later date, but within a year. Hence the rule as to reasonable doubt applies in full force.

The evidence shows the following: Both Milton and Kane were plaintiff's employés. Milton was Kane's superior, being employed as an engineer and inventor, whose inventions were to belong to plaintiff. During the year 1909, up to August 20, he was working on a high-tension magneto for variable speed, multi-cylinder gas engines, which gave great promise, and was the means of securing a large contract for plaintiff with the Cadillac Company, but which was a failure. He was also paying some attention to the low-tension magneto for hit and miss engines.

In April, 1909, the magneto produced by plaintiff, called the Milton magneto, proved unsatisfactory, and there was danger of plaintiff losing the business of supplying it to its chief user, the International Harvester Company. Mr. Webster, the president of the plaintiff, urged Kane and another employé, by the name of Chiville, to try to produce a device which would solve the difficulty. Kane worked the matter out on April 11, 1909, made an incomplete drawing, and brought it to plaintiff's office. He followed this by a complete drawing, made April 14, 1909, showing the new device in full detail. He exhibited the first drawing to his father, then employed by the Harvester Company, and to persons in the office, and the later drawing to Mr. Chiville and others, and a device made according to the later drawing was produced shortly after, put on an engine, and worked satisfactorily. None of these facts is in dispute, but Milton testifies that the idea was his, and not Kane's and that the latter made the last drawing under his direction. Kane produced both of the drawings, they bear his name and the dates, and he is corroborated by his father, who produced his diary, showing the date appearing on the first drawing, both of which are in evidence.

Milton's testimony that the drawings were made under his direction is not corroborated, except by slight circumstances unsatisfactory in their character, and is inconsistent with his testimony and conduct in the Kane-Milton interference proceedings in the Patent Office. In those proceedings he put the date of his disclosure in August, 1908. On this trial he adopted Kane's date. He took very little interest in the interference proceedings, but refused to concede priority to Kane. His American patent was owned by plaintiff, so he had no interest in showing priority, except the pride of an inventor. He produced no drawings showing his alleged discovery, other than those in the English patent, made in October, 1909, no original drawings whatsoever, no corroboration of his claim to invention. While the correspondence in 1909 between him and Mr. Webster shows that he took considerable interest in the improved low-tension magneto, as well as the high-tension device, and he attempted to develop it in England, yet the evidence as a whole is overwhelming that he was not the inventor, and that Kane was. The evidence is thoroughly satisfactory.

[4] A like decision was reached in the Patent Office also, and this determination imposed upon Milton the burden of showing its incor-

rectness under section 4914, R. S. U. S. (Comp. St. § 9459). Decisions by the Court of Appeals of the District of Columbia in interference cases are binding on the office; they are not res adjudicata in the courts. Westinghouse v. Hein, 159 Fed. 936, 87 C. C. A. 142, 24 L. R. A. (N. S.) 948. Like all executive decisions they are presumptively valid on questions of fact, not subject to collateral impeachment, except for gross mistake or fraud. A patent is presumed valid, as everybody knows. Like presumption should aid the decision of the examiner in deciding an interference.

Apart from these considerations, however, the proof shows that Kane is beyond reasonable doubt the first inventor.

[5] *The Kane Patent.* It is urged by defendant that the claims of the Kane patent sued on, being 2, 3, 7, and 8, are invalid, because not within the original disclosure; 2 and 3 being in the Milton interference, and the others first introduced in 1918. Thus it is necessary to examine Kane's original application, on which he obtained his first patent, No. 1,204,573; the one in suit having been issued on a divisional application.

Kane's first application of February 2, 1910, describes the magneto, and the mechanism by which the armature is so operated as to cause a spark to be produced in the engine cylinder at the instant of compression. The drawings show the device fully, with one exception, and are reproduced in the patent in suit, with an additional one taken over from the Milton patent, showing how the movable electrode is brought back to normal position. It is true that the main object of Kane seems to have been to cover means for rendering the apparatus inoperative during the high-speed period of the engine. But if he shows enough in his specification, drawings, and claims to cover the elements of the claims made later, in the patent in suit, that is sufficient.

In the first place, the drawings in the first application exhibit all that the later claim 2 includes, except the curved cam surface. They show a cam surface, in the sense that two surfaces are brought in contact by circular movements around different centers and with different radii. They slide on each other, and there will be the true cam movement. Claim 3 of the patent in suit counts on a cam surface only, and hence that claim is certainly within the original drawings. Kane therefore had the right to make that claim.

Claims 7 and 8 are much broader, and it is urged that the original disclosure did not cover the subject-matter of these two claims. The claims follow:

"7. In an electrical ignition device for internal combustion engines, the combination of a magneto generator comprising rotor and stator and generating winding, a pair of relatively movable make and break spark electrodes adapted to be located within an engine cylinder, spring means tending normally to hold said rotor in a certain position, mechanism whereby the movement of the rotor effects the separation of said electrodes at a predetermined point in the movement of the rotor, a rigid unitary and integral support upon which all of the aforesaid parts are mounted, whereby all of said parts may be removed from and returned to their position upon an engine cylinder without disturbing their relations one to another, conductors for carrying electric current from said generating winding to said electrodes,

and engine driven means adapted to oscillate said rotor against the action of said spring means and then to release it.

"8. In an electrical ignition device for internal combustion engines, the combination of a magneto generator, comprising rotor and stator and generating winding, a pair of relatively movable make and break spark electrodes adapted to be located within an engine cylinder, spring means tending normally to hold said rotor in a certain position, mechanism whereby the movement of the rotor effects the separation of said electrodes at a predetermined point in the movement of the rotor, a supporting member upon the several parts of which all of the aforesaid mechanism is mounted and having a single integral part adapted to be attached to the engine, whereby all of said mechanism may be removed from the engine by removing said single integral part and may be returned to its position upon the engine with unchanged relations between any and all of the parts of all of said mechanism, thereby insuring the predetermined synchronism and interrelated adjustment of said mechanism when it is replaced upon the engine, and engine driven means adapted to oscillate said rotor against the action of said spring means and then to release it."

Original claim 8 in the first Kane application reads:

"8. In igniters for explosive engines, the combination with an electric circuit having included therein two electrodes, of means for normally holding the electrodes in contact with each other, a magnetic field, an oscillatory armature located in said field and included in said circuit, a reciprocating member controlled by the running of the engine for moving the oscillatory armature in one direction, means for moving the oscillatory armature in the opposite direction, means for separating the electrodes when the oscillatory armature is moved in said opposite direction, and means for timing the movement of said armature in said opposite direction."

I think that claims 7 and 8 are shown in all their elements in the original application. Figure 1 shows the unitary structure attached to the engine, and claim 8 (original) shows in a general way the electrical device. I find claims 3, 7, and 8 of the Kane patent in suit valid.

[6] Eight years elapsed between applying for and issuing the Kane patent, but Kane complied with the law and Patent Office rules in all respects. Two interferences had to be disposed of, with the necessary delays incident to them. A divisional application was required and must be prosecuted. Mere delay does not affect the validity of the patent. Columbia Motor Car Co. v. Duerr & Co., 184 Fed. 893, 107 C. C. A. 215; Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 Fed. 853, 68 C. C. A. 233; Cadillac Motor Car Co. v. Austin, 225 Fed. 983, 141 C. C. A. 105. There are many other like decisions.

The question of collusion in the Milton-Kane interference is entirely set at rest in favor of plaintiff by the decision in this circuit of Western Glass Co. v. Schmertz Wire Glass Co., 185 Fed. 788, 109 C. C. A. 1.

It is unnecessary to consider the effect of dissolving the Kane-Podlesak interference by reason of the conclusion that the assignment of Exhibit D is limited to the patent legal title, royalties, accounting, and inspection.

[7] Claims 1, 2, 3, 8, 9, 21, and 22 of the Podlesak reissue, No. 13,878, are infringed; also such claims of Podlesak patent, No. 1,101,956, as may be in issue.

No sufficient proof of contributory infringement appears, and the bill should be dismissed as to the Podlesaks. Other matters reserved until settlement of decree.

UNITED STATES v. BUCHANAN.

(District Court, W. D. Texas, San Antonio Division. February 20, 1919.)

No. 2342.

1. BAIL ⟸55—BAIL BONDS—UNITED STATES COMMISSIONERS—PROCESS.
The form of a bail bond taken by the United States commissioner should conform in all substantial particulars to the requirements of the laws of the state in which the commissioner is sitting, Rev. St. § 1014 (Comp. St. § 1674), providing that the United States commissioner may take bail in any state agreeable to the usual mode of process against offenders in such state.

2. BAIL ⟸66—BONDS—SUFFICIENCY.
Where a bail bond set out that defendant committed a felony by attempting to export munitions of war into Mexico in violation of the Presidential Proclamation of March 12, 1914, *held* that the bond was sufficient under Code Cr. Proc. Tex. art. 321, having set out that the offense was a felony, which was all that was required by the statute, notwithstanding the original proclamation of President Taft, under the Congressional Resolution of March 14, 1912, making a violation a felony, had been revoked before March 12, 1914; a similar proclamation having been issued by President Wilson before and in effect at the time the offense was alleged to have occurred.

3. JUDGMENT ⟸342(1)—VACATION—AUTHORITY OF COURT.
A judgment on a bail bond cannot be set aside by the court after the expiration of the term at which it was rendered, where the bond was valid and the judgment was not a nullity.

Manuel Buchanan was charged with unlawfully attempting to export munitions of war into Mexico. On motion to set aside judgment of forfeiture of bail bond entered at former term, on the ground that the bond was void and the final judgment entered a nullity. Motion denied.

Heilbron & Matthews, of San Antonio, Tex., for petitioner.

Hugh R. Robertson, U. S. Dist. Atty., and Claud J. Carter, Asst. U. S. Dist. Atty., both of San Antonio, Tex.

WEST, District Judge. The defendant as principal, together with his sureties, move to set aside the final judgment of forfeiture entered at former term upon his bail bond upon the ground that said bond is void, and that final judgment is itself a nullity, wherefore the court may take jurisdictional cognizance of the motion even though the final judgment was entered at a former term. The invalidity of the bond is based upon a claim that it does not appear from the bond that the defendant is charged with any offense against the laws of the United States.

[1, 2] The material portions of the bond charging the offense is as follows:

"In violation of the President's proclamation of March 12, 1914, of the Revised Statutes of the United States, unlawfully committed a felony."

As a matter of fact there was no proclamation made by the President "of March 12, 1914." There was a proclamation made by President

Taft on March 14, 1912, pursuant to the provisions of the joint resolution of Congress approved March 14, 1912, the joint resolution authorizing the President to declare, by proclamation, it to be unlawful to export arms or munitions of war into any American country where conditions of domestic violence existed under such limitations and exceptions as he, the President, might prescribe. Section 2 of this joint resolution prescribes a penalty of the grade of felony for any violation of such resolution and proclamation; 37 St. at L. pt. 1, p. 630. President Taft's proclamation was revoked by President Wilson on February 3, 1914; 38 St. at L. pt. 2, p. 1992. President Wilson, on October 19, 1915, made his proclamation, carrying into effect and rendering operative the joint resolution before referred to. 39 St. at L. pt. 2, p. 1756.

The form of a bail bond taken by a United States commissioner should conform in all substantial particulars to the requirements of the laws of the state in which the commissioner is sitting, so far as such laws are applicable; U. S. v. Sauer (D. C.) 73 Fed. 671. This accords with article 1014, R. S. (Comp. St. § 1674), which provides that a United States commissioner may take bail in any state "agreeably to the usual mode of process against offenders in such state." The Code of Criminal Procedure of Texas 1911, art. 321, is to the effect that:

"A bail bond shall be sufficient if it contains the following requisites * * *

"(3) If the defendant is charged with an offense that is a felony, that it state that he is charged with a felony."

See Anduaga v. United States, 254 Fed. 61, — C. C. A. —.

The Court of Criminal Appeals of Texas, construing article 321, C. C. P., supra, through Judge Prendergast, in Anderson v. State (Tex. Cr. App.) 201 S. W. 994, referring to the sufficiency of the bond under the requirements of this section of the Criminal Code, says:

"The bond will be sufficient if it states merely that the offense charged is a felony, without telling what the offense is. Under this statute either this must be done, or the specific offense must be stated."

Applying the rules of construction as laid down by the authorities mentioned, and testing the sufficiency of the bond in this case by those rules, it appears that the matter of the offense is touched upon in the bond in two particulars: (1) Where the charge is said to be "in violation of the President's proclamation of March 12, 1914"; and (2) "of the Revised Statutes of the United States unlawfully committed a felony."

Presumably the reference to the offense being in violation of the President's proclamation was intended as a mere reference to the proclamation so that it might be consulted, certainly such a reference could not comply with that requirement of the law mentioned by Judge Prendergast, which says that the offense must be named. To name the offense charged would require a résumé from the proclamation and resolution of all the essential elements of the offense therein stated, which is not done. Since it appears that the President issued and made no proclamation of any character whatever on March 12, 1914,

that verbiage in the bond may be disregarded as meaningless surplusage. The inquiry then follows as to whether or not there still remains in the body of the bond the second alternative requirement specified in the Criminal Code of Texas, and as stated by Judge Prendergast, to wit, that the offense charged is a felony or misdemeanor as the case may be. The bond provides, eliminating the language referred to, as follows, the charge being:

"On or about the 11th day of October, A. D. 1917, within said district, in violation of the Revised Statutes of the United States, unlawfully committed a felony."

[3] It then appears that the identical requirement of the Code is complied with, in that the principal defendant is charged with having committed a felony. The offense is shown by the bond to have been committed on or about the 11th day of October, A. D. 1917. At that time the joint resolution of March 14, 1912, and the President's proclamation of October 19, 1915, making the resolution operative, were in effect. Section 2 of the joint resolution provides:

"That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding $10,000, or imprisonment not exceeding two years, or both."

The joint resolution of Congress, together with the proclamation of the President, constitutes a valid enactment of a law and statute of the United States. The grade of the offense is also fixed by the resolution as that of felony. The requirements of the Code of Criminal Procedure of the state of Texas seems to have been fully met, and the bond is a valid and subsisting obligation of the signers. Therefore the motion to set aside the judgment, being made at a term subsequent to that at which the final judgment was entered, comes too late; the court is without jurisdiction to entertain it, and the motion is therefore dismissed.

A formal order to this effect will be entered as of this date.

HOWARD v. 9,889 BAGS OF MALT.

(District Court, D. Massachusetts. February 15, 1919.)

No. 1567.

1. ADMIRALTY ⇐36—SCOPE OF JURISDICTION—SET-OFF.
A set-off is unknown to the admiralty law, except as a credit on the transaction which forms the subject of the libel.

2. SHIPPING ⇐154—LIEN FOR FREIGHT—STORAGE OF CARGO.
A ship does not lose her lien on a cargo for freight by delivery to a public warehouse for storage without intention to deliver to the consignee.

3. MARITIME LIENS ⇐1—FAVORED BY COURTS—ACTS WHICH WILL DEFEAT.
A maritime lien is one favored by the courts and will be enforced, unless clearly displaced by the acts or agreements of the parties.

In Admiralty. Suit by Thomas J. Howard against 9,889 Bags of Malt. Decree for libelant.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Hill, Barlow & Homans, of Boston, Mass., for libelant.

Pitt F. Drew, of Boston, Mass., for petitioner France & Canada S. S. Co., Limited.

George Everett Kimball, of Boston, Mass., for petitioner Hustis.

Pitt F. Drew, of Boston, Mass., for claimant.

HALE, District Judge. This is a suit in rem to enforce a lien of the libelant upon the cargo of the ship George S. Repplier for carrying 9,889 bags of malt from Hoboken, N. J., to Mystic Wharf, Boston, and for four days demurrage.

The contract of carriage is shown by the bill of lading, by correspondence, and by oral testimony of conferences of the libelant with one Elder, who appears to have been the agent for Renke, the undisclosed principal. It appears that the undertaking on the part of the libelant was to get the malt to Boston, to deliver it to Mystic Wharf, and to use all diligence to catch the steamship Moorish Prince, upon which the malt was to be carried from Boston to a foreign port.

From an examination of the proofs, it appears that the contract was made on July 12, 1917. On July 13, at 7 in the morning, the libelant produced the barge for loading in Hoboken, N. J. Late in the afternoon of July 15, the barge was being loaded by the shippers. The necessary bills of lading were not produced until July 16. The barge then sailed through Hell Gate on July 17, and proceeded the same day to Whitestone Head off Long Island Sound.

The testimony must be held to prove that up to July 17, the time which had elapsed was due to the loading of the barge by the shippers, over which the libelant had no control, and to the delay of the shippers in producing the necessary bills of lading. The voyage was made without further delay, except for the thick fog which prevailed.

The testimony tends to show that the delay in reaching Boston was from no fault of the libelant, but from conditions of weather, or, in other words, from perils of the sea.

The libelant engaged a towing company to take the barge; he also gave orders for prompt action. He appears to have used reasonable diligence in making the voyage. His contract was not to reach the Moorish Prince, in any event before she sailed, but to use all diligence to reach her.

He has met the burden of proving that he did use such diligence, and that he performed his contract.

[1] At this point it must be observed that the claimant makes a demand that a certain set-off should be allowed because of breach of contract on the part of the libelant. It is not necessary to go into the question whether the testimony shows such breach. It is enough to say that, under the law, these damages cannot be recovered by set-off, but must be recovered by a separate action. A set-off is unknown to the admiralty law, except as a credit on the transaction which forms the subject of the libel. O'Brien v. Bags of Guano (D. C.) 48 Fed. 726, 730. The claim for damages is a personal right on the part of the owner against the carrier, and is not a claim upon the cargo itself. The Giulio (D. C.) 34 Fed. 909.

[2] A sharp contention is made by the claimant that the lien of the libelant has been lost by the discharge of the cargo, and by abandonment of possession. The testimony makes it clear that on the arrival of the ship at Mystic Wharf, the steamship Moorish Prince had sailed. No consignee or other claimant appeared to accept delivery of the cargo. The only person to supervise the unloading was one Ackerly, the superintendent of the pier. The malt was stored on the pier, in the warehouse of the Boston & Maine Railroad, a public warehouseman, and not shown to be an agent of the consignee. The malt was received by the France & Canadian Steamship Company as a deposit for the benefit of both parties. The testimony fails to prove that it was delivered to the consignee, or that such was the intention of the parties. On the other hand, the proofs are clear that on August 8th, as soon as he heard of the discharge of the cargo, the libelant sought to enforce his lien; that he went to Elder, the agent of the claimant and told him that he should libel the cargo for his freight. This appears from Elder's testimony. The testimony is convincing that the libelant did not intend to abandon his lien by giving up possession; that the cargo was received by the France & Canadian Steamship Company; and that this company was wholly a stranger to the obligation to pay freight.

[3] The maritime lien is one favored by the courts; it will be enforced unless clearly displaced by the acts or agreements of the parties. In Bags of Linseed, 66 U. S. (1 Black) 108, 114 (17 L. Ed. 35), in speaking for the court, Mr. Chief Justice Taney observes:

"Courts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade. * * * It is the interest of the shipowner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery. And it would be a serious sacrifice of his interests if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty."

See, also, Costello v. Cargo of Laths (D. C.) 44 Fed. 105; The Anna Kimball, 2 Cliff. 4, 15, Fed. Cas. No. 7,772.

Under the maritime law of this country, a manual turning over of cargo by shipowners to an independent warehouseman, or even to the consignee itself, does not of itself operate of necessity to discharge their lien for freight. Where the intent of the shipowners in making such delivery is merely to discharge the cargo, and not to deliver it, their lien for freight remains in full force. 600 Tons of Iron Ore (D. C.) 9 Fed. 595, 597; 151 Tons of Coal, 4 Blatchf. 468, Fed. Cas. No. 10,520; Davidson S. S. Co. v. Bushels of Flaxseed (D. C.) 117 Fed. 283.

In the case before me, the testimony proves that the libelant has earned his freight, and that he did not intend to lose his lien by abandonment of possession. According to the liberality of the admiralty law, he is still able to enforce the lien against the cargo. The price for the libelant's services, fixed by the contract, appears to have been

a reasonable one. He paid out $750 for towage to Cape Cod Canal; $60 for canal charges; $175 from the canal to Boston—making nearly $1,000 for towing alone. The value of the barge is fixed at $55 per day. I am of the opinion that the libelant, by competent testimony, has proved his case for freight under his contract as claimed in his libel, and that he also has established his claim for demurrage as set forth in his libel. I do not allow interest.

A decree may be presented for the libelant, for the sum of $2,649.07. The libelant recovers costs.

CITY OF MOORHEAD v. UNION LIGHT, HEAT & POWER CO.

(District Court, D. Minnesota, Sixth Division. October 26, 1918.)

GAS ⊂=14(1)—CONTRACT WITH GAS COMPANY—SPECIFIC ENFORCEMENT.

A gas company which has contracted to furnish gas to a city and its inhabitants for a term of ten years at fixed rates cannot be given the right by a court of equity to violate its contract and increase its rates because war conditions have rendered them unprofitable.

In Equity. Suit by the City of Moorhead against the Union Light, Heat & Power Company, with cross-bill. On motions by each party for preliminary injunction and by complainant to dismiss cross-bill. Motions of complainant granted.

James A. Garrity, of Moorhead, Minn., for plaintiff.

Denegre & McDermott, of St. Paul, Minn., and A. W. Fowler, of Fargo, N. D., for defendant.

AMIDON, District Judge. Plaintiff, the city of Moorhead, is a municipal corporation operating under a home rule charter adopted by its people March 22, 1900. That charter (section 223), provides that every ordinance by which the council shall propose to grant any franchise shall contain all the terms and conditions of the franchise, and it shall be a feature of every franchise so granted that the maximum price of the service shall be stated in the grant, and before the ordinance shall become effective it shall be submitted to, and approved by, the qualified voters of the city.

On the 6th day of May, 1912, an ordinance granting the defendant, the Union Light, Heat & Power Company, a franchise for the purpose of distributing gas for the term of ten years, was adopted by a majority of the voters of the city. It was accepted in writing on August 22d. Section 6 of this ordinance fixes the maximum price of gas at not to exceed $1.80 per thousand cubic feet for illuminating, and $1.45 per thousand cubic feet for fuel purposes. Defendant has since been supplying gas to the city and its inhabitants under this franchise at the rates agreed upon. Its plant is located in the city of Fargo, in the state of North Dakota, and it supplies gas to that city and its inhabitants, as well as to the plaintiff.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

August 22, 1918, defendant served upon the city of Moorhead written notice that the rates for gas for all purposes from and after September 1st would be $2 per thousand cubic feet.

On the 30th of August the bill in this suit was filed in the state court for the county of Clay, in which the city of Moorhead is located. The pleading sets forth a history of the relations between the parties, as above stated, and the threat of the defendant to increase its rates and to discontinue its service unless the increased rate was accepted. It prays for a temporary injunction to restrain this violation of the ordinance, and for a permanent injunction upon the hearing of the case.

Defendant has filed an answer and cross-bill. It admits the allegations of the complaint, but alleges that owing to the European War all the elements entering into the cost of manufacturing and distributing gas have been so greatly increased that it cannot supply gas at the rates fixed by the ordinance except at an actual loss; sets forth in detail the elements of such increased cost, and facts tending to show that the ordinance rate when applied to the business of the company for the year 1918 leaves nothing by way of providing for depreciation or interest on the investment, and, as this process has been steadily growing worse since the beginning of the war, the bill charges that a continuance of the rate will result in an actual loss to the company even if depreciation and interest on the investment are disregarded. The bill further states that its gas business supplying both Fargo and Moorhead is operated as a single enterprise, and that the rates for both cities ought to be the same, and that, for the reasons set forth in the cross-bill, the rates in Fargo have been fixed and accepted at $2, and that it is both impracticable and unjust to supply gas to the city of Moorhead and its inhabitants at a lower rate than obtains in the neighboring city.

The cross-bill prays that the provision of the ordinance fixing the maximum rate be declared to be null and void, and that plaintiff be enjoined from enforcing its provisions, and from attempting to compel defendant to furnish gas to plaintiff, or its inhabitants, at those rates.

While the case was pending in the state court, a temporary injunction was granted on plaintiff's motion. Thereafter the cause was removed into this court by defendant on the ground of diversity of citizenship. Plaintiff moves that the temporary injunction in the state court be continued, and that the cross-bill be dismissed upon the ground that it states no facts entitling the defendant to relief in equity. Defendant moves that the temporary injunction granted by the state court be set aside, and that a temporary injunction be issued by this court in accordance with the prayer of the cross-bill.

The meat of the case is this: Does the fact that defendant's contract with the city has, by reason of the European War, become unprofitable, justify the court in releasing defendant from the contract? Does a public utility company, which contracts to supply the public with a commodity like gas or electricity, occupy a different position from other contractors who have agreed to supply articles the cost of which have been greatly enhanced by the war? Is a public utility company

entitled to modify its contract whenever a change is necessary in order to make performance profitable? When cities are expressly vested with power to enter into contracts as to rates, it is now established by repeated decisions of the Supreme Court that such contracts are binding upon the city even though the public utility company may make extortionate profits therefrom. Detroit v. Detroit, etc., Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Vicksburg v. Vicksburg Water Co., 206 U. S. 496, 27 L. Ed. 762, 51 L. Ed. 1155; Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. Ed. 176. Public utility companies are insistent that their rights under such contracts be protected by the courts against every attempt of the state or city to reduce rates, and when the city's power to make the contract is clear the courts have uniformly restrained their violation. If such be the law in favor of public utility companies, why should not the converse be equally true, and such companies be compelled to perform their contracts even though they may result in a loss?

It is easy to confuse this case with the cases which have usually been brought before courts by utility companies. Such companies usually come into court upon the following state of facts: They have received a franchise from the city, fixing the rate for their service. At a subsequent date the city in the exercise of its police power reduces those rates, and the company then asserts that the new rates are confiscatory; that is, are so low as not to yield a reasonable profit upon the value of the property devoted to the service. As against all such reductions, the company is protected by the Fourteenth Amendment of the Constitution against rates being made so low as not to pay a reasonable profit. Such, however, is not the present case. Here there has been no reduction by the city of the franchise rates. It simply stands upon its contract and asks protection against the rates being raised by the company. The party who is changing the franchise rates now is, not the city, but the public utility, and the city is only asking the court to compel the company to perform its contract and furnish gas at the rates for which the company has agreed to be bound.

It is conceded in argument that the rule in the federal courts in actions at law is that a party is bound by his contract, though performance results in loss. That is settled by the Court of Appeals of this circuit in the recent case of Berg v. Erickson, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917A, 648. From a careful review of the authorities, Judge Sanborn there states that in some of the state courts a rule has been developed that, when conditions arise of such a character that the court can say that they were not within the contemplation of the parties at the time the contract was made, such a change of situation will excuse a violation of the contract. He concludes, however, as follows:

"But no decision of the Supreme Court or of any federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise."

He cites many federal authorities in support of the strict rule. Among them are Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; The

Harriman, 9 Wall. 161, 172, 173, 19 L. Ed. 629; Jones v. United States, 96 U. S. 24, 29, 24 L. Ed. 644; Chicago, etc., Ry. Co. v. Hoyt, 149 U. S. 1, 14, 15, 13 Sup. Ct. 779, 37 L. Ed. 625.

Conceding this to be the rule at law, counsel for defendants insist that the rule in equity is different, and that a court of equity will not specifically enforce a contract when a change in the situation has occurred of such a character that the parties at the time of making the contract did not have it in contemplation. Controlling decisions of the federal courts, however, are also fatal to this contention. The question has been directly passed upon, and contracts much more inequitable than the one here involved were enforced in the following cases: Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 471, 12 Sup. Ct. 900, 36 L. Ed. 776; Guffey v. Smith, 237 U. S. 101, 115, 35 Sup. Ct. 526, 59 L. Ed. 856. These cases all decide that in determining whether equitable relief should be granted with respect to a contract the court must place itself in the position occupied by the parties at the time the contract was made, and not at the time at which it is to be performed. If at the time it was made the contract was fair and free from fraud, mistake, or imposition, parties must be left free to make their contracts, and it is the duty of courts to enforce them as made. The same doctrine has been applied to contracts between municipalities and public utility companies. Logansport, etc., Gas Co. v. Peru (C. C.) 89 Fed. 185; Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; Westfield Gas & Mining Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033; Pond on Public Utilities, §§ 431, 432.

The contract between plaintiff and defendant is for a comparatively short term. The conditions which cause the hardship are not permanent, and are certainly not greater than those which frequently arise in contracts between private corporations and individuals. In the case of In re Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319, Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts, held that contracts between public utilities companies and corporations for a brief term, so as to give to both parties peace and an established status, were reasonable, and when made should be enforced by courts.

I am therefore unable to find any ground, either in law or equity, that would justify the court in excusing defendant from complying with its contract.

It is finally urged that the franchise is not mandatory but permissive, and that the company has a right at any time to withdraw from performance when performance will entail an actual loss. There are numerous decisions which have held that street railway companies may withdraw their service from a limited section under the circumstances named. My attention has not been called to any case authorizing a public utility company to withdraw from supplying an entire city with a commodity like gas or electricity. I shall not attempt to determine at this time whether defendant possesses such a right. If any such right exists, it would need to be carefully safeguarded. The public has rights in such a case as well as the company. The service cannot be

suddenly and arbitrarily withdrawn. It should not be withdrawn except upon a clear notice of intention to withdraw given for such a time as under the circumstances of the case will enable the municipality to contract with another private company to supply the commodity, or enable the municipality to erect a plant and furnish the article for itself and its inhabitants. After a community has become accustomed to the use of gas or electricity, it cannot be suddenly thrown back and commanded to use oil lamps and coal ranges. It is entitled to sufficient notice to enable it, in the exercise of reasonable diligence, to secure the service from which the utility company has withdrawn.

The situation disclosed by the cross-bill, if it is a true picture of the actual effect of the rates upon defendant's business, is such as might lead a just man in private life to modify a contract. It is within the power of the city council to modify a contract. In states having a public utility commission vested with full authority to deal with the subject of rates, such, for example, as Massachusetts, New York, Wisconsin, and California, those commissions have exercised their powers to increase rates when they were unreasonably low just as freely as to reduce them when they were unreasonably high. Unfortunately there is no commission in the state of Minnesota clothed with such a power. The same is true in North Dakota. A commission which is powerless to protect the public is also powerless to protect the company. Relief against such a situation, however, can be found only in the Legislature, and will not justify courts in assuming legislative powers.

The temporary injunction granted by the state court will be continued in force, and the application of the defendant for an injunction upon its cross-bill will be denied, and the cross-bill dismissed for want of equity.

In re BOSTON-WEST AFRICA TRADING CO.

(District Court, D. Massachusetts. March 4, 1919.)

No. 26089.

1. BANKRUPTCY ⟸74—INVOLUNTARY BANKRUPTCY—INDEBTEDNESS.
In computing indebtedness of one against whom an involuntary petition was filed, claims paid by preferential transfers, which amounted to acts of bankruptcy, are to be counted.

2. BANKRUPTCY ⟸166(5)—PREFERENTIAL TRANSFERS—WHAT CONSTITUTES.
Where the treasurer of a corporation, who had supplied practically all of its capital, and who had been led to believe that a claim against the corporation was unfounded, though other corporate officers knew it was well founded, paid over to himself on his own claims practically all of the corporate assets, *held*, that such payment was preferential, for the corporation was charged with knowledge of all of its officers.

3. BANKRUPTCY ⟸166(5)—CORPORATIONS—OFFICERS—KNOWLEDGE.
If a corporation has creditors, to the knowledge of any of its officials or agents, by whose knowledge it would in ordinary business affairs be bound, it is held to that knowledge, and is presumed to act in the light of that knowledge, when it makes a payment to another creditor, which would be preferential if other creditors exist.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Bankruptcy. In the matter of the Boston-West Africa Trading Company, alleged bankrupt. On review of the referee's report in favor of an adjudication in involuntary bankruptcy. Report confirmed, and adjudication ordered.

Putnam, Putnam & Bell, Louis G. De Rochemont, and Jacobs & Jacobs, all of Boston, Mass., for petitioning creditors.

Swift, Friedman & Atherton, of Boston, Mass., for alleged bankrupt.

MORTON, District Judge. The question is whether the respondent should be adjudicated on an involuntary petition.

The facts are as stated in the referee's report. The only points which require discussion are: (1) Whether the respondent owed debts to the amount of $1,000 at the time when the petition was filed; and (2) whether the payment to Argous was an act of bankruptcy. The complete facts are rather complicated, and only such of them will be referred to as are necessary to the discussion of the questions stated.

[1] As to (1), whether the debts amounted to $1,000: There were less than 12 creditors, and for present purposes the petition may be regarded as if brought by only one, viz. the Quaker City Morocco Company. Its claim, as stated by the referee, amounted to less than $1,000. The only other indebtedness of the respondent, which is here established, is that to Argous, on which the payment was made which is alleged in the petition as the act of bankruptcy. The contention for the respondent is that the payment extinguished the debt, and that therefore there was less than the amount of indebtedness required in bankruptcy proceedings. It has, however, been decided in this district, and upon what seem to me sound grounds, that in computing total indebtedness claims paid by preferential transfers, which are found to have been acts of bankruptcy, are to be counted.

"A debt, even if paid in full within four months of an involuntary petition, may be counted as a debt owing at the date of the petition, if the payment has been preferential or in fraud of creditors." Dodge, J., In re Jacobson (D. C.) 24 Am. Bankr. Rep. 927, 931, 181 Fed. 870, 873.

There is no question that the debt to Argous, if counted, was more than enough to make up $1,000. It follows that the petitioner established a sufficient indebtedness.

[2, 3] As to (2), whether the payment to Argous was a preference or fraudulent conveyance: Argous had supplied practically all the capital to the respondent, and was the person most heavily interested in it. It had shipped hides in the course of its business from Africa to this country and had been paid for them. It owed no indebtedness, except to Argous, and the claims by the petitioner, who had bought hides of it, for overcharges and inferior quality; the alleged claim of the Bank of British West Africa is not considered in the present controversy.

On December 5, 1917, at Boston, Argous, as treasurer, paid himself about $12,000 from the respondent's funds, on a claim of like amount which he held against the respondent. At the same time he transferred

to himself all the rest of the cash belonging to the respondent, about $6,500, and gave the respondent his personal note therefor. The statement of the transaction sounds fraudulent, but the learned referee did not so regard it. Argous was, as stated, practically the only person interested in the company; he was evidently somewhat dissatisfied with the way its affairs were being handled; its active business was being reduced or given up; and he apparently took over its cash for his own protection. At that time, although he knew of the claim by the Morocco Company against it, he had been advised that the claim was unfounded, and he did not have in mind to gain any advantage over the Morocco Company by transfers to himself. Schroeter, who was president of the company, and whose place of business was in New York, had been notified of the claim, and regarded it as better founded than did Henkel, who advised Argous about the matter.

The cash transferred to Argous constituted the entire substantial assets of the respondent. A few hundred dollars was left, but not sufficient to pay the petitioner's claim. If the respondent is to be held to the combined knowledge of Schroeter and Argous, it knew that the transfer to Argous would tend to hinder, delay, and defraud its other creditors. Such inevitably would be the effect of any conveyance by a debtor of all its property without arranging to pay its debts. Wilson v. Mitchell-Woodbury Co., 214 Mass. 514, 102 N. E. 119. The respondent is a corporation. The alleged act of bankruptcy was the act of the corporation. I do not think that it can be heard to say that, although Schroeter knew of the claims, he did not know of the transfer, and that Argous, although he knew of the transfer, did not believe the claims to be well founded, and that therefore no act of bankruptcy was committed, because no intent to prefer existed in any person's mind. If a corporation has creditors to the knowledge of any of its officials or agents, by whose knowledge it would in ordinary business affairs be bound, it is held to that knowledge, and is presumed to act in the light of it, in matters of this sort. Cohen, Trustee, v. Tremont Trust Co. (D. C. Dec. 11, 1918) 256 Fed. 399.

Report confirmed.

Adjudication ordered.

UNITED STATES v. HOYT.

(District Court, S. D. New York. November 9, 1917.)

1. POISONS ⟸2—HARRISON ANTI-NARCOTIC ACT—VALIDITY.
The Harrison Anti-Narcotic Act (Comp. St. §§ 6287g–6287q) is not unconstitutional.

2. POISONS ⟸9—HARRISON ANTI-NARCOTIC ACT—INDICTMENT.
Though Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), declares that nothing in the section shall apply to registered physicians who distribute narcotics in their professional practice, *held*, that an indictment, though averring that defendant was a registered physician, charged a violation of section 2, in that he sold and dispensed heroin not in his professional practice, and in that the sale was not made in pursuance of a written order on a blank issued by the Commissioner of Internal Revenue.

3. INDICTMENT AND INFORMATION ⟸71, 125(3)—POISONS ⟸9—CERTAINTY—DUPLICITY.
An indictment charging a violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), in that defendant sold and dispensed heroin, not on a written order on a blank issued by the Commissioner of Internal Revenue, *held* not uncertain, ambiguous, and duplicitous, though it was averred that the defendant was a registered physician.

Daniel J. Hoyt was indicted for violating the Harrison Anti-Narcotic Law, by selling less than an ounce of heroin, which sale was not made in pursuance of a written order, etc., on a form issued in blank for that purpose by the Commissioner of Internal Revenue. On demurrer to the indictment. Demurrer overruled.

John E. Walker, Asst. U. S. Dist. Atty., of New York City, for the United States.

Carl E. Whitney, of New York City, and N. L. Johnson, for defendant.

McCALL, District Judge. Stripped of its technical verbiage, the offense charged in the indictment is that Daniel J. Hoyt was a dealer in and dispenser of opium, coca leaves, and their salts, derivatives, and compounds, and that he sold, bartered, dispensed, and distributed to J. B. Williams less than an ounce of heroin, which sale was not made in pursuance of a written order from the person to whom the heroin was sold, bartered, dispensed, and distributed, on a form issued in blank for that purpose by the Commissioner of Internal Revenue; that is to say, it is charged that the defendant sold, bartered, dispensed, and distributed heroin on an order therefor, other than on an order made on the form issued by the Commissioner of Internal Revenue.

A demurrer is filed to the indictment, and the following grounds are assigned:

(1) That Act Dec. 17, 1914, c. 1, 38 Stat. 785, is unconstitutional.
(2) and (3) That there is no offense charged in either count of the indictment.
(4) That the indictment is uncertain, ambiguous, and duplicitous.

[1] I deem it unnecessary to say more of the first ground than that it is overruled.

[2] As to the second and third grounds, the question for decision is: Did the Harrison Anti-Narcotic Law (Act Dec. 17, 1914, c. 1, 38 Stat.

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785 [Comp. St. §§ 6287g–6287q]) permit Hoyt, on the facts alleged in the indictment, to sell, barter, dispense, or distribute heroin upon any order other than one written on a blank form issued for that purpose by the Commissioner of Internal Revenue?

It is insisted for the defendant that the indictment also charges that he was a "physician registered with the collector of internal revenue as the law requires, and therefore paragraph 1 of section 2 of the act, on which the indictment is based, does not apply to him, since subsection (a) of section 2 (Comp. St. § 6287h) provides that nothing contained in section 2 shall apply to physicians registered under the act, who dispense and distribute narcotics in the course of their professional practice only, provided the physician does certain other things not material here. This is true, and is important, in that it might be fatal to the indictment, if the pleader has not worded it so as to render the exception inapplicable.

As we understand paragraph 1, § 2, it does not apply to registered physicians who dispense or distribute narcotics in the course of their professional practice only. But that is the precise thing the defendant is charged with not having done. The legal presumption in favor of the defendant, as a registered physician, that he complied with the law, in that he dispensed and distributed narcotics in the course of his professional practice only, is expressly negatived by the charge that he did not limit his operations to the course of his professional practice only.

[3] In the fourth ground of demurrer it is said that the indictment is uncertain, ambiguous, and duplicitous. True, it is averred that the defendant was, at the time of the commission of the alleged offense, a "registered physician," and it is insisted, from the language used, that it is not certain whether he is being prosecuted for violating the law as it relates to him as a physician dispensing and distributing narcotics, as contradistinguished from him as an individual engaged in selling, bartering, exchanging, and giving away the drug.

We think if the language used by the pleader is confusing in the slightest degree it may and should be treated as surplusage. To us it is clear that, although a physician may be properly registered, that fact would not necessarily prevent him from violating paragraph 1, § 2, of the act, for he might and could use the fact that he was registered as a cloak to do the very things charged against him in this case; that is, notwithstanding he was a registered physician, he sold, bartered, dispensed, and distributed the drug while not acting in the course of his professional practice only.

This case is clearly distinguishable from United States v. Friedman (D. C.) 224 Fed. 276, cited by defendant. There are other questions raised by the demurrer, but I need not discuss them. I understand the ruling in this case goes, also, in United States v. Hoyt, No. 4283.

The demurrer is overruled.

JOHNSON v. GRAND FRATERNITY.

(Circuit Court of Appeals, Eighth Circuit. February 4, 1919.)

No. 4989.

1. INSURANCE ⟸695—AGENCY CONTRACTS—CONSTRUCTION.
A contract between a fraternal insurer and agents *held* not to include and provide for commissions on certificates designated as stipulated premium and annuity certificates.

2. CONTRACTS ⟸147(2)—CONSTRUCTION—INTENTION.
A court can seek outside of the written contract for the intention of the parties only when it is not clearly expressed.

3. CONTRACTS ⟸166—EXHIBITS—CONSTRUCTION.
Where exhibits attached to a contract relating to commissions were subordinate, and merely explanatory of details dealt with in general terms in the contract, only such portions thereof as perform that function can be regarded as intended to be operative.

4. INSURANCE ⟸695—FRATERNAL INSURANCE—CONTRACTS—CONSTRUCTION.
A contract between a fraternal insurer and agents *held* unambiguous, and not to allow compensation on certificates designated in exhibits attached merely for illustration as stipulated premium and annuity certificates.

5. CONTRACTS ⟸166—CONSTRUCTION—EXHIBITS.
The mere statement that an exhibit is made a part of the contract is not controlling in determining whether the terms of the contract can be violated by the exhibit.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit by D. E. Johnson against the Grand Fraternity. From an order confirming the report of a special master in an accounting, plaintiff appeals. Affirmed.

George P. Steele, of Denver, Colo., for appellant.

William A. Jackson, of Denver, Colo. (Charles W. Waterman, of Denver, Colo., on the brief), for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Appeal, in an accounting under a contract, from the order of the District Court confirming the report of the special master.

Appellant had sued the appellee on account of certain commissions earned by him and his assignors for procuring insurance contracts for the United Moderns, a fraternal insurance organization later absorbed by appellee. As the appellee in connection with this absorption contemplated the assumption of the agency contracts of the United Moderns and as it objected to certain exclusive territory features in the contracts under which appellant and his assignors were working, the United Moderns and these agents replaced the existing agency contracts with others. These new contracts were not only prospective in effect but defined existing commission liabilities. Thereafter appellee contracted concerning these later agency contracts as follows (omitting address and signatures):

"In the matter of your contract with United Moderns relating to commissions on field work heretofore placed by you, and which contract is hereto attached marked 'Exhibit A.'

"This is to certify and guarantee to you that the Grand Fraternity will assume and pay all unpaid commissions according to the terms of said contracts as they mature."

[1] By interlocutory order the court instructed the master to exclude from the accounting all evidence as to commissions earned under two kinds of certificates, designated as stipulated premium and annuity certificates. This action was based on the determination of the court that such certificates were not included within the terms of the contracts. The question of construction thus presented is whether these two kinds of certificates are within these contracts. The body of each of the contracts refers to five classes or kinds of certificates (twenty annual premium, ordinary life, installment at age 70, natural premium, and age 55 convertible), which do not include stipulated premium and annuity forms of certificates. The exhibits, which are attached to the contracts and consist of lists of policies secured by the agent, do include these two kinds. The disputed construction narrows, therefore, to the question of whether the inclusion in the exhibits alone justifies the conclusion that they are to be included in the contracts. The contention of appellee that the contract is clear, complete, and unambiguous must be considered before reaching that of appellant, which is that, under all of the circumstances surrounding the transaction, an intention to include these two kinds of policies must be found. This requires examination of the wording of the contracts.

The two agency contracts (one with M. B. and H. J. Johnson, the other with W. L. Stowers) were identical, except for description of territory and lists of policies as set forth in the exhibits attached to each. Each of these contracts began with the recital of a theretofore existing agency contract wherein the United Moderns agreed to pay—

"certain commissions out of the first annual premium which have heretofore been paid in full, and certain commissions on more recent work which are not as yet fully paid but which are maturing from month to month, that is to say, the parties of the second part were to receive a commission of 60 per cent. on the first annual premium and 15 per cent. of the second annual premium, payable one-fifteenth of the total of 75 per cent. out of each monthly premium as collected, on business written by themselves or organizers in their said territory until fully paid, upon all business written under the twenty annual premium, ordinary life, and installment at age 70 certificates, and 50 per cent. of the first year's premium upon all natural premium and age 55 convertible certificates. A list of the business written by said organizers, and on which any portion of the commissions as aforesaid are unpaid, and the extent to which the same shall be payable, provided the certificates remain in force and make their payments, is shown by the list attached hereto marked 'Exhibit A,' and made a part hereof.

"As a further consideration for said services, it was agreed that during the term of 30 years on all such certificates written as aforesaid, and which remain in force, a renewal commission beginning with the second annual premium should be paid at the rate of $1.10 per $1,000 of insurance in force, said commissions payable pro rata quarterly out of the premium installments as paid. A list of all business written and in force on the books of the party of the first part at this time on which said renewal commissions are payable,

or hereafter payable, showing the date from which the same are hereafter payable is hereto attached marked 'Exhibit B,' and made a part hereof."

After other recitals here unimportant these contracts continued as follows:

"Whereas, the said party of the first part is desirous of securing a cancellation of the contract of the parties of the second part especially as to their exclusive right to do business in the said territory and to employ other agents in said territory, permitting said second parties to only receive a commission upon such new business as they may hereafter write for the order; and

"Whereas, all of said parties desire and have agreed that their said contract together with any and all amendments and modifications which may have been made thereto subsequent to the date thereof, whether expressed in writing or otherwise, shall be canceled, annulled and shall be of no further force or effect from and after this date and that the agreement next hereinafter recited and set forth shall be substituted for and taken in lieu thereof in all respects the same as if said original contract had never been made and as though the agreement herein next following were the original and only agreement between the parties hereto, that is to say:

"United Moderns will pay to parties of the second part the commission and renewals as they mature on business now in force as heretofore stipulated, a commission of sixty per cent. of the first annual premium and fifteen per cent. of the second annual premium, payable one-fifteenth of the total of seventy-five per cent. out of each monthly premium as collected, on business written by themselves or organizers in their said territory, until fully paid, upon all business written under the twenty annual premium, ordinary life and installment at age seventy certificates, and fifty per cent. of the first year's premium upon all natural premium and age fifty-five convertible certificates, payable pro rata as collected, as per the list heretofore attached, marked 'Exhibit A,' and which is made a part hereof.

"United Moderns will also pay for and during the term of thirty years from and after February 24, 1897, as a further consideration hereof, on all such certificates written as aforesaid and which remain in force, a renewal commission, beginning with the second annual premium at the rate of one dollar and ten cents per one thousand dollars of insurance remaining in force, whether transferred to any other form or not, said renewal commissions to be payable pro rata quarterly out of premium installments as paid, all as per list of business written and in force on the books of the party of the first part at this time on which said renewal commissions are payable or which may hereafter become payable, showing the date from which same are hereafter payable, which is hereto attached, marked 'Exhibit B,' and made a part hereof."

Exhibit A, of the Johnson contract was a list of about 515 certificate holders, comprehending seven kinds of certificates as follows: Ordinary life, stipulated premium, twenty annual premium life, age, convertible, installment age seventy, and natural premium. Exhibit B contained a list of about 2,000 certificate holders of five kinds as follows: Annuity, twenty annual premium, installment age seventy, stipulated premium, and ordinary life. Exhibit A of the Stowers contract contained about 175 certificate holders of five kinds as follows: Ordinary life, stipulated premium, annual premium life, age, and convertible. Exhibit B contained about 1,000 certificate holders of five kinds as follows: Annuity, annual premium life, ordinary life, installment age, and stipulated premium.

[2] This difference between the contracts and the exhibits attached to them is apparent, but if, under accepted legal rules, there is no

ambiguity in the contracts, there is no right in the court to do more than declare what the plain wording of the contract imports. A court can seek outside of a written contract for the intention of the parties only when that intention is not clearly expressed within the writing itself.

[3] If the exhibits are parts of the respective contracts of equal force and effect as other parts, then an ambiguity exists. If they are subordinate, and merely explanatory of details dealt with in general terms in the contract itself, then only such portions of the exhibits as perform that function can be regarded as intended by the parties to be operative. Guerini Stone Co. v. Carlin, 240 U. S. 264, 277, 36 Sup. Ct. 300, 60 L. Ed. 636.

[4] What office did these contracting parties intend these exhibits to fill? Without these exhibits the contracts were complete and unambiguous, and were, beyond question, applicable to but five classes named therein. Suppose there had been no exhibits attached to the contracts, but the appellant had undertaken to show that these very lists were discussed and in the minds of the parties during the negotiations leading up to the contracts, and therefore the contract should be construed as containing seven classes of certificates. Obviously, such a result would have been denied as making, not construing, a contract. Immediately following the naming of the five classes of certificates, in each of two places in the contracts, are the only references in the contracts to Exhibit A as follows, respectively:

"A list of the business written by said organizers, and on which any portion of the commissions as aforesaid are unpaid, and the extent to which the same shall be payable, provided the certificates remain in force and make their payments, is shown by the list attached hereto marked 'Exhibit A,' and made a part hereof. * * * As per the list heretofore attached, marked 'Exhibit A,' and which is made a part hereof."

The references to the renewal commissions are equally significant. If the exhibits contained other policies, they had no place there. The very careful naming in the contract (which was prepared by appellant) of five classes of certificates is highly significant of the intention of the parties to exclude all other classes. The only function of these exhibits was to set out in detail the policies within the general description of the contract to prevent any future dispute as to any particular policy belonging in such classes by definitely identifying it.

Situations similar to those in this case have been heretofore met in this court and elsewhere and disposed of in line with the above. Miller v. Hamilton, 216 Fed. 131, 133, 132 C. C. A. 375; Daly v. Busk Tunnel Ry. Co., 129 Fed. 513, 64 C. C. A. 87; Cruthers v. Donahue, 85 Conn. 629, 84 Atl. 322, Ann. Cas. 1913C, 221; Meyer v. Berlandi, 53 Minn. 59, 61, 54 N. W. 937; Boteler v. Roy, 40 Mo. App. 234, 240; Moreing v. Weber, 3 Cal. App. 14, 20, 84 Pac. 220; Hayes v. Wagner, 113 Ill. App. 299, 301 (affirmed 220 Ill. 256, 77 N. E. 211); B. & O. R. R. Co. v. Stewart, 79 Md. 487, 497, 29 Atl. 964; White v. McLaren, 151 Mass. 553, 24 N. E. 911; Reichert v. Brown, 38 Misc. Rep. 782, 78 N. Y. Supp. 834.

[5] The mere statement that the exhibit is "made a part" of the contract is not controlling. Daly v. Busk Tunnel Ry. Co., supra; Cruthers v. Donahue, supra; Meyer v. Berlandi, supra; Boteler v. Roy, supra.

The judgment is affirmed.

PARKE, DAVIS & CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1919. Rehearing Denied March 15, 1919.)

No. 3083.

1. ADULTERATION ⟸4—INSECTICIDE ACT.
In determining whether an insecticide is adulterated or misbranded within Act April 26, 1910 (Comp. St. §§ 8765–8777), where words in everyday use are put upon the labels, they are to be given their ordinary meaning so far as they have one, unless it is disclosed that their use was under such circumstances that they conveyed a different meaning.

2. ADULTERATION ⟸4—INSECTICIDE ACT—CONSTRUCTION.
The use of the name "Insect Powder" on labels does not constitute a profession of standard or quality, nor that the package does not contain ingredients lacking in purity or insecticidal value, so as to constitute either adulteration or misbranding because of the presence of such ingredients within Insecticide Act April 26, 1910, §§ 7, 8 (Comp. St. §§ 8771, 8772).

Sheppard, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Criminal prosecution by the United States against Parke, Davis & Co. Judgment of conviction, and defendant brings error. Reversed.

Charles M. Woodruff, of Detroit, Mich., and Richard B. Montgomery, of New Orleans, La., for plaintiff in error.

Jos. W. Montgomery, U. S. Atty., and J. D. Dresner, Asst. U. S. Atty., both of New Orleans, La.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

WALKER, Circuit Judge. This was a prosecution instituted by an information containing two counts, each of which charged that the plaintiff in error, Parke, Davis & Co., a corporation, on or about March 4, 1912, did wrongfully and unlawfully ship and cause to be shipped and transported for sale, from New Orleans, La., to the purchaser thereof, to wit, the Southern Drug Company, Houston, Tex., a certain insecticide, to wit, a quantity of so-called insect powder, which when so shipped bore the following label on the packages containing the same:

"1 lb. Net. Parke, Davis & Co. 90, 92 & 94 Maiden Lane, New York. [P. D. & Co. Brand Insect Powder P. D. & Co.]"

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The first count charged that said insect powder, when so shipped, labeled as aforesaid, was adulterated in the following manner and particulars, to wit:

"That said label indicated that the said insecticide was a pure and genuine insect powder, whereas, in truth and in fact, it was not a pure and genuine insect powder, but the strength and purity of said so-called insect powder, when shipped as aforesaid, then and there fell below the professed standard of quality under which it was sold, in that it was sold as a pure and genuine insect powder, whereas said insect powder contained an excessive and unlawful amount and quantity of pyrethrum stems in violation of law and the Insecticide Act 1910."

The second count charged that said insect powder, when so shipped, labeled as aforesaid, was misbranded in the following manner and particulars, to wit:

"That said label then and there indicated that the so-called insect powder was a pure and genuine insect powder, whereas, in truth and fact, it was not a pure and genuine insect powder, but then and there contained an excessive and unlawful amount and quantity of pyrethrum stems in violation of law and the Insecticide Act 1910, and said label therefore bore a false statement as to the so-called insect powder, and as to the ingredients thereof, and was such as to deceive and mislead the purchaser into believing that the said so-called insect powder was pure and genuine, when in truth and in fact it was not pure and genuine and of the standard known to the trade as insect powder."

The question of the sufficiency of the information was raised by a motion to quash and also by demurrer. The motion and the demurrer were overruled. There was a trial resulting in the conviction of the defendant.

Each count of the information undertakes to charge an offense under the Act of Congress of April 26, 1910, known as the Insecticide Act, c. 191, 36 Stat. 331 (Comp. St. §§ 8765–8777). That act includes a prohibition of the shipment in interstate commerce of adulterated or misbranded insecticides, and makes such a shipment a misdemeanor. It defines the terms "insecticide," "adulterated," and "misbranded," as used in the act. The following are provisions of the act:

"The term 'insecticide' as used in this act shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any insects which may infest vegetation, man or other animals, or households, or be present in any environment whatsoever.

"For the purpose of this act an article shall be deemed to be adulterated—

"*Paris Green.*

"In the case of paris green: First, if it does not contain at least fifty per centum of arsenious oxide; second, if it contains arsenic in water-soluble forms equivalent to more than three and one-half per centum of arsenious oxide; third, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"*Lead Arsenate.*

"In the case of lead arsenate: First, if it contains more than fifty per centum of water; second, if it contains total arsenic equivalent to less than twelve and one-half per centum of arsenic oxid (As205); third, if it contains arsenic in water-soluble forms equivalent to more than seventy-five one-hundredths per centum of arsenic oxid (As205); fourth, if any substances have been mixed and packed with it so as to reduce, lower, or injuriously affect its quality or strength: Provided, however, that extra water may be added to lead arsenate (as described in this paragraph) if the resulting mixture is

labelled lead arsenate and water, the percentage of extra water being plainly and correctly stated on the label.

"*Other Insecticides or Fungicides.*

"In the case of insecticides or fungicides, other than paris green and lead arsenate: First, if its strength or purity fall below the professed standard or quality under which it is sold; second, if any substance has been substituted wholly or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if it is intended for use on vegetation and shall contain any substance or substances which, although preventing, destroying, repelling, or mitigating insects, shall be injurious to such vegetation when used.

"The term 'misbranded' as used herein shall apply to all insecticides, paris greens, lead arsenates, or fungicides, or articles which enter into the composition of insecticides or fungicides, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to all insecticides, paris greens, lead arsenates, or fungicides which are falsely branded as to the state, territory, or country in which they are manufactured or produced.

"That for the purpose of this act an article shall be deemed to be misbranded—

* * * * * * * * * *

"In the case of insecticides (other than paris greens and lead arsenates) and fungicides: First, if it contains arsenic in any of its combinations or in the elemental form and the total amount of arsenic present (expressed as per centum of metallic arsenic) is not stated on the label; second, if it contains arsenic in any of its combinations or in the elemental form and the amount of arsenic in water-soluble forms (expressed as per centum of metallic arsenic) is not stated on the label; third, if it consists partially or completely of an inert substance or substances which do not prevent, destroy, repel, or mitigate insects or fungi and does not have the names and percentage amounts of each and every one of such inert ingredients plainly and correctly stated on the label: Provided, however, that in lieu of naming and stating the percentage amount of each and every inert ingredient the producer may at his discretion state plainly upon the label the correct names and percentage amounts of each and every ingredient of the insecticide or fungicide having insecticidal or fungicidal properties, and make no mention of the inert ingredients, except in so far as to state the total percentage of inert ingredients present."

The act provides for the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor making uniform rules and regulations for carrying out the provisions of the act. The term "insect powder" is not found in the act.

[1] The subjects of the alleged shipments were packages labeled as alleged in the information. The words on the label, except those stating weight and the name and address of the defendant, were: "P. D. & Co. Brand Insect Powder P. D. & Co." In the connection in which the letters "P. D." are found on the label, they are to be taken as used as the initials of a previously stated name. The bracketed words of the label import insect powder of the named brand. The term "insect powder" is one which was in common use long before the enactment of the statute. Judicial cognizance is taken of the meaning of words or terms in common use. The following is the definition of the term given in the Century Dictionary: "A dry powder used to kill or expel insects; an insecticide or insectifuge." That definition is followed by this statement:

"The principal kinds, used against museum and household pests, are the Persian, made from the dry flowers of pyrethrum roseum; the Dalmatian

(also called Persian), from those of pyrethrum cinerariae-folium; and the Californian, also made from the last-named plant, all of which are known as buhach."

Where words in everyday use are put upon labels, they are to be given their ordinary and customary meaning so far as they have one, unless it is disclosed that their use was under such circumstances that they conveyed a different meaning. Libby, McNeill & Libby v. United States, 210 Fed. 148, 127 C. C. A. 14; United States v. 150 Cases of Fruit Puddine (D. C.) 211 Fed. 360. The information does not allege any facts or circumstances from which it could be inferred that the term "insect powder," as used in the label, had a meaning other than the one it has in everyday use. If the word "insecticide" had been used, it would have conveyed the same meaning, except that it would not have indicated that the thing referred to was a dry powder. The use of either of the words is not inconsistent with the thing referred to being a mixture containing ingredients lacking in purity or insecticidal value. And the use of either of them does not constitute a profession of standard or quality or a statement of the ingredients or substances contained in the thing referred to. The statute specifies ingredients of paris green and lead arsenate the presence or absence of which is given such effect that those articles are to be deemed adulterated. Those provisions are not applicable to insecticides other than the ones named. So far as appears, at the time of the alleged shipments, no regulation had been prescribed which purported to deal with the use of the word "insect powder" on labels.

[2] The first count of the information undertook to charge that the subject of the alleged shipment was adulterated within the meaning of the provision of the statute that an article should be deemed to be adulterated "if its strength or purity fall below the professed standard or quality under which it is sold." It does not attempt to charge that the thing shipped was adulterated within the meaning of any other clause of the statute's definition of that term. That count failed to state facts constituting the offense attempted to be charged, in that it failed to show that the alleged label or any part of it imported a professed standard or quality under which the subject of the alleged shipment was sold. It imported no more than that the thing referred to was a powder intended to be used to kill, repel, or mitigate insects.

The second count of the information undertook to charge that the subject of the alleged shipment was "misbranded" within the meaning of that part of the statute's definition of that term which makes it apply to all insecticides, etc., "the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular." There was no attempt to charge that the thing shipped was misbranded within the meaning of any other clause of the statute's definition of that term. The charge as made in that count involves the assumption that the word or term "insect powder" amounts to a statement which was false and misleading, though the thing referred to is one which properly is identified or

described by that name as it applied ordinarily and customarily. That assumption is unwarranted.

The conclusion is that the averments of neither count of the information showed the commission of any criminal offense. The court erred in ruling otherwise. Its judgment is reversed.

SHEPPARD, District Judge (dissenting). The evidence at the trial established the trade meaning of "professed standard" of insecticide, namely, a powder made of the flower heads of the pyrethrum plant. The evidence further showed that the introduction of more than 10 per cent. of stems of the plant into the powder reduced its purity and efficacy relatively in proportion to the quantity of powdered stems put into the article. The insect powder of defendant put on the trade was shown to contain 50 per cent. of powdered stems. Stems were shown to have only a slight insecticidal value, and by the terms of the statute the percentage amount of the inert ingredient should be plainly stated on the label. I think the information charges an offense under the statute.

The evidence in my opinion made out a case of at least misbranding, and the judgment should not be disturbed. United States v. Antikamnia Co., 231 U. S. 654, 34 Sup. Ct. 222, 58 L. Ed. 419, Ann. Cas. 1915A, 49.

EGGEN v. CANADIAN NORTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. November 18, 1918.)

No. 5030.

1. LIMITATION OF ACTIONS ⊂⊃2(3)—STATUTE—CONSTRUCTION.
   Railway Act of Canada, c. 37, § 306, requiring personal injury suits to be brought within one year, is purely a statute of limitations, and so has no extraterritorial effect, and does not govern an action brought outside of Canada for injuries received therein, but such action is governed by the law of the forum.

2. CONSTITUTIONAL LAW ⊂⊃207(3)—EQUAL PRIVILEGES—LIMITATION STATUTE.
   Gen. St. Minn. 1913, § 7709, providing that, when a cause of action has arisen outside the state, and action thereon, under the laws of the place it arose, is barred by lapse of time, no such action shall be maintained in the state, unless plaintiff be a citizen of the state who has owned the cause of action since accrual, is invalid under Const. U. S. art. 4, § 2, as denying citizens of other states privileges and immunities.

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action by Gus Eggen against the Canadian Northern Railway Company. There was judgment for defendant, and plaintiff brings error. Reversed.

Ernest A. Michel, of Marshall, Minn. (Tom Davis, of Marshall, Minn., on the brief), for plaintiff in error.

H. Seger Slifer, of Minneapolis, Minn. (Hector Baxter, of Minneapolis, Minn., on the brief), for defendant in error.

Before HOOK, CARLAND, and STONE, Circuit Judges.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

STONE, Circuit Judge. Writ of error from directed verdict favoring defendant in a personal injury suit.

[1] The errors assigned present questions of law. Plaintiff, a citizen of South Dakota, was injured on a Canadian railway. Slightly more than a year later he brought this action in Minnesota. The first inquiry is as to whether the Canadian or the Minnesota statute of limitation governs. The Canadian statute (section 306, c. 37, of the Railway Act of Canada) which is here involved requires that suits such as this shall be brought within one year. This requirement is no part of the right to bring an action, but is purely a statute of limitation. Peszeniczny v. Canadian Northern Ry. Co., 35 Western Law Reporter, 546, 11 Western Weekly Reports, 546. Such character of statutes have no extraterritorial force. Therefore the Minnesota law, being that of the forum, governs.

[2] Two sections of the Minnesota statutes (Gen. St. Minn. 1913, §§ 7701, 7709) give rise to the final inquiry. Section 7701 is an ordinary statute of limitation of six years for personal injuries. Section 7709 is:

"When a cause of action has arisen outside of this state, and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued."

The facts bring this case within section 7709, so that if that section is valid this action cannot be brought. Plaintiff challenges that section as being violative of section 2, art. 4, of the national Constitution, and of the Fourteenth Amendment thereto. It is necessary to discuss only the former. That provision is—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

It has been wisely seen that this provision of the Constitution is of comprehensive scope (Ward v. Maryland, 12 Wall. 418, 430, 20 L. Ed. 449; Conner v. Elliot, 18 How. 591, 593, 15 L. Ed. 497), and of deep influence in molding the Union into a compact nation (Blake v. McClung, 172 U. S. 239, 251, 19 Sup. Ct. 165, 43 L. Ed. 432; Paul v. Virginia, 8 Wall. 168, 180, 19 L. Ed. 357; Lemmon v. People, 20 N. Y. 607). Therefore the courts have prudently refrained from attempting any hard and fast definition of its terms (Ward v. Maryland, 12 Wall. 418, 430, 20 L. Ed. 449; Conner v. Elliot, 18 How. 591, 593, 15 L. Ed. 497; McCready v. Virginia, 94 U. S. 391, 395, 24 L. Ed. 248; Blake v. McClung, 172 U. S. 239, 248, 19 Sup. Ct. 165, 43 L. Ed. 432); but there is no divergence of opinion from the view expressed in Cole v. Cunningham, 133 U. S. 107, 113, 10 Sup. Ct. 269, 271 (33 L. Ed. 538) by Mr. Chief Justice Fuller, who said:

"The intention of section 2, art. 4, was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances; and *this includes the right to institute actions.*" (Italics ours.)

Which view was emphasized by Mr. Justice Moody in Chambers v. B. & O. R. R. Co., 207 U. S. 142, 148, 149, 28 Sup. Ct. 34, 35 (52 L. Ed. 143) who said:

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the federal Constitution. * * * Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land." Ward v. Maryland, 12 Wall. 418, 430 (20 L. Ed. 449); McCready v. Virginia, 94 U. S. 391, 395, 24 L. Ed. 248; Blake v. McClung, 172 U. S. 239, 249, 19 Sup. Ct. 165, 43 L. Ed. 432; Harris v. Balk, 198 U. S. 215, 223, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084; Corfield v. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230.

We regard section 7709 as opposed to this constitutional requirement, as it has been expounded in the above decisions, and therefore void.

Defendant seeks to draw a distinction between the right to bring a suit and the continuing right to bring it. A discrimination in the right to bring a suit five years after it accrues is as much a substantial discrimination as one in bringing the suit originally. Any difference is of degree, not of kind. The case of Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. Ed. 806, is based upon no such distinction and employs no such reasoning. That case was decided upon the ground that there was an equitable and just ground for the discrimination in a limitation statute. For over 40 years this decision has been passed in silence by the Supreme Court without once being cited, that we can discover, upon this constitutional point. The later decisions above cited seem opposed to the spirit of that decision. They recognize and emphasize the great importance of this provision of the fundamental law, and the necessity of carefully preserving it from the slightest infringement. This statute, like many other state laws resulting in discrimination between citizens of different states, may have much to commend it, but such considerations have no place in constitutional tests, nor could they weigh against the paramount object of this constitutional provision, which aims at unified nationality as opposed to confederation.

The judgment is reversed.

HOOK, Circuit Judge (dissenting). It is well settled that holding a legislative act contrary to the Constitution should be avoided, if fairly possible. Even grave doubts should be resolved in favor of validity. United States v. Jin Fuey Moy, 241 U. S. 394, 401, 36 Sup. Ct. 658, 60 L. Ed. 1061. There is no clearly defined line between the power of the states and the limitations of the national Constitution, on one side or the other of which all cases readily fall; and in many instances legislation near the border has been upheld upon consideration of reasonableness in view of the conditions upon which it

operates. That course, while preserving the true essence of the Constitution, has imparted an elasticity essential to its permanence.

I do not think the Minnesota statute should be held repugnant to the Constitution. It proceeds upon the principle that in a general sense a liability, debt, or obligation is due at the domicile of the obligee and that he who owes it should go there to discharge it. Upon default it is not primarily the duty of the obligee to hunt his debtor beyond the boundaries of his state; he may await his coming within the jurisdiction of its courts. These are considerations in which an obligee domiciled in another state does not participate, and provisions of many state statutes of limitation proceed upon a recognition of them. It is not enough to say there is discrimination. Some difference in legislative treatment is warranted by a difference in conditions. The privileges and immunities contemplated by the Constitution are those which are of a fundamental character. In the field of legal remedies alone state legislation contains many discriminations in favor of both resident debtors and resident creditors which no one would now seriously contend are invalid. For examples, permitting attachment against a nonresident debtor without bond while requiring a bond in attachment against a resident; nonresidence, of itself without more, as a ground for attachment of the owner's property; the running of a statute of limitations in favor of a resident debtor, but not in favor of a nonresident one; requiring a bond of a nonresident creditor in bringing suit, but dispensing with it if he is a resident. Blake v. McClung, 172 U. S. 240, 256, 19 Sup. Ct. 165, 43 L. Ed. 432; Central Loan & Trust Co. v. Campbell, 173 U. S. 84, 19 Sup. Ct. 346, 43 L. Ed. 623 (Equal Protection Clause). In such cases residence or nonresidence may and generally does imply citizenship or the lack of it.

The right of access to courts of justice is of the greatest importance, but in preserving the equal privileges of the citizens in the several states in respect of it the Constitution does not pick up all local procedural details. The statute of Minnesota does not deny nonresidents the right to sue in its courts on causes of action arising elsewhere. It keeps its courts open to all as long as is allowed in the foreign jurisdiction where the cause of action arose, and then gives further time to those of Minnesota, and only those who have "owned the cause of action ever since it accrued."

None of the cases cited to overthrow the statute involved the question before us, and reliance is therefore placed on general language in the opinions. It has been held dangerous broadly to apply abstract definitions of the word "privileges," in the constitutional provision, to particular cases of legislation. Conner v. Elliot, 18 How. 591, 593, 15 L. Ed. 497. Perhaps the strongest of the quotations relied on is that from Chambers v. Railroad, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143, but that case was not at all like the one here. It involved the constitutionality of an Ohio statute under which a right of action, created by the laws of another state in favor of the widow or personal representative of one whose death was caused by negligence, could be maintained in Ohio only when the deceased was an Ohio citizen, and the validity of the statute was sustained. The near-

est approach to the case at bar is Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. Ed. 806. Like the case here, it involved the validity of a state statute of limitations under the "privileges and immunities" clause of the Constitution. Concisely expressed, the statute provided that if the plaintiff resided in the state the time should not run while defendant was out of the state, but that it should run if both plaintiff and defendant resided out of the state. In the consideration of the case residence was taken as synonymous with citizenship. It will be perceived that an exemption from the operation of the statute—from the running of the limitation—was accorded a resident creditor, but not accorded a nonresident creditor, under precisely the same condition, to wit, the nonresidence of the debtor. The discrimination was held reasonable and the statute was sustained. The precise point in that case does not appear to have again arisen in the Supreme Court, but in Anglo-Am. Prov. Co. v. Davis, 191 U. S. 373, 375, 24 Sup. Ct. 92, 48 L. Ed. 225, in which the validity of a New York statute was sustained under the "full faith and credit" clause, the court said: "As to discrimination against nonresidents, see Chemung Canal Bank v. Lowery, 93 U. S. 72 [23 L. Ed. 806]." In Penfield v. Railroad, 134 U. S. 351, 10 Sup. Ct. 566, 33 L. Ed. 940, a New York statute of limitations quite like the one here was construed, and held to bar a plaintiff who did not actually reside in the state. No point was made, however, upon its constitutionality.

SOUTH DAKOTA CENT. RY. CO. v. CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK et al.*

(Circuit Court of Appeals, Eighth Circuit. February 1, 1919.)

No. 5150.

1. REMOVAL OF CAUSES ⊂=13—GROUND OF REMOVAL—"FEDERAL QUESTION."
A suit in a state court, attacking the title to property acquired under a decree of a federal court on the ground that such decree was void, involves a "federal question," and is removable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Federal Question.]

2. JUDGMENT ⊂=502—COLLATERAL ATTACK—ERROR IN JUDGMENT.
A decree of a federal court in a railroad foreclosure suit, directing sale of the property by its receiver without appraisement or right of redemption, which are provided for in real estate foreclosures by the laws of the state, if erroneous, is not void for want of jurisdiction and subject to collateral attack, but is reviewable only by appeal.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit in equity by the South Dakota Central Railway Company against the Continental & Commercial Trust & Savings Bank and others. Decree for defendants, and complainant appeals. Affirmed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 249 U. S. —, 39 Sup. Ct. 493, 63 L. Ed. —.

Odin R. Davis, of Sioux Falls, S. D. (Tore Teigen, of Sioux Falls, S. D., on the brief), for appellant.

E. C. Lindley, of St. Paul, Minn. (H. E. Judge and Frank R. Aikens, both of Sioux Falls, S. D., on the brief), for appellees.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. This is an appeal from a final decree sustaining a motion of the defendants to dismiss the complaint for want of equity.

The cause was originally instituted by the appellant in a circuit court of the state of South Dakota, and on petition of the appellees removed to the District Court of the United States for the District of South Dakota. A motion to remand the cause to the state court was overruled, and thereupon the motion to dismiss the complaint for failing to state a cause of action was sustained. The parties will be referred to as they appeared in the court below.

The object of the complaint was to redeem the railroad property from the defendant the Watertown & Sioux Falls Railway Company, who was in possession thereof, after an accounting for the rents and profits derived therefrom by the defendant railway company, and quiet title in the plaintiff, after paying what amount may be found to be due upon such accounting. The material allegations in the complaint are that, in a foreclosure proceeding of a mortgage on the property executed by the plaintiff, a final decree of foreclosure was rendered by the District Court of the United States for the District of South Dakota, which provided that if the mortgage debt, which was found to be due from the defendant in that cause, the plaintiff in this action, is not paid within a time specified, the mortgaged premises be sold by the special master appointed for that purpose "without valuation or appraisement, right of redemption, stay, or execution"; that the sale was made accordingly, the debt adjudged to be due not having been paid. The sale was made on June 12, 1916, without valuation or appraisement, and without right of redemption, stay, or extension to the defendant Charles O. Kalman. The report of sale by the special master was filed on the same day and was confirmed by the court on June 28, 1916; that thereupon the said Kalman assigned his bid to the defendant Watertown & Sioux Falls Railway Company, who paid the purchase price, received a deed to the property on July 6, 1916, took possession thereof, and has been in such possession ever since, collecting the rents and profits therefrom. This action was instituted in the state court on August 20, 1917.

The contention of the plaintiff is that under the statutes of South Dakota the property of the railroad could not be sold under foreclosure without valuation, appraisement, and the right of redemption within one year after such sale, and therefore the decree of foreclosure is absolutely void and subject to collateral attack at any time.

The assignment of errors raises two questions of law. (1) That the court erred in refusing to remand the case to the state court. (2)

That the decree of foreclosure, which is attacked in this proceeding, is absolutely void, for depriving the mortgagor of the right of appraisement of the property before sale, and redemption after sale, and therefore is subject to collateral attack.

[1] I. As this is an action attacking a title to property acquired under a decree of a national court, upon the ground that the decree was coram non judice, there is a federal question involved, the action being dependent upon the original proceeding, under which title is claimed, and it was clearly removable upon that ground. This has been decided by the Supreme Court and this court, as well as all other national courts, so many times, that it has ceased to be a debatable question. Among the many decisions, upholding the jurisdiction of the national courts on this ground, decided by this court, are the following: Campbell v. Golden Cycle Mining Co., 141 Fed. 610, 73 C. C. A. 260; Lang v. Choctaw, Oklahoma & Gulf R. R., 160 Fed. 355, 87 C. C. A. 307; Mound City v. Castleman, 187 Fed. 921, 110 C. C. A. 55; Ferguson v. Omaha, etc., R. R. Co., 227 Fed. 513, 142 C. C. A. 145; Swift v. Black Panther Oil & Gas Co., 244 Fed. 20, 156 C. C. A. 448.

While in most of the cases cited the proceedings in the national courts were to enjoin the party attacking the decree from proceeding in the state court, Campbell v. Golden Cycle Mining Co., supra, and Ferguson v. Omaha, etc., R. R. Co., supra, were actions instituted in the national courts originally, and the jurisdiction sustained upon the sole ground that an attack upon a decree of a national court raises a federal question.

The same rule has been recognized by the national courts generally. Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; Wabash Railroad v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379; First National Bank v. Society for Savings, 80 Fed. 581, 25 C. C. A. 466 (4th Ct.); Woods v. Root, 123 Fed. 402, 59 C. C. A. 206 (7th Ct.); Cornue v. Ingersoll, 176 Fed. 194, 99 C. C. A. 548 (1st Ct.); McClelland v. Rose, 247 Fed. 721, 159 C. C. A. 579 (5th Ct.), Ann. Cas. 1918C, 341.

Counsel cite numerous authorities, in which it has been held that actions involving title to property sold under executions issued out of a national court, or actions on judgments rendered by a national court, involve no federal question, and therefore not removable, have no application to the issue involved in this cause. Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992, is relied on as conclusive against the right of removal. A careful examination of what is there decided, does not sustain this contention. The right, which was claimed to arise under a decree of a national court, was first set up as a defense in the answer, and did not appear in the complaint; no attack was made on the decree, or its validity questioned. As stated by the court:

"It is an attempt to enforce an ordinary property right, acquired under the authority of judgments and decrees in the courts of the United States, without presenting any question 'distinctly involving the laws of the United States.'"

It is clearly distinguishable from the facts in the instant case. The motion to remand was properly overruled.

[2] II. Counsel for appellant in his argument frankly stated that, unless the original decree of foreclosure is absolutely void for being in excess of the court's jurisdiction, the decree dismissing the bill is right. In view of this admission, we do not deem it necessary to determine whether the statute of the state of South Dakota, providing for an appraisement and redemption from sales of realty under a decree of foreclosure, applies to foreclosure sales of railroads, when the mortgage, as this did, includes, not only the realty of the railroad company, but also "all ballast, ties, spikes, bolts, joints, rails, * * * telegraph and telephone lines and apparatus, locomotives, cars, roundhouses, machine shops, * * * maintenance and construction equipment and rolling stock, all tools, machinery, materials, supplies, books, papers, records, accounts, franchises, licenses, agreements, * * * and all property and property rights of whatsoever character or nature and wherever situated, real, personal or mixed, now or at any time hereafter acquired," etc. Nor is it necessary to determine whether such a statute, if it applies to such a mortgage of a railroad, must be followed by the courts of the United States. Assuming, without deciding, that appellant's contention, that both of these questions must be answered affirmatively, is correct, it does not follow that the decree was absolutely void, and therefore subject to collateral attack.

In our opinion, it would only be error, which can only be corrected by appeal. The court, in the foreclosure proceeding, had jurisdiction of the subject-matter, of the persons of the defendants, who had been duly served with process and appeared therein, and was in possession of the property at the time the decree was rendered, and the sale made, by its receiver. A case exactly in point is Suitterlin v. Connecticut Mutual Life Ins. Co., 90 Ill. 483. Again, as early as 1823 it was held in McCormick v. Sullivant, 23 U. S. 192, 199, 6 L. Ed. 300, that a decree of a national court, based on pleadings which failed to show a diversity of citizenship or any other jurisdictional ground, is not coram non judice, and therefore not subject to collateral attack. Later cases in which the same principle is recognized are Dowell v. Applegate, 152 U. S. 327, 337, 340, 14 Sup. Ct. 611, 38 L. Ed. 463; Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520; Riverdale Mills v. Manufacturing Co., 198 U. S. 188, 197, 25 Sup. Ct. 629, 49 L. Ed. 1008; Marin v. Augedahl, 247 U. S. 142, 38 Sup. Ct. 452, 62 L. Ed. 1038.

We are not advised upon what ground the court, when it rendered the decree of foreclosure, based its decision. It may have held that the statute did not apply to foreclosures of railroad mortgages, or that it was unconstitutional, or that the national courts are not bound by the state statutes, or on some other ground not apparent to us. The most that can be claimed is that it erred in so holding. If there was error, and we do not hold that there was, it could only be corrected by appeal, and not by a collateral attack, as is attempted in the instant case.

The decree is affirmed.

SCULLIN STEEL CO. v. NORTH AMERICAN CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 4, 1919. Rehearing Denied April 12, 1919.)

No. 5060.

1. EQUITY ⊂=61—MAXIMS—CLAIMS.
When equities are equal, the legal title must prevail.

2. RECEIVERS ⊂=152—CLAIMS—PREFERENCE—EXCESS FREIGHT PAID.
A shipper, who through fraudulent acts of its own employé and a station agent overpaid the railroad company, is entitled in receivership proceedings to a preference on account of such payment over other creditors, on the theory of a trust, only on establishing that in equity and good conscience its claim ought to be paid in preference to other creditors.

3. CARRIERS ⊂=200—OVERCHARGE—FRAUD OF AGENTS—LIABILITY.
While there is a presumption that knowledge of an agent is that of the principal, such presumption does not apply where the agent is engaged in a scheme to defraud his principal, and so a railroad company will not be charged with a scheme between its station agents and an employé of a shipper, whereby freight in a greater amount than was earned was collected, and the two divided the surplus.

4. TRUSTS ⊂=95—CONSTRUCTIVE TRUSTS—NOTICE.
Where a railroad company's agent and the agent of a shipper united to defraud the shipper by collecting freight in excess of that earned, and they divided the surplus between them, the shipper could not recover on the theory of a constructive trust, on the ground that the railroad company, by examination of its books and checks deposited by its own agent, might have discovered the fraudulent scheme.

5. RECEIVERS ⊂=152—CLAIMS—PREFERENCE.
Where a shipper's agent conspired with the agent of a railroad company to collect freight in excess of the amount due, and the two wrongdoers divided the surplus, *held*, under the circumstances, that the railroad company was not chargeable with notice of the amounts collected on the shipper's checks, so as to entitle the shipper in receivership proceedings to priority over other creditors; it appearing that the railroad was in no wise enriched by the scheme.

Appeal from the District Court of the United States for the Eastern District of Missouri; Walter H. Sanborn, Judge.

Suit by the North American Company against the St. Louis & San Francisco Railway Company, in which a receiver was appointed. The Scullin Steel Company filed an intervening petition. From an order overruling exceptions to the report of the master, denying intervener's claim to a preference, the intervener appeals. Affirmed.

In an action by the North American Company against the St. Louis & San Francisco Railway Company, receivers for the property of the Railway company were appointed by the District Court for the Eastern District of Missouri. The appellant, the Scullin Steel Company, filed an intervening petition for two claims, but the only question presented on this appeal is whether the claim for $4,500, allowed by the master as an unsecured claim, is entitled to preference over the mortgage and other creditors. The master, to whom the case had been referred, held that it was not entitled to such preference, and upon exceptions he was sustained by the trial judge.

The facts as stated by the learned trial judge in overruling appellant's exceptions to the special master's report are fully sustained by the evidence and

the findings of the special master, and therefore are accepted as a correct statement of facts by this court. The facts found are:

"The railroad company carried freight for the Scullin Company from May 1, 1909, until May 27, 1913, when the receivers were appointed, and the receivers carried like freight for the Scullin Company from May 27, 1913, until July 31, 1913. This freight was received and delivered at Cheltenham station. During all this time Mr. Betts was the station agent of the railroad company, and after May 27, 1913, of the receivers, and Mr. Dunn was the freight traffic man or freight receiving man of the Scullin Company. It was the duty and practice of Betts to prepare waybills and freight bills of the Scullin Company's freight, and to collect the freight charges for transportation owing by that company for freight delivered to and received from it at Cheltenham station. It was the duty and practice of Mr. Dunn to receive from Betts for the Scullin Company the bills for these transportation charges against the latter company, to compare them for it with the amounts of freight received and shipped by it, to see that the amounts, weights, rates, and extensions were correct, and to draw voucher checks of the Scullin Company for the amounts payable to the railroad company, which were subsequently signed by higher officers of the Scullin Company in reliance upon Dunn's action, then delivered to the railroad company and paid. Betts and Dunn by raising the amounts on some freight bills, by issuing some bills for transportation never conducted, by making false entries in account books, and by issuing vouchers for amounts in excess of the amounts owing, succeeded between May, 1909, and July 31, 1913, in causing the Scullin Company to issue and pay vouchers of $4,500 more than it owed to the railroad company, and in withholding and wrongfully withdrawing this surplus from the railroad company and dividing it between themselves. Neither the railroad company, nor the Scullin Company, nor any of its agents or officers, other than Betts and Dunn, were shown to have had any notice or knowledge of these wrongs until the receivers discovered them in July, 1913, about two months after their appointment. From May 1, 1909, until the appointment of the receivers the railroad company had in its treasury at all times cash on hand equal to or in excess of $24,000. Upon their appointment the receivers obtained from the railroad company about $600,000 in cash, and at all times thereafter prior to the filing of the intervener's petition, they have had on hand an amount largely in excess of the $4,500 claimed by the intervener."

One other fact not mentioned in the statement by the learned trial judge, but which is found by the special master and sustained by the evidence, is "that the vouchers of intervener issued for freight were made payable to the railroad company, and Betts deposited these vouchers in the bank to the credit of the railroad company, but as station agent, he being charged with the total amount of freight due from all shippers at this station, received credit from the railroad company on his general account for the amounts so deposited, and was thus enabled to withhold in cash and divide with Dunn, from other freight collections made by him for the railroad company at such station, an amount equal to the excess charged and collected on claimant's voucher."

John M. Goodwin, of St. Louis, Mo. (Jourdan, Rassieur & Pierce, of St. Louis, Mo., on the brief), for appellant.

Edward T. Miller, of St. Louis, Mo. (William F. Evans, of St. Louis, Mo., on the brief), for appellees.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). On behalf of the appellant it is claimed that as it paid to the agent of the railroad company $4,500 more than its just and proper freight charges, the railroad company became a trustee of the fund, on the ground that, where one has obtained money of another which does not equitably belong to him, through fraud of a third person, a constructive trust

arises in favor of him who is equitably entitled thereto; that this $4,500 actually went into the treasury of the railroad company, and at no time was its cash reduced below that sum before its property was placed in the hands of the receivers; and that a larger sum was turned over by the railroad company to the receivers. Therefore, it is contended, appellant is equitably entitled to have that money paid back to him by the receiver in preference to the claims of the mortgagees and other lien creditors.

[1, 2] As stated by the learned trial judge in his opinion:

"This suit is a suit in equity, and the intervener is entitled to preference in payment only if it has established the fact that in equity and good conscience its claim ought to be paid in preference to those of the other creditors."

And in Williams v. Jackson, 107 U. S. 478, 484, 2 Sup. Ct. 814, 819 (27 L. Ed. 529), it was held that "when the equities are equal the legal title must prevail."

The facts show that, although the money of which appellant was defrauded by reason of the fraudulent acts of Betts, the agent of the railroad company, and Dunn, its freight traffic man, the railroad company's funds were in no wise swelled, nor was it enriched one penny, as the amount paid over by its agent was only what was actually due from him for freight bills collected as agent of the railroad. The overpayments made by the checks of Dunn were deducted with the moneys collected by Betts from other shippers and then divided between them; therefore the railroad company received no benefit from any of the money of which appellant was defrauded. In Wilson v. Wall, 73 U. S. (6 Wall) 83, 91 (18 L. Ed. 727), it was held:

"A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge."

And as held by this court in Empire State Surety Co. v. Carroll County, 194 Fed. 593, 604, 114 C. C. A. 435, 446:

"It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver"—followed in State Bank v. Alva Security Bank, 232 Fed. 847, 147 C. C. A. 41.

[3] It is not claimed that any of the officers of the railway company had notice of the frauds, but it is earnestly insisted that the railway company is chargeable with notice of the fraud, as the knowledge of its agent Betts was its knowledge, and also that, as the checks of the appellant showed that they were for freight charges, the railway company, by comparing them with the freight bills due from the steel company, would have known that the checks were for excessive sums.

As to the knowledge of the agent being the knowledge of the com-

pany, that is a presumption which the law will conclusively indulge in, for the reason that it will presume that the agent informs his principal of that which his duty and the interest of his principal require him to communicate. But this presumption does not arise, cannot arise, when the agent is engaged in a scheme to defraud his principal, or desires to subserve simply his own personal ends. "In such cases," Mr. Justice Harlan, delivering the opinion of the Court in American Surety Co. v. Pauly, 170 U. S. 133, 156, 18 Sup. Ct. 552, 561 (42 L. Ed. 977), said, "the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf." Judge Lacombe, who delivered the opinion of the United States Circuit Court of Appeals for the Second Circuit in that case (72 Fed. 470, 483, 18 C. C. A. 644, 656), said on that subject:

"When two officers of a corporation have entered into a scheme to purloin the money of the corporation for the benefit of one of them, in pursuance of which scheme it becomes necessary to make false representations to a third person, ostensibly for the bank, but in reality to consummate said scheme, and for the benefit of the conspirators, and not in the line of ordinary routine business of such officers, and without express authority—the corporation being ignorant of the fraud—the officers are not, in thus consummating such theft, the agents of the corporation."

To the same effect is Interstate Nat. Bank v. Yates Center Nat. Bank, 245 Fed. 294, 157 C. C. A. 486. Therefore the knowledge of its agent is no more chargeable to the railway than the knowledge of appellant's agent, Dunn, is chargeable to it.

[4] Nor is the railroad company chargeable with notice by reason of the fact that by examining its books it could have ascertained that the appellant's checks were in excess of the amounts due. The law does not place such a burden on it. If every time a check, purporting to be in payment of some bill of a large number of bills, is received, the party to whom it is given is required to compare the amount with the bills which accrue daily, it would take a great deal of valuable time to do so, and then would probably be of no real benefit in a case like this; for, as appears from the record, the appellant received large shipments almost daily, and only made payments as they were delivered.

[5] But, aside from this, the finding of facts made by the special master is to the effect that these checks were not turned over by the agent to the railway company, but were deposited by him in the bank to the credit of the railway company, which, when notified by the bank that a certain sum had been placed to its credit by its agent, Betts, would credit him therewith. So the railway company would never know whether these deposits were in cash or checks, and, if checks, whose checks.

In the instant case the equities are much stronger in favor of the receivers than of appellant.

The order denying appellant the preferential right for this sum was right and is affirmed.

WALLINGFORD BROS. v. BUSH.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1918.)

No. 5075.

CARRIERS ⟸194—FREIGHT CHARGES—PERSONS LIABLE.

One who became the owner of a grain shipment while it was in transit, etc., but whose ownership ended before delivery of the shipment to a purchaser, *held* under no obligation to pay freight charges after delivery.

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by B. F. Bush, receiver of the Missouri Pacific Railway Company, against Wallingford Bros. There was a judgment for plaintiff, and defendants bring error. Reversed, with directions.

Ray Campbell, of Wichita, Kan. (J. Graham Campbell, of Wichita, Kan., on the brief), for plaintiffs in error.

W. P. Waggener and J. M. Challiss, both of Atchison, Kan., for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

STONE, Circuit Judge. This is a writ of error from a judgment entered after an order sustaining a demurrer to the answer filed by plaintiffs in error. The suit is by a carrier for the amount of an inadvertent undercharge on an interstate shipment. Plaintiffs in error had contracted for a large amount of corn from the Farmers' Elevator Company, located at Green Mountain, Iowa. No particular corn had been purchased, but only corn of a certain description. This particular car, with intent that it should constitute part of the purchase, the elevator company shipped to Cedarvale, Kan., under a shipper's order bill of lading, with the notation: "Notify Wallingford Brothers." Before this shipment the plaintiffs in error had sold a quantity of corn to L. C. Adams Mercantile Company, of Cedarvale. The elevator company drew for the sale price of the corn upon the plaintiffs in error, attaching to that draft the bill of lading. Wallingford Bros. met this draft, received the bill of lading, and very shortly afterward attached it to a similar draft against the mercantile company. This draft in turn was paid, the mercantile company received the bill of lading, and upon the arrival of the car of corn at Cedarvale, Kan., surrendered the bill and received the shipment.

The plaintiffs in error present two points here: First, that there was no proof before the court as to the amount of the undercharge; second, that they were not the proper parties to be sued for any undercharge, as they were not parties to the contract of shipment. In the course of argument counsel for plaintiffs in error stated that they would not insist upon the first point, as they desired the ruling of the court upon the second proposition. As this seems the desire of both parties, the case will be considered only in relation to the latter point.

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It is true, as claimed by plaintiffs in error, that they were not nominal parties to the contract of shipment. However, defendant in error insists that they were the real owners of the corn at the time the corn was shipped and the shipment contract made, and also were such when the shipment was delivered; that the elevator company was their agent in making the contract of shipment, and the mercantile company in the receipt of the corn; that they are liable as undisclosed shippers, or as consignee taking delivery, or as owner of the shipment. In our judgment they were not undisclosed shippers (consignors), nor undisclosed consignees taking delivery, nor owners at the time either of the shipment or of the delivery. Their sole connection with the shipment was that they owned it for the brief period between the payment by them of the draft with bill of lading attached and the payment to them of a similar draft by the mercantile company. This ownership began and ended while the shipment was in transit. Only during that period had they any manner of control over the shipment. At any other time their wishes regarding the shipment could have been ignored by the railway, and they could have been treated by it as strangers to the shipment. Does such a brief ownership while the shipment is in transit give rise to any obligation to pay the charges after delivery?

Such an obligation must be contractual. No express contract here involved carries such duty. There seems no reason for the law to raise such by implication. It is common knowledge that some commodities, particularly grain, are sold several times while in transit. It would be startling and upsetting to dealers in such commodities to ascertain that a fleeting, temporary ownership of the grain in transit had cast upon each such owner a liability, which endured long after such ownership, to the railway to pay the freight charges. There is no counterbalancing consideration in favor of the railway. It need not take the shipment until it has received the freight charge. It need not deliver it until its charge is paid. If it chooses to rely upon credit, it is given that of the parties to the shipping contract, of the consignee to whom delivery is made, or of his assignee to whom delivery is made, and of the undisclosed principals (including owner) of any of the above. 10 C. J. 445 et seq., with notes. Thus the carrier is given every reasonable means of securing the payment of its charges. It certainly is not necessary to extend the field for the protection of the carrier. To do so would interfere with the present orderly business methods worked out by practical men and generally employed in a very large and important trade. In our judgment there is no basis for any implied contract based upon such transitory ownership.

The carrier has not claimed that on the present record it can avail itself of any matter in the answer to which the demurrer was sustained. Much less can it found thereon a cause of action entirely different from that stated in its petition. This would eliminate the suggestion that the carrier may rely upon the contracts between the elevator company and plaintiffs in error, and between such plaintiffs and the mercantile company, on the theory of contracts made for its benefit.

The demurrer to the answer should have been overruled. The judgment is reversed, with directions to proceed in accordance herewith.

HOOK, Circuit Judge (dissenting). Some admitted facts, which seem to me to be material to the question decided, do not appear in the foregoing opinion. In substance and effect they are as follows: Wallingford Bros., the defendants, bought the car of corn, in respect of which the freight undercharge occurred, from their vendor at Green Mountain, Iowa, and directed its shipment to Cedarvale, Kan. They sold it to be delivered at Cedarvale at a specified price, which included all freight charges to that place, whatever they might be. The corn was transported from Green Mountain to Cedarvale. In dealing with their vendor at the point of origin, defendants were to pay the freight charges, and they specifically reserved the right to route the shipment and also to change its destination. In selling to their vendee at Cedarvale, they likewise reserved the right of routing, and they designated the railroad of the plaintiff as the final carrier. The transportation was at the instance of defendants; they caused it. As between the three parties successively owning the corn, they alone were to pay the freight charges. The others were not financially interested in the amount of the charges. The price their vendor was to receive was f. o. b. Green Mountain. The price their vendee was to pay them was basis Cedarvale, which, as the shipment actually terminated there, was in effect f. o. b. Cedarvale. Had the vendee diverted the shipment, the rate to Cedarvale would have been the measure of defendants' liability to them for the freight; but it was not diverted. Defendants left in the hands of their vendee a part of the contract purchase price with which to pay the freight to Cedarvale, and when they did so the vendee became their agent in that particular. The vendee was to pay so much for the grain at Cedarvale, no more, no less, and was not financially interested in the amount of the freight, or in its payment, except as necessary to get possession from the railroad. The course of the bill of lading and the drafts was consistent with the above.

It is argued by counsel that under the decisions of the courts the railroad could not maintain an action for the undercharge against defendants' vendee who got the corn at Cedarvale. Since the railroad must under the law require somebody to pay, it would follow, if the argument is sound, that the action would have to be against defendants' vendor at Green Mountain. But the vendor sold to defendants f. o. b. Green Mountain, and simply followed their shipping directions. If it were compelled by judgment to pay, it could in turn compel reimbursement from defendants; and thus the opinion of my Brothers would operate in a roundabout way to secure justice, when, as it seems to me, there is a plain, direct road. A bill of lading is not conclusive of the relations of the parties named as consignor and consignee to the property transported. Inquiry into the transaction in which it originated is admissible. That is familiar law, and it accords with common knowledge that very frequently one or both of them act for undis-

closed principals. It is easily conceivable that the "notify party," so called, may be both consignor and consignee in substance and fact. The right of a railroad to a freight charge, the amount of the charge, and its legal duty to require payment in full, do not arise from the bill of lading. The right arises from the fact of carriage or transportation; the amount is determined by application of the published schedules; and the duty to collect in full is prescribed by statute carrying penalties.

It may be that the petition in the case will not, without amendment, support a judgment for plaintiff upon the admissions in the answer; but a decision of what will eventually be the controlling question was sought in the trial court and here by both parties.

CENTRAL CONTRACTING CO. et al. v. GRIGNON.

GRIGNON v. CENTRAL CONTRACTING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1919.)

Nos. 5121, 5125.

1. CONTRACTS ⇐199(1)—CONSTRUCTION—CONTRACT FOR REBUILDING BARGE. Contract for rebuilding of a barge, made by correspondence, construed, and *held* to include specifications contained in the owner's final letter of acceptance.

2. CONTRACTS ⇐211—CONSTRUCTION—TIME AS OF ESSENCE OF CONTRACT. A contract for rebuilding a barge, although the owner in accepting stated the builder's offer to be to rebuild the barge "and hand same over ready for sea in seven weeks," *held*, under the facts shown, not to make time of its essence.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by Peter Grignon, Jr., doing business as the Marine Iron & Shipbuilding Works, against the barge Crete; the Central Contracting Company, and J. W. Wolvin, claimants. From the decree, both parties appeal. Affirmed.

W. D. Bailey, of Duluth, Minn. (H. A. Carmichael, of Duluth, Minn., on the brief), for Central Contracting Co. and others.

John H. Norton, of Duluth, Minn., for Peter Grignon.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

WADE, District Judge. [1] 1. Under the evidence and the well-settled rule (Silver King Coalition Mines Co. v. Silver King Co., 204 Fed. 166, 122 C. C. A. 402, Ann. Cas. 1918B, 571) that consideration must be given by this court to the finding of facts by the trial court, we are satisfied that the specifications were part of the contract between the parties. No formal contract was made and signed. A letter was written by the contractor on July 6th, which was a mere pro-

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posal to "rebuild" the barge for $16,000. Certain limitations and specifications were stated in this letter.

On August 8th, the owner of the barge wrote:

"Replying to your letter dated July 6, 1916, offering to rebuild our barge Crete and hand same over, ready for sea in seven weeks, we beg to advise that we accept your offer and inclose herewith specifications which, if satisfactory, please sign and return. If not, make necessary changes. Our Mr. Smith is out of town but we expect him back before the end of the week, when, no doubt, he will immediately go to Duluth and close this matter up.

"[Signed] Central Contracting Company."

The contractor did not reply to this letter, but the parties, on August 11th, had a conference which terminated in the following letter:

"Aug. 11, 1916.

"To the Marine Iron & Shipbuilding Company, Duluth, Minn.—Dear Sir: Replying to your letter dated July 6, 1916, offering to rebuild our barge Crete and hand same over ready for sea in seven weeks, for the sum of $16,000, we beg to advise you that we accept your offer, and inclose specifications, which must be carried out to the satisfaction of our surveyor, Robert Curr."

And thereupon the work was undertaken and carried out.

The contractor now insists upon the limitations indicated in his letter of July 6th; but the owner in his letter of August 8th, and in the letter of August 11th, which was accepted by the contractor as closing the contract, specifically indicates his understanding of the meaning of the letter of July 6th.

In the letter of August 8th, it is stated:

"Replying to your letter dated July 6, 1916, offering to rebuild our barge Crete and hand same over ready for sea."

By this letter the contractor was notified of the construction which the owner placed upon the letter of July 6th. He was advised that the owner understood the letter as "offering to rebuild our barge," and "hand the same over ready for sea."

Likewise in letter of August 11th:

"Replying to your letter of July 6, 1916, offering to rebuild our barge Crete and hand same over ready for sea in seven weeks for the sum of $16,000."

This again was a clear statement of the construction by the owner of the contractor's letter, but the owner does not stop with this mere statement of construction. In this letter the contractor is advised that—

"We accept your offer (construed as above) and inclose specifications which must be carried out to the satisfaction of our surveyor, Robert Curr."

How can there be any question as to whether the specifications, which the contractor admits he received, were part of the contract? It was specifically stated that these specifications "must be carried out."

The contractor admits that, if these specifications were required "to be carried out" as part of the contract, his claim for extras falls.

Not only are the specifications specifically made part of the acceptance, and therefore of the contract, but any other construction would be unreasonable. The specifications covering the very items

covered by the claim for extras, it is apparent that the owner knew that these items would be required in the rebuilding of the barge, and it sounds highly improbable that the owner would make a specific contract for $16,000, covering only part of the work which he knew had to be done, and leave the rest to be supplied as "extras."

The finding of the lower court that the contractor is not entitled to recover for extras cannot be disturbed.

[2] 2. The owner of the barge filed counterclaim against the contractor for $23,996, alleging damages "because the barge was not completed and ready for sea in seven weeks," as stated in the proposal of the contractor, and in the acceptance of the owner.

If the contractor can recover under the pleadings and the evidence, it must be upon a finding by the court that time was of the essence of the contract; otherwise, the contractor would have a reasonable time in which to complete the work, and, as to what would constitute a reasonable time, no proof was offered.

"The tendency of the later authorities, at law as well as in equity, is to regard the question as one of construction to be determined by the intent of the parties, and to hold that time is not ordinarily of the essence of the contract, unless made so by express stipulation, or unless there is something connected with the purpose of the contract and the circumstances surrounding it, which makes it apparent that the parties intended that the contract must be performed at or within the time named." 13 Corpus Juris, p. 687.

Under the language used by the parties in the letters which constitute the contract, and under all the facts and circumstances, it cannot be held that time was of the essence of the contract in this case. The work was done under the supervision of a representative of the owner; it was of such a nature as that it was difficult, if not impossible, to anticipate the exact extent of the work, and the nature of the materials required. After the original contract, an additional contract for "fairing" the sides of the vessel was entered into, for which the owner agreed to pay $1,000. The owner through its representative, knew the course of the work. There was controversy over estimates and payments. When the seven weeks expired, the work was incomplete, and the delay was discussed, and the promises given and accepted by the owner. At no time was there any specific notice given to the contractor that the owner relied upon the claim that time was of the essence of the contract, or that, because it was not finished within the seven weeks, payment therefore would not be made.

The contractor clearly did not understand that time was of the essence of the contract, and he certainly did not understand that delay was imposing upon him an obligation for damages, which not only covered the entire contract price for all his work and materials, but which would leave him subject to a judgment for over $7,000 besides.

"Equity will refuse to enforce an express provision making time of the essence of the contract, when to do so would be unconscionable." 13 Corpus Juris, 688.

Under the circumstances in this case, it would be unconscionable to sustain the claim of the contractor. The finding of the lower court upon this counterclaim must be sustained. The decree of the lower court is affirmed.

THE NORTH STAR.

THE FRANCIS J. REICHERT.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

Nos. 122, 123.

1. COLLISION ⟸63—LIABILITY—VESSELS AT FAULT.
In a suit for collision between a steamer and a cattle float in charge of a tug, *held*, that the steamer and tug were both at fault.
2. COLLISION ⟸25—LIMITATION OF LIABILITY—RIGHT TO LIMIT.
Where a collision was due entirely to careless navigation, the fact that the mate of the tug, in charge of a cattle float injured by the collision, was not on board, *held* not ground for denying the owner of the tug the right to limit liability; it appearing that the collision did not occur during the mate's watch.

Appeals from the District Court of the United States for the Southern District of New York.

Libel for collision by the Reichert Towing Line, Incorporated, against the steamer North Star, her engines, etc., claimed by Calvin Austin, as receiver of the Eastern Steamship Corporation, and by the New York Stockyards Company, against the steamer North Star, her engines, etc., also claimed by Calvin Austin, as receiver, and the steam tug Francis J. Reichert, her engines, etc., claimed by the Reichert Towing Line, Incorporated. From decrees finding both vessels at fault, the Reichert Towing Line, libelant, which was claimant of the steam tug Francis J. Reichert, and Calvin Austin, receiver, claimant of the steamer North Star, appeal. Modified and affirmed.

Foley & Martin, of New York City, for appellant Reichert Towing Line, Inc.

Park & Mattison, of New York City, for appellee New York Stockyards Co.

Haight, Sandford & Smith, of New York City, for the North Star.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. December 8, 1915, about 5 p. m., the cattle float El Paso, on the starboard side of the tug Francis J. Reichert, bound down the North River, came into collision with the steamer North Star, bound up the river about off Pier 1 or 2. The night was dark, but clear, and the one thing certain is that the collision was inexcusable.

There is even more than the usual contradiction between the witnesses as to lights and signals, and there are the usual obvious inaccuracies in the estimates of time and distance. It would be quite useless to review the testimony in detail.

The story of the Reichert is that the North Star, being on the starboard bow of El Paso, ported, and so struck the starboard side of the cattle float. The story of the North Star is that the Reichert, being on the port bow of the North Star, starboarded across her course, and so came into collision with her starboard bow.

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[1] Certain facts are fairly clear. Each vessel contends that she was going straight up or down the river, respectively parallel with the line of the New York piers. Each agrees that the collision was a side swipe between the bluff of the North Star's starboard bow and the starboard side of El Paso, and each admits that if the North Star's stem, which is sharp, had struck El Paso, it would have gone right through her side.

The engine room log of the North Star shows that the engines were worked as follows:

Stop, 5:14.
Astern, 5:14.
Stop, 5:16.

There is no reason to doubt the accuracy of these entries, and they show quite obviously that the danger of collision was appreciated all at once at 5:14, and that the collision happened somewhere between 5:14 and 5:16, when the signal to stop must have been given after it. The North Star has a left-handed propeller, which backs to port, and the bow of El Paso is square.

It seems quite plain to us that the steamer and cattle float must have been approaching nearly head on, and such is the testimony of a number of the witnesses. We are satisfied that a vigilant lookout on either vessel would have prevented the collision, and that they were so close when they appreciated the danger that the collision was practically unavoidable. Starboarding of their helms in accordance with the signal of two blasts blown by the Reichert, though this is not testified to, and the effect of reversing the North Star's left-handed propeller, might explain the bluff of her bow coming in contact with El Paso's starboard side a little aft of the bow and the vessels then scraping past and clear of each other. But quite apart from this possible explanation, lack of vigilance and of a proper lookout is sufficient to put each vessel at fault. What occurred is much more consistent with the lack of vigilance on the part of both vessels than such an extraordinary and senseless manœuver as each attributes to the other.

A great deal is made by the counsel for the cattle float of the nearness of the North Star to the New York shore. It does not seem at all important to us in this case, and if it were a fault both vessels were guilty of it.

[2] Upon the question of the Reichert's right to limit we cannot agree with the District Judge. The collision was due entirely to careless navigation. There is no pretense that the master of the tug was not properly licensed, and there is no obligation that her lookout should have a license. The particular fault attributed to the owner, viz. that the mate was not aboard the tug, had nothing whatever to do with the collision, because it did not happen in his watch, and if he had been on board he might well have been asleep, and he certainly had no duty to perform. On the same reasoning, the owner's right to limit might be denied, because there was no anchor aboard.

The decrees finding both vessels at fault are affirmed, but modified, by allowing the owner of the tug to limit its liability. No costs of this appeal.

ROBERTS CONE MFG. CO. et al. v. BRUCKMAN et al.

(Circuit Court of Appeals, Eighth Circuit. February 10, 1919.)

No. 5310.

1. APPEAL AND ERROR ⟸671(1)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.
Only errors that properly appear on the record in the appellate court are reviewable.

2. APPEAL AND ERROR ⟸688(1)—REVIEW—QUESTIONS PRESENTED.
Where appellants pointed out no place in the record before the Circuit Court of Appeals where the terms of their special appearance and objections to the District Court's jurisdiction were set forth, and the record showed no motion by appellants in the District Court to transfer the case to the law side, or objection or exception to the ruling thereon, their motion to direct the court below to reverse its decree and transfer the case to the law side should be denied.

Appeal from the District Court of the United States for the Western District of Missouri; Joseph W. Woodrough, Judge.

Bill by Frederick A. Bruckman and others against the Roberts Cone Manufacturing Company and others. Decree for complainants, and defendants' motion to direct the court below to reverse its decree and transfer the case to the law side of the court was denied. On motion for rehearing of the motion to direct the court below to reverse its decree, etc. Motion for rehearing denied.

Toulmin & Toulmin, of Dayton, Ohio, and Culver & Philip, of St. Joseph, Mo. (H. A. Toulmin, of Dayton, Ohio, of counsel), for appellants.

Albert E. Dieterich, of Washington, D. C., for appellees.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

SANBORN, Circuit Judge. [1, 2] The motion to direct the court below to reverse its decree and transfer this case to the law side of that court was denied, because the record did not disclose that a proper motion or objection or exception to a ruling of the District Court on the subject was made in that court, and it was too late to make such objection or motion in this court. The motion to direct the District Court to reverse its decree and to transfer this case to the law side of the court was submitted to this court on printed briefs, in which no specification or reference to any part of the record before this court was made, wherein the facts appeared that the appellants had made a motion in the District Court to transfer this case to the law side of that court, or had made any objection to the trial of this case in equity in that court, on the ground that it was triable at law only, or that the court had overruled any such objection or motion, or that any exception had ever been taken in that court to any such ruling therein. The appellees, in their answering brief on the motion to direct the reversal, asserted that at no time during the trial below did the appellants object to the jurisdiction of the District Court in equity or move for a jury trial, or for a transfer of the case to the law side. The

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appellants made no denial of that assertion. This court did not discover in the records here any recital of such an objection or motion, or of any ruling of the District Court thereon, or of any exception to such a ruling, and the defendants have not now, in their motion for a rehearing or in their argument upon it, pointed out any place in the record in this court where such a motion or objection or ruling or exception appears. They allege in their printed argument for rehearing that they made a special appearance, under which they could raise any questions which they desired without consent to the jurisdiction of the court below, and that at that time they raised the question of the District Court's jurisdiction in equity by oral argument and written brief; but they point out no place in the record before this court where the terms of such special appearance, the objections specified therein, the motion to transfer to the law side, or the argument or written brief to which they refer, are set forth. Hence none of these can be considered, for those errors that properly appear upon the record in this court, and those only, are reviewable here.

The transcript of the record in this case has not been prepared and printed in accordance with the rules in equity and the rules of this court. Rule 75 in equity (198 Fed. xl, 115 C. C. A. xl); rule 23, Circuit Court of Appeals (188 Fed. xv, 109 C. C. A. xv).

The motion to direct the District Court to reverse its decree and to transfer this case to the law side of the court was an attempt to secure a decision upon one of many specifications of error before the transcript was properly prepared or printed, and thereby to evade the rules and to try this case in this court piecemeal.

Let the motion for rehearing be denied.

NEW YORK LIFE INS. CO. v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1919.)

No. 5161.

1. COURTS ⟸280—FEDERAL COURTS—DUTY TO DETERMINE JURISDICTION.
   It is the duty of every federal court to inquire into its jurisdiction of a cause, whether or not that question is raised by the parties.
2. COURTS ⟸329—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.
   It is not the amount claimed in the prayer for relief which determines the jurisdiction of a federal court; but, if it unmistakably appears from plaintiff's pleading that the amount recoverable is not within the jurisdiction of the court, it is its duty to dismiss the action.

In Error to the District Court of the United States for the Southern District of Iowa; Page Morris, Judge.

Action at law by Isabel H. Johnson against the New York Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. D. Perry, of Des Moines, Iowa (John Barnes, of Milwaukee, Wis., James H. McIntosh, of New York City, and H. H. Stipp, R.

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J. Bannister, and Vincent Starzinger, all of Des Moines, Iowa, on the brief), for plaintiff in error.

S. F. Prouty, of Des Moines, Iowa, for defendant in error.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

TRIEBER, District Judge. The defendant in error, plaintiff in the court below, instituted this action to recover on a policy of life insurance for $3,000 issued by the plaintiff in error on the life of her husband, alleged to be dead. The prayer of the complaint is that the plaintiff have judgment for the sum of $4,080, but there are no allegations in the complaint which will justify a recovery for a greater amount than the face of the policy, unless it be interest which had accumulated from the time of the alleged death of the assured until this action was instituted. The policy which is the basis of the action shows that the amount involved does not exceed $3,000.

[1] Judgment having been rendered for the plaintiff, the cause was brought to this court on writ of error. Neither party has raised the question of jurisdiction, but section 37 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098 [Comp. St. § 1019]) makes it the duty of the District Court to dismiss any cause, if at any time it appears to the satisfaction of the court that such suit does not really and substantially involve a dispute properly within the jurisdiction of said District Court. So far as the appellate courts are concerned the well-established rule is that:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." M., C. & L. M. Ry. Co. v. Swan, 111 U. S. 379, 382, 4 Sup. Ct. 510, 511, 28 L. Ed. 462; Chicago, B. & Q. R. R. v. Willard, 220 U. S. 413, 419, 31 Sup. Ct. 460, 55 L. Ed. 521; Chicago, R. I. & P. Ry. v. State of Nebraska, 251 Fed. 279, — C. C. A. —.

Nor may it be waived by consent of parties. Minnesota v. Northern Securities Co., 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 870; Chicago, R. I. & P. Ry. v. Nebraska, supra.

[2] It is not the amount claimed in the prayer for relief which determines the jurisdiction of the court, if the unmistakable fact and legal certainty be that the plaintiff could not have had any reasonable expectation that she could recover, exclusive of interest and costs, an amount within the jurisdiction of the court. In such a case it is the duty of the court to dismiss it for want of jurisdiction, although the ad damnum clause demands judgment for a sum sufficient to confer jurisdiction on the court. Smith v. Greenhow, 109 U. S. 669, 3 Sup. Ct. 421, 27 L. Ed. 1080; North America, etc., Co. v. Morrison, 178 U. S. 262, 267, 20 Sup. Ct. 869, 44 L. Ed. 1061; Vance v. W. A. Vandercook Co., 170 U. S. 468, 472, 18 Sup. Ct. 645, 42 L. Ed. 1111; Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 549, 23 Sup. Ct. 754, 47 L. Ed. 1171; Bank of Arapahoe v. David Bradley & Co., 72 Fed. 867, 19 C. C. A. 206; Less v. English, 85 Fed. 471, 29 C. C. A. 275; Fuerst Bros. & Co. v. Polasky, 249 Fed. 447, — C. C. A. —.

As it clearly appears from the facts stated in the complaint that in no event can the plaintiff recover more than $3,000 on this policy, exclusive of interest and costs, the court below was clearly without jurisdiction.

The cause is reversed, with directions to the District Court to remand same to the state court from whence it came.

DAVIS v. BAKEWELL et ux.*

(Circuit Court of Appeals, Eighth Circuit. January 27, 1919.)

No. 4653.

LIBEL AND SLANDER ⟸9(1)—WORDS TENDING TO INJURE IN PROFESSION OR BUSINESS.

The publication of false words or statements concerning one in relation to his profession, trade, or business, which are calculated to cause, and which do cause, him pecuniary loss in the practice of his profession, trade, or business, is actionable.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Susan Lawrence Davis against Paul Bakewell, Jr., and wife. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Benjamin Carter, of Washington, D. C., and Christian F. Schneider, of St. Louis, Mo., for plaintiff in error.

Jesse McDonald, of St. Louis, Mo. (Arnold Just, of St. Louis, Mo., on the brief), for defendants in error.

Before SANBORN, Circuit Judge, and TRIEBER, District Judge.

SANBORN, Circuit Judge. This case presents by demurrer to the complaint the single question: Does the latter state facts sufficient to constitute a cause of action for slander? The court below answered this question in the negative. The averments of the complaint material to an answer to the legal issue are that the plaintiff was engaged in practicing the profession and business of a lecturer on hygiene, and was daily and honestly acquiring great gains and profit therefrom, when one of the defendants, with intent to injure her in her lecturing, in the presence of divers citizens falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said plaintiff in the way of her said lectures on hygiene, the false statement that "Susie" meaning the plaintiff, "is crazy," whereby the plaintiff was greatly injured in her lectures on hygiene, divers of her neighbors and other citizens were caused to refuse to attend her lectures, as they had previously been accustomed to do, and the plaintiff was caused to lose great gains and profits, which would otherwise have arisen and accrued to her from her lectures on hygiene, to her damage in the sum of $100,000.

For the purpose of the decision of the question presented by this

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied March 29, 1919.

complaint, it will be conceded, without discussion of the proposition, that the averment that the defendant published the false statement that the plaintiff "Susie is crazy" would not have stated a cause of action for slander, without the allegations that she made this statement of the plaintiff in relation to her profession, and thereby caused her the pecuniary damage alleged in the practice of that profession.

But the publication of false words or statements, concerning one in relation to his profession, trade, or business, which are calculated to cause, and which do cause, him pecuniary loss in the practice of his profession, trade, or business, is actionable, and the averments of the complaint, which have been recited, clearly state a good cause of action under this well-established rule. Onslow v. Horne, 3 Wilson, 177; Sanderson v. Caldwell, 45 N. Y. 398, 405, 6 Am. Rep. 105; Morrasse v. Brochu, 151 Mass. 567, 575, 25 N. E. 74, 78, 8 L. R. A. 524, 21 Am. St. Rep. 474; Moore v. Francis, 121 N. Y. 199, 203, 204, 205, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810.

Let the judgment below be reversed, and let the case be remanded to the court below, with permission to the defendants to answer.

UNION SULPHUR CO. v. FREEPORT TEXAS CO.*

FREEPORT TEXAS CO. v. UNION SULPHUR CO.

(Circuit Court of Appeals, Third Circuit. March 4, 1919.)

Nos. 2391, 2392.

PATENTS ⟸328—VALIDITY.

The Frasch patent, No. 799,642, claims 2, 3, 6, 12, 19, 21, and 22 for a process for sulphur mining, the Frasch patent, No. 800,127, claims 2, 3, 7, 11, 21, and 24, for apparatus for sulphur mining, and patent No. 1,008,319, claims 7, 26, and 28 for sulphur mining, *held* invalid, in view of the disclosures of the earlier Frasch patents.

Appeal from the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge.

Suit by the Union Sulphur Company against the Freeport Texas Company for infringement of patents. There was a decree (251 Fed. 634) in favor of plaintiff as to a part of its claims, and in favor of defendant as to the remainder, and both parties appeal. Reversed on defendant's appeal, affirmed on plaintiff's appeal, and bill dismissed.

Elihu Root, Livingston Gifford, Samuel R. Betts, and James R. Sheffield, all of New York City, Joseph C. Fraley, of Philadelphia, Pa., and John W. Peters, of New York City (Sheffield & Betts, of New York City, of counsel), for Freeport Texas Co.

Frederick P. Fish and Charles Neave, both of Boston, Mass., Henry A. Wise, of New York City, and Maxwell Barus, of Boston, Mass., for Union Sulphur Co.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and THOMPSON, District Judge.

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*Certiorari denied 249 U. S. —, 39 Sup. Ct. 392, 63 L. Ed. —.

BUFFINGTON, Circuit Judge. As this case involves basic matters affecting the whole sulphur product of the United States, a preliminary review of general sulphur production is, in our judgment, requisite to a proper consideration of this case.

In its natural state, sulphur is found in rock formation. This rock is mined, and when subjected to sufficient heat the sulphur liquefies. This liquid thereafter solidifies into the sulphur of commerce. The mining of sulphur rock was an old and developed industry and prior to the American method, here involved, was carried on in the ordinary methods of mining, viz. stripping where the sulphur was near the surface, or shafting where the sulphur rock was too deep for stripping. Nine-tenths of the world's supply was produced in Sicily, which furnished 400,000 tons; Japan furnished 15,000, and the United States a few hundred. In Sicily the sulphur ore was mined from deposits which varied in depth from the surface of the ground to 340 feet down. Where the ore was near the surface, pits and quarries were used; where deeper, shafts and galleries. The mining machinery was crude, and the ore was carried by men and boys on their backs up steep slopes on circular stairways. How water, the ever-present enemy of the miner, was kept from flooding the mines where their primitive methods were employed, does not appear in the proofs, but that it actually was present, and was later overcome by pumps, appears in Plaintiff's Exhibit 88, The Mineral Industry, 1894:

"It is a striking fact that in the new development in Japan, on a remote island and against great natural difficulties, the most modern methods and management prevail, while in Sicily, in the center of the oldest civilization, these are to a great extent of the crudest. In 1889 the Sicilian industry experienced very hard times. Prices were low, and much hardship was caused. To some degree it led to improved methods, and in the larger mines pumps and hoisting engines are now installed."

And that water was present in the Sicilian mines is also shown by the report of Brühl, United States consul at Catania, quoted in Plaintiff's Exhibit No. 78, Seventeenth U. S. Geological Survey, 1895–96:

"The overproduction cannot well be reduced, for obvious reasons. Mines cannot, without serious loss, be left standing unworked, because in most of them the rapidly entering water has constantly to be pumped out; *otherwise it would soon fill and ruin the mines, especially those* which are worked in a primitive mode (where the sulphur is carried to the surface in bags by men and boys over stairs crudely hewn into the walls of the passages leading out of the mines), or would cause such damage as would require perhaps six months or more (depending, of course, upon the condition of the mine) to reopen and again put in a workable condition; it would ruin the larger mines which contain mostly machinery. * * *"

In this state of the art, Sicily continued to supply the substantial part of the world's sulphur and practically the greater part of that consumed by the United States, for while sulphur was found in various parts of our country, and indeed a tremendous bed of it had, years before, been located in Louisiana, its depth and the nature of the overlying strata had thwarted all efforts to mine it.

This Louisiana deposit was discovered in 1869, when a well was being drilled for oil. It was substantially 100 feet thick and was lo-

cated between 400 and 500 feet below the surface. Although this enormous and valuable deposit was known to exist, and although large sums of money and high engineering skill were used, all efforts to mine it proved unsuccessful for 25 years. The existence of the sulphur bed and the failure to mine it finally attracted the attention of a man who, in inventive fertility and past experience seemed to be the one man to solve the difficulty and successfully work out one of the most remarkable wonders of world commerce. As what this man—Frasch—did, or, as it is now claimed, failed to do, is the real question which underlies this case, we deem a proper appreciation of what he had previously done, and the fields of operation he was familiar with, will throw light on the question of what he did, or failed to do, when he first attacked the problem of mining this Louisiana sulphur bed.

Turning first to what had been done there when Frasch entered the field, we may say that the sulphur bed had been discovered in 1869, when a company in drilling for oil struck this sulphur bed or pot, some hundreds of feet below the surface. It was a pure, high-grade sulphur, and the possibility of mining it by shafting methods at once, and for 25 years, appears to have attracted the men and companies that sought to do so up to the time Frasch entered the field. As we have said, the bed was drilled through when it was first discovered, and in the subsequent operations, preceding Frasch, different other wells were drilled, and by these drillings, not only were the different strata, above and below the sulphur bed ascertained, but cores were preserved of the sulphur, which, of course, disclosed its physical and chemical structures. These drillings also disclosed and located those two great obstacles with which the shaft miner has to contend, quicksand and water. The drill further showed that, after passing through the quicksand, there was a vein of cap rock which overlaid the sulphur, and it was felt that this cap rock would afford a base or support on which a caisson shaft, carried through the quicksand, could rest, and that the sulphur, protected by the cap rock, could be safely mined when the shaft was carried through such cap rock and into the mine. The drill also disclosed water strongly impregnated with sulphur, showing the water must have come in contact with sulphur, and, as the shafting progressed, the fatal accidents from sulphurous gas, which indeed largely contributed to the abandonment of shafting operations, showed, and indeed created, a record of, the intimate proximity of sulphur and water to each other. The principal difficulty in shafting arose from the quicksand, which, when the rings which formed the shaft reached a certain depth, forced its way up from the bottom of the inside of the rings, and precluded further effort. In addition to this, the sulphurous gas, which entered the rings, killed several men.

Into this field of failure Frasch entered, but from a new and wholly different angle. In effect he said:

"Abandon your shafting entirely, for by it you have never even reached the sulphur bed. Now in the drilling field, with which I am familiar, we have drilled, not shafted for oil, and we have pumped up oil and oil impregnated with sulphur. In that work we have steamed wells hundred of feet underground."

We can readily see how Frasch's work in drilling for oil, his knowledge of sulphur in steaming oil wells, all had prepared him for announcing the really astounding proposition of drilling a small-sized hole into the sulphur bed, carrying down hot water to melt the sulphur, and then pumping the liquid sulphur to the surface. This plan was looked on as visionary, and when suggested to men and companies in Italy and England, who were accustomed to shafting and stripping mining, it was considered so impossible and improbable as to give them no concern.

In his previous experience, Frasch had made some epoch-making inventions in which sulphur was the main factor. The petroleum produced from the great oil fields of Pennsylvania was wholly free from sulphur, and for that reason perfectly sweet burning oil, gasoline, paraffin, and oil's numerous by-products could be distilled therefrom. But both the Ohio and Canadian oil contained sulphur in such offensive combinations that it was impossible to refine them or get any by-products that were not so offensive as to make them unmarketable. Indeed, no use could be made of this vast oil product, save for fuel, for the odor emanating from its sulphur was so offensive and permeating that cargoes of ships carrying flour and bacon near vessels loaded with these oils were spoiled. Without entering into details, it suffices to say that, when he turned his attention to this sulphur pest, Frasch eliminated it by his process of refining and revolutionized the Ohio and Canadian oil industry, making it equal to the Pennsylvania product. Indeed, while Frasch was exploring this Louisiana sulphur field, he was also turning his attention to treating oil while it was in situ underground, with a view to increasing production. This came about in this way: Pennsylvania oil was found in Devonian sandstone and to increase its underground flow this sandstone was shattered by exploding nitroglycerine at the bottom of the well. On the other hand, the Ohio, Indiana, and Illinois oils are located in Silurian limestone. As these wells were exhausted, it was found nitroglycerine did not have the rejuvenating effect in limestone it had in the Pennsylvania sandstone, so Frasch devised the successful use of sulphuric or hydrochloric acid for increasing the oil flow, for by plugging the well after the acid was poured down the pressure of the carbonic acid gas forced the acid through the most minute cracks of the limestone and thus opened new sources of oil supply.

But not only did he do these particular things, involving sulphur and treating fluids or soluble minerals in situ, but Frasch, from his connection with the oil well industry, was trained in what was probably the most resourceful and most original art in any branch of human activity in overcoming obstacles. The great oil fields of Pennsylvania have given the courts of the Third Circuit a more than ordinary acquaintance with the art of gas and oil well drillings, and in no other field of activity have we found such fertility of resource and original skill. Why this is so will be apparent at once, when it is realized that the great elemental forces with which the operator contends are located from 1,000 to 3,000 feet below the surface, and can only be reached by mechanism of the size of a 6, 8, or 10 inch bore, and that such

mechanism must be controlled and operated from the surface. When to these subterranean difficulties we add the fact that these operations are carried on in places isolated from machine shops and customary appliances, we can appreciate that the well drillers' art is a species of mining distinct in itself, and those engaged in it are the most resourceful of men. The wonderful developments of this art, its control of water, its mastery of quicksands, its recovery of tools, pipes, and fittings from the bottom of wells—these and many other features unite to make the art one in which improvements in the art, which in other arts would be looked on as inventive, are in this art considered as the natural and to be looked for expedients and devises of self-reliant, resourceful men. We can thus see that the daring, original, and inventive step, which Frasch took in proposing to melt this sulphur bed in situ and then pump it to the surface, was made by a man who appreciated what he wanted to do, knew the obstacles he would have to encounter, but who was particularly qualified to overcome those difficulties. We can also understand that Frasch entered the field, knowing it was going to take time, for he was a man of such large affairs and general activities that even this sulphur development was a side issue, or as he himself said:

"At that time my sulphur enterprise was merely a hobby, the bulk of my time being devoted to my Standard Oil work."

He approached the problem in a most thorough way. From the proofs it would appear that some wells had been previously drilled through the sulphur bed, and that records had been kept of the strata, and cores had been taken of the sulphur itself as these wells were drilled. We here remark that the contention of the plaintiff is that Frasch conceived his process and applied for his process patent under a fundamental misapprehension of the physical character of the sulphur bed he was proposing to operate. We find no warrant in the proofs of this assumption, and Frasch himself proves the contrary. He got a core of the sulphur; he had it before him; he knew just what its physical structure was. It is said his patent was based on the assumption that the Louisiana sulphur was similar to Sicilian sulphur, in that it was impervious to water, while in point of fact it was porous. In the first place, if the Sicilian sulphur was impervious to water, there is no proof whatever that Frasch had then visited the Italian mines, or knew that their sulphur was waterproof. And we have seen, also, that in some way water did get into the Sicilian sulphur mines. But there is proof that he knew the physical structure of the Louisiana sulphur, for the very first thing he did was to get "a core from the sulphur deposit"; so that it is perfectly clear that Frasch started out with a knowledge from this core, of just what the structural character of this sulphur was. If it was porous, he had the evidence of its porosity before him. If he knew the nonporous character of the Sicilian rock, and if this Louisiana core differed from the Sicilian product, then he had them before him for contrast. If his patent was based on the theory of nonporosity, we would naturally expect some reference to be made in specification to the matter of porosity

or nonporosity; but not only is there none, but when, 22 years after, Frasch summed up all his work and detailed all the obstacles that confronted him in this Louisiana field, and when he recounted how he had been misled in regard to the sulphur bed, he never once referred to sulphur porosity or nonporosity, or suggested that his process was based on the assumption of nonporosity. On the contrary, he then and there asserted that his original process was carried out successfully, and, what is more, he made no reference to, or attributed any inventive character to, any act, device, or disclosure made subsequent to his original discovery and disclosure.

Turning to the account of Frasch just referred to, it will be seen that, in addition to getting the sulphur core, he also got the drilling records; but these, as he subsequently found, had been colored by people who expected to float companies, and that what he had considered correct later proved to be entirely wrong. In that regard he says:

"Unfortunately, all the drilling records had been colored by the people who expected to float companies. Everything unfavorable was concealed, and only that given which would be likely to induce investment, so that what I had considered a correct report proved later to be entirely wrong."

What this coloring was he does not say, and certainly does not say it was in regard to the porosity of the sulphur or the fact of water permeating it. That the company had been misled as to the presence of water he does say, and that this misleading information had, when rectified, led to the company abandoning the work; but, as this abandonment took place before Frasch began his operations for the company, it is clear that he himself was under no misapprehensions as to the presence of water when he began work. As to this discovery of water, the presence of water containing hydrosulphide, the death of the men, the water permeating the sulphur, and the consequent abandonment of operations by the company, Frasch says:

"They had a very ingenious scheme for sinking a shaft with a shield, but after the expenditure of a great deal of money the shield was lost, and the danger due to the presence of water containing hydrogen sulphide was demonstrated by the death of a number of men. It was decided to abandon this method, especially after a drilling record had been made by a drilling company who reported direct to the owners, when it was discovered that there was no roof over the sulphur, *and that sulphur water was permeating the deposit in inexhaustible quantities.*"

What was the misleading information, which Frasch had, he does not say; but its nature was such as led him to believe the sulphur bed extended through the region generally, and to purchase adjoining property and drill a well of his own, which first well was followed by three others. Referring to these matters Frasch says:

"*Being misinformed as to the character of the deposit*, I reached the conclusion that the sulphur was distributed in the rock, as in Sicily, and, when I heard of the limestone roof covering the deposit, I felt that sulphur could be found anywhere within reasonable proximity to the sulphur mines. * * *

"In view of the information obtained from the various companies, I believed that there was sulphur over miles of territory, and started to drill on land I had purchased within a mile and a half of Sulphur Mine. I went down over 2,000 feet without finding anything. Then I located a second, a third, and a fourth well, but found no sulphur in any instance. This took much time

and money, and I finally reached the conclusion that all the sulphur was located on the land owned by the New York company operating it at the time."

From Frasch's account it appears that from the very start he determined not to operate the bed as was done in Sicily, not for any physical reason, but on the practical commercial one that he could not compete with Sicilian labor. In that regard he says:

"I realized at the outset that a method entirely different from that employed in the mines of Sicily was necessary for success here, as the class of labor required to operate this mine would demand at least $5 per day, while the Sicilian miners were being paid 60 cents."

This labor barrier Frasch determined to overcome by abandoning shafting, quarrying, and carrying to the surface. His plan was, as stated by himself:

"To meet the extraordinary conditions existing in this deposit, I decided that the only way to mine this sulphur was to melt it in the ground and pump it to the surface in the form of a liquid. After careful study and consideration, I became convinced that this could be done."

Having found no sulphur in the four neighboring wells he drilled, Frasch evidently came to the conclusion that the sulphur bed was confined to the company's property; so he became associated with them, and proceeded to drill a test well, which led him to completely modify the process and apparatus he had expected to use. In that regard he says:

"I succeeded in getting possession of the property, and at once set to work to drill a well of sufficient diameter to determine finally the character of the existing material. When this had been done, I was obliged to modify completely the process and apparatus I had expected to employ.

"At that time the drilling of a well in an alluvial deposit containing quicksand, etc., was a very tedious task, and it took from six to nine months to get through the alluvial material to the rock—work which we do to-day in three days."

At this point we note that the well which Frasch then proceeded to drill on the company's property was presumably drilled to carry out the process and to use the apparatus disclosed in the patents which he had then obtained. Such being the case, three questions naturally arise: First, did the well prove the process was practical? Second, did the apparatus suggested in the patent, and used in the well, show a practical way of using the process? And, thirdly, what modifications of the process and apparatus did this well lead Frasch to make?

Let us first see what Frasch had patented. As to process, there were two: The first was one in which hot water was used to liquefy sulphur; the second was one in which the sulphur was liquefied by chemicals. The water process was applied for October 23, 1890, and resulted in the grant of patent No. 461,429, of October 20, 1891. The gist of the invention is thus stated in the specification:

First, the use of underground fusing: "The fusion or melting of the sulphur in the mine or underground deposit and its removal in a fused or melted condition."

Second, the fusing agent: "To fuse the sulphur, use is or may be made of a heat-conveying fluid or vehicle, preferably a cheap liquid, such as water."

Third, the means for bringing the sulphur to the surface: "The liquefied sulphur need not be forced up by the heat-conveying liquid, but may be pumped up in any ordinary or suitable way. * * * The term 'pumping' is intended to cover the movement by means of a pump or any known or suitable substitute for a pump."

And in connection with this third or latter feature we here note that as but one claim specifies "pumping," and all the others use the general term "removing," it is quite evident that Frasch contemplated that any known kind of lifting agency fell within the scope of his process. As to the use of water as a heat-conveying vehicle, it is quite evident, in his application as originally filed, Frasch made "contact" of the water with the sulphur an element of his claims. Such water-sulphur "contact" is specified, for instance, as (claims 3–9, inclusive) "fusing the sulphur in the mine by bringing *into contact* therewith a fluid," etc. But on December 26th following Frasch filed additional claims, and among them was claim 10, which provided:

"The process of mining sulphur, consisting in *circulating through the underground* deposit of sulphur or sulphur-bearing rock a fluid, such as water, at a temperature above the melting point of the sulphur, thereby liquefying the sulphur by fusion, and removing the melted sulphur, substantially as described."

In this it will be observed he changes from "contact" to "circulating through the underground deposit or sulphur-bearing rock a fluid." It is quite evident, therefore, that Frasch, by this addition of a "circulating through claim," meant something different from his "contact" claims, and that two subdivisions of water treatment are disclosed by this patent, viz.: One, the fusing of sulphur by water coming in contact therewith; the other, by water circulated through it.

When Frasch, on October 23, 1890, applied for this patent, he coupled with his process a form of apparatus by which his process could be used. The office compelled a division, and his apparatus was finally patented to him in No. 461,430, granted October 20, 1891. Without entering into details, it suffices to say this patent disclosed three distinct elements, but all used in combination, viz.: First, the fluid heating appliances on the surface; second, the appliances which carried the heated fluid to the sulphur bed; and, third, the appliances by which the sulphur melted underground was brought to the surface. Referring to his drawings, Frasch says:

"Figure I is a diagram of a plant for mining sulphur in accordance with the invention. Figure II is an enlarged diagram of the well."

Taking these two figures as embodying his plant and his well, Frasch adds:

"Referring to Figs. I and II, a well *A* is drilled as usual, in making salt and oil wells," etc.

He then proceeds from this point (line 52 of page 1 of his specification to line 80 of the second page of his patent) to describe the process and the apparatus for securing sulphur fusion. The reference letters in his description are to plant, Figure I, and well, Figure II, and there is no reference or allusion in this description to any other draw-

ing or feature of the specification, save these shown in Figures I and II. Therefore the language he uses applies to and must be read onto Figures I and II. In the operation thus described, the hot water from the heaters is forced by force pump *F*, down the casing *B*, and after it has melted the sulphur, such water, together with the melted sulphur, is forced to the surface through the tubing *C*, and eventually returned to the heater. It is of this circulating process and device the specification says:

"It will thus be seen that there is a closed circuit, which includes a chamber in the sulphur or sulphur-bearing rock, and through which water at a temperature sufficient to fuse the sulphur is forced."

But this water pressure, water circulating and water-sulphur lifting process is not the only one Frasch suggested. In his specification he also says: "Fig. III is a view illustrating a modified arrangement of part of the apparatus"—which was noncirculating. This modification Frasch thus describes:

"Instead of relying upon the pump *F* to force the melted sulphur and hot water up the tubing *C*, *a pump F' at the bottom of the well in the tubing C may be employed, as shown in Fig. III.* By the use of this latter pumping arrangement it is *not necessary to fill the cavity* in the mine with hot water in order to remove the melted sulphur, since it can be raised *by the pump* in the tubing *C*. The mine might be filled with hot water, and after a quantity of sulphur had melted this could then be removed by the pump *F'*, thus making the operation of melting the sulphur and removing it periodical. The pump *F'* is formed by a working barrel at the bottom of the well and a plunger operated by a sucker rod with valves such as are commonly used in oil wells where a similar arrangement of pump is employed."

Frasch also pointed out another modification, saying: "Fig. IV is a view illustrating a further modification"—which it will be observed may be either circulating or noncirculating. This modification he thus describes:

"In Fig. IV there is a third passage or pipe *T* extending into the mine, through which the hot water (or other fusing vehicle) pumped down the casing *B* may be allowed to escape after having first melted the sulphur in the mine. The melted sulphur collects about the end of the tubing *C*, through which it is raised by the pump *F'*. Of course it could be forced up by the pressure in the mine by checking the outflow from the pipe *T*. The pipe *T* is (or may be) connected with the heaters *E*."

The specification does not state the distance pipe *T* is from the main pipe or when it was drilled. It follows, therefore, that it is quite possible that the pipe *T* may have been drilled at such distance in time and place from the main well that the hot water coming down the main well would have to work its way for a considerable distance through the sulphur rock itself, or fissures in it, in order to reach the outlet pipe *T*. And it is also apparent that, the hole for *T* being drilled through the same strata as the main well, but having no casing to shut off the water in the strata which the drill passed through, the water of the strata would, as the well was drilled, flood the hole, and consequently the sulphur bed.

It will, of course, be noted that, whatever the problematic effect of the drilling of the bleed pipe *T*, it is apparent that, as stated in the ex-

tract quoted above, the device was one which provided two water courses: A closed circuit similar to that of Figs. I and II; for, as stated in the extract last quoted:

"Of course it could be forced up by the pressure in the mine by checking the outflow from the pipe *T*. The pipe *T* is (or may be) connected with the heaters *E*."

Instead of being thus used as part of a closed circuit, or a dead end to secure a closed circuit, pipe *T* might be used as an open outlet to the surface, viz. "the hot water (or other fusing vehicle) pumped down the casing *B* may be allowed to escape after having first melted the sulphur in the mine," in which case, as the specification states, "The melted sulphur collects about the end of the tubing *C*, through which it is raised by the pump *F*'." From this it will appear that this apparatus patent really disclosed alternative uses of apparatus: First, the closed water circuit of Figs. I and II, with water lift of sulphur; second, the closed water circuit of Fig. IV, with water lift of sulphur; third, the water circuit of Figs. I and II caused by deadheading pipe *T* of Figure IV, with water lift of sulphur; fourth, the open outlet through *T* of Figure IV, with pump lift of sulphur; and, fifth, the partial water filling of the sulphur when Figs. I and II were used without closing the circuit and a pump or other device was used to lift the sulphur.

In addition to these several modifications indicated in these two patents, where water was the heat vehicle used, it will also be apparent that all these agencies, appliances, and processes could be used by Frasch in his later patent No. 461,431, which he applied for on December 26, 1890, where his fluid, in addition to conveying heat, was a solvent such as "bisulphide of carbon, tar, petroleum, and other hydrocarbon or ethereal oils."

From this résumé of Frasch's patents, it will be seen, he had several modifications or alternative methods he could employ, and his work was not based on a single, predetermined plan, adapted to meet but one set of underground conditions.

Turning from these theoretical, paper outlines of his process, let us ascertain what Frasch actually did, and how his theories worked out when he drilled his fifth well, which was located on the ground under which the four prior wells told him the sulphur could only be found. Of this well, and the success of his process, we have quite full proof.

Frasch's first well on the Sulphur Company premises was No. 14. It was drilled in the fall of 1894, under the directions of Jacob C. Hoffman, an experienced man, and one who evidently knew conditions and obstacles he would naturally have to overcome. Hoffman says there had been 13 wells drilled before that by the company, that the cores were there which had been taken out in former drillings, that there were blueprints showing the different formations, and that he found the reports of both Schmitz (1893) and Rothwell (1890) in the Office. The heating plant was built, the well drilled and provided with apparatus as outlined in Frasch's patent, and the difficulties and delays

were those incident to a work of this character. In that respect Frasch says:

"At that time the drilling of a well in an alluvial deposit containing quicksand, etc., was a very tedious task, and it took from six to nine months to get through the alluvial material to the rock—work which we do to-day in three days."

The first part of the work determined on was to drive a 10-inch casing through the quicksand until they reached the cap rock. In that regard the patent said:

"A well *A* is drilled, as usual, in making salt and oil wells, a casing *B* (say 10 inches in diameter) being brought to the rock above the sulphur, so as to shut off water and quicksand."

This is what Hoffman says they did:

"We were attempting to drive a 10-inch drive pipe from the surface down to the rock overlaying the sulphur deposit."

As to the difficulties he says:

"In driving the pipe we encountered an enormous deposit of quicksand, which seemed to grip the pipe very firmly, so it was very hard work to drive this pipe downward. * * * I recall that in some cases we would allow a stem weighing nearly 2,000 pounds to strike the driving cap on top of the drive pipe as much as 200 times to drive the pipe an inch."

But these difficulties, and the quicksand pushing up through the drive pipe with such tremendous pressure as to float the tools, were overcome, and as Hoffman says:

"This method of drilling continued practically until we had driven the 10-inch pipe onto the rock overlying the sulphur."

The cap rock being reached, and the patent instructing, "and a smaller hole (say 8 inches in diameter) being continued into or to the bottom of the sulphur deposit," Hoffman followed these instructions, his testimony being:

"After driving the 10-inch pipe firmly onto the rock, we reduced the size of the bit with which we had been drilling from 10-inch to 8-inch, and we continued the 8-inch hole to the bottom of the sulphur bed."

After driving 4 or 5 feet into the sulphur, Hoffman struck a flow of sulphur water. This gave them considerable trouble; its volume and head was such that it rose 8 feet above the derrick floor. Although the gas from this waterflow caused serious physical annoyance to the drillers and necessitated substantial changes in drilling arrangements on the derrick floor, it is highly significant that neither Hoffman nor Frasch allude to this water flow as anything unexpected.

The proof also shows that all the wells drilled by the old company were flowing water. The Schmitz report of 1893, to which Hoffman refers in his testimony, shows that in the well drilled in February, 1893, from the time the drill entered the sulphur bed at 472 feet, there was an almost steady increase in water, until at 560 feet a test showed 160 gallons per minute, "of which 140 gallons are issued from the 4-inch casing and come from the upper sulphur horizon from 472 to 520 feet.

No increase of water has been found from 520 to 560 feet, but the water has greater force at 560-foot level or depth and rises 8 feet above drill floor, or over 9 feet above surface in a 3-inch pipe."

Referring to the increase of water which was found from 660 to 680 feet which was through sulphur or sulphur and limestone, Schmitz says:

"That the increase was direct due to water sources struck in the last 20 feet. * * * The limestone and gypsum (especially the former) has many cavities, as the drill record shows, which cavities have likely large extension in the strata, or connect with each other horizontally and vertically, and thus may communicate the waters from the principal flows of the sulphur-bearing marl, limestone, and gypsum strata, and from one level to the other."

In the Supplement of June 3, 1893, Schmitz says:

"While I have only small hopes that the property of your company can be ever mined with success by the common methods (shafts, etc.) on account of the porous and cavy structure of the formation and the *water masses present in the sulphur deposits* and formation, I think it but proper that the directors of your company should do no decisive step as to the abandonment of the property until they have fully satisfied themselves that the *waters of the Sulphur horizon below the big flows are too large to be controlled*, and as well that there exists no other practical methods of extracting the sulphur than by the common shaft methods."

As these reports were accessible to Hoffman, as Frasch had joined forces with the company, as the company had been advised that this water in the sulphur forbade shaft mining, and as neither Hoffman nor Frasch say the presence of water in the sulphur was any surprise to them, we are justified in declining to believe that Frasch's patented process, or his use of it in well No. 14, was based on the assumption that the sulphur in this property was nonporous and free from water.

When the drilling of the 8-inch hole, extending from the cap rock and the end of the casing and into the sulphur bed, was completed, a 6-inch tubing was inserted, with a plug at its lower end. This tubing was perforated at the lower end to strain the entering sulphur, while higher up were larger holes for the outflow of the hot water. Within the 6-inch tubing was a string of 3-inch pipe provided with a working barrel and sucker rods, adapted for pumping melted sulphur. As to the appliances on top of the ground for heating the water and forcing it, under pressure, into the sulphur bed, no detailed description need be given, further than to say they were in substantial form, as directed in the specifications. The well having been drilled, the process used was thus stated by Hoffman:

"After having the well connected up, as I have above described, we first tested out our steam lines and connections to the heater and connections leading to the well. When we found everything was tight, we shut off the steam and blew out the heater through the exhaust valve I have already referred to. We next started our pumps, pumping cold water into the heater and allowing this to flow by gravity from the bottom of the heater down the 6-inch casing and out into the well. This was to see if the strainer had not become obstructed in lowering it into the well. When we found that the water passed down freely without backing up into the heaters, we gradually turned the steam on from the 3-inch line leading from the manifold above the boilers to the heaters. This operation was always part of my duty, because it became necessary to allow the steam to pass through the valve very slowly,

to prevent any pounding of the lines as it met the hot water. After having the full boiler pressure on the well for about 24 hours, during which time, of course, we were pumping water into the heater all the time, Mr. Frasch personally raised the lever leading from the safety valve in the line extending horizontally from the T, allowing the accumulated steam in the 3-inch tubing to escape. This steam blew very strongly at first, and after continuing for a short time it seemed to lack the force it started with, and in watching Mr. Frasch's face I felt that he realized the well had sealed over, and in a short time no steam would escape through this line. This proved to be the case; the well had sufficiently sealed after going through this exhaust pipe for about 5 minutes that we could remove the valve on the top of the 3-inch tubing and get ready to lower the sucker rods and plunger, in order that we could start pumping the liquid sulphur. We then connected the plunger on the bottom of the sucker rods, lowered these rods and plunger down to the working valve already referred to, put a stuffing box on top of the 3-inch through which the polished rod operated, connected the sucker rod with the walking beam, starting the engine, and in a short time were pumping sulphur."

From this it will be seen that on the first trial Frasch's process proved practical; sulphur was liquefied underground and pumped to the surface. Frasch's interesting account agrees with Hoffman's, and is:

"I drilled a well through the alluvial deposit to the rock with a 10-inch pipe; then continued through the sulphur deposit, which was about 200 feet thick, with a 9-inch drill, and immersed a 6-inch pipe from the surface to the bottom of this well. The 6-inch pipe had a strainer only 6 inches long, at the very bottom, and a seat to receive the 3-inch pipe through which we expected to lift the sulphur to the surface. The 6-inch pipe, directly above the seat for the 3-inch pipe, was also perforated for a distance of 3 feet.

"After the well had been drilled, and before the pipes were inserted, it was filled up with sand in order to insure a tight receptacle at the bottom for the liquid sulphur. After the same had been washed out, the pipes were inserted and equipped, and the well was ready for the melting fluid.

"This melting fluid consisted of water superheated to 335° Fahr. *The porosity of the rock in which the melting had to be done* seemed to furnish an almost insurmountable obstacle to success, as I feared that the *wild waters* in the rock would break into the melting zone *I expected to create*, and reduce the temperature of the fluid with which I expected to melt below the temperature necessary to fuse the sulphur. I had supplied a large number of boilers to furnish the heat necessary to maintain in the well a temperature higher than that required for the fusion of the sulphur.

"The water was superheated in columns in which 100 pounds per square inch pressure was maintained, and the apparatus which I had constructed to accomplish this proved efficient. We used 20 150 horse power boilers for a well, which represents experimentation on a ponderous scale.

"When everything was ready to make the *first trial, which would demonstrate either success or failure*, we raised steam in the boilers, and sent the superheated water into the ground without a hitch. If for one instant the high temperature required should drop below the melting point of sulphur, it would mean failure, consequently intense interest centered in this first attempt.

"After permitting the melting fluid to go into the ground for 24 hours, I decided that sufficient material must have been melted to produce some sulphur. The pumping engine was started on the sulphur line, and the increasing strain against the engine showed that work was being done. More and more slowly went the engine, more steam was supplied, until the man at the throttle sang out at the top of his voice, 'She's pumping.' A liquid appeared in the polished rod, and when I wiped it off with my finger I found my finger covered with sulphur. Within five minutes the receptacles under pressure were opened, and a beautiful stream of the golden fluid shot into the barrels we had ready to receive the produce. After pumping for about 15 minutes, the 40 barrels we had supplied were seen to be inadequate. Quickly we threw up

embankments and lined them with boards to receive the sulphur that was gushing forth, and *since that day no further attempt has been made to provide a vessel or a mold into which to put the sulphur.*

"When the sun went down we stopped the pump to hold the liquid sulphur below until we could prepare to receive more in the morning. The material on the ground had to be removed, and willing hands helped to make a clean slate for the next day. When everything had been finished, the sulphur all piled up in one heap, and the men had departed, I enjoyed all by myself *this demonstration of success.* I mounted the sulphur pile and seated myself on the very top. It pleased me to hear the slight noise caused by the contraction of the warm sulphur, which was like a greeting from below—proof that my object had been accomplished. Many days and many years intervened before financial success was assured, but the first step toward the ultimate goal had been achieved. *We had melted the mineral in the ground and brought it to the surface as a liquid. We had demonstrated that it could be done.*"

The well was pumped for 4 or 5 hours, producing some 500 barrels of sulphur, when mechanical difficulties began. The pump sucker rods started to jerk, and finally ceased working altogether. The difficulty was at once diagnosed as due to the sulphur corroding the iron working parts of the valve and pump, and when the sucker rods were drawn such proved to be the case. It was at once seen these iron parts must be replaced by ones that would not corrode; aluminum was determined upon, and it was arranged that Frasch, who was then leaving for Cleveland, should send such aluminum parts to the well. Before leaving, and pending the arrival of the aluminum parts, Frasch arranged to operate the surface plant and steam the well, so that, as Hoffman testified:

"We would be storing up heat in the sulphur rock as well as melting sulphur, so that when he furnished us with the new working valve we could immediately lower this and start pumping right away."

But, unfortunately for this plan, the pressure on the boiler of the heating plant had developed dangerous weakness, and—

"fearing that this would let go and cause an explosion, we had to shut off our steam, and in shutting off the steam the sulphur cooled around the six-inch casing, closing the water outlets, so that when we attempted to again operate the well we could get no water to pass through the 6-inch casing."

The result was that after the first pumping, which was the latter part of 1894, no further pumping took place until the fall of 1895; but it will be noted that such delay was wholly due to defects in the surface plant, pump, and valve, and was in no way caused by any defect in the Frasch process. In this period of inaction the well piping, as also the surface apparatus, were practically replaced. As to the well equipment, tubing, and casing Hoffman testified:

"In starting to equip the first well, our first casing was the ordinary black oil well casing, of rather light weight, and a finer thread than we used later."

When the sulphur congealed and solidified in and around the tubing, working barrel, etc., it of course became necessary to pull the tubing, and, when this was done, both new tubing and casing were put in; obviously, a protracted job. As Hoffman says:

"The time spent between the congealing of the well after the first operation was all consumed in clearing the well of the pipe, so that it could be recased and retubed with new equipment."

In addition to this retubing and recasing of the well hole, there were four, and only four, changes, none of which were process changes. There was, first, a new and heavier heater top in connection with the sulphur heating system; second, using a tapering plug at the end of the tubing, to facilitate dropping the tubing to place, using a shorter strainer and galvanizing it; third, making a tighter joint at the point in the tubing where the water flowed out and the sulphur ran in; fourth, using aluminum pump valves, to avoid corrosion. Having made these changes, the second trial was made by the same process as the first, but with the result that this time the tonnage was increased to 500 tons. Then, as it proved, the aluminum valves proved too frail; the pumping ceased, the sulphur congealed, and another delay ensued, until the spring of 1896. Hoffman testified as to this breakdown, its cause, and its remedy, as follows:

"After having put in the aluminum valves, the sucker rods, and made the connection of these rods to the walking beam, we started pumping. * * * The second pumping we got about 500 tons of sulphur. The well up to this time had not what we call 'blowed'; by this I mean there was sufficient melted sulphur in the tubing to keep the steam and water out of this pipe, but finally we noticed that the sulphur stream had ceased flowing, although the engine continued to run freely. We then decided that our aluminum valves must have broken from the jar of the heavy column of sulphur above. In attempting to remove the barrel and the valves, we had to shut off the hot water to the well, and the melted sulphur again congealed around the 6-inch casing and tubing."

Following this there was another cessation, or, as Hoffman testified:

"The next sulphur we obtained was in the spring or early summer of 1896, and was from well No. 14, the original well drilled in while I was there."

In this interval changes were made, all of which were also not of process, but of apparatus to carry on the original process, as follows: First, the water supply from the adjoining marshes was supplemented by a river supply pumped into a ditch or canal 8 miles long; second, four steam boilers, of 150 horse power each, and 10 heaters, were added; third, to obviate congealing of sulphur when the tubing had to be pulled, rapid-acting, tubing-pulling devices and additional valves and appliances were provided, so that sulphur congealing would be obviated; fourth, instead of the frail aluminum pumping device, an air lift was provided. This air lift consisted simply of an inch air line, suspended in the 3-inch line. This latter line had been used in the former trials. It was thus described by Hoffman:

"The top of the 3-inch tubing was fitted with a T and our usual horizontal pipe was run out towards the sulphur bins. This pipe was provided with a safety valve as in our first operation. In the top of the 3-inch T was a heavy plug. This plug was threaded on both top and bottom sides, and in the bottom of the plug was screwed the 1-inch air line which hung down into the 3-inch tubing and extended to within probably 13 to 15 feet from the bottom of the well. In the top of this plug just described was also a 1-inch line which was connected with an air compressor, which had been sent us since our last difficulty in pumping by means of the sucker rod method, and which we hoped to use in raising sulphur in our next operation. * * * We in all cases first tested our lines as previously described. Steam was then turned into the 6-inch casing. This was continued for probably 10 or 12 hours. We then turned one of the heaters into the 10-inch pipe and continued that for another 12 hours; of course, at all times keeping the heat going down the 6-inch casing.

On trying the well for melted sulphur after steaming probably 24 hours, we found the well sealed. We started our air compressor, and the pressure commenced to gradually rise, and in a short time the sulphur was flowing in gushes out of the sulphur discharge pipe into the bins. We continued pumping by this method as long as we could get any melted sulphur or had bin capacity for the same."

Hoffman testified the air compressor was known as the Clayton compressor; that it was a secondhand one; that while Mr. Frasch was at the well, and gave instructions to them how to use it, when sulphur was first pumped; that "we had tested out the air compressor after having placed it on its foundation."

A study of the proofs in this case also satisfies us that the long delays, before this sulphur process proved commercially profitable, were not due to unexpectedly meeting water in the sulphur deposit, or the necessity of further invention of apparatus to utilize Frasch's process, but were due to financial, fuel, drilling, and the like difficulties. Neither Hoffman nor Frasch assert that the presence of water in the sulphur strata was unexpected, or caused any change in their plans. When Hoffman began drilling under Frasch's directions, they had the drilling of the former wells; they knew these 13 wells were each and all flowing sulphur water. In that regard, Hoffman says:

"When I first went there, instead of 1 flowing well, there were at least—or to be exact, I think there were—13 flowing wells, and all of them flowed sulphur water freely. One of them we rigged up and used for bathing purposes. I do not recall the various sizes of the pipes leading from these wells, but each flowing well seemed to be flowing the full capacity of the outlet pipe from that well."

It is quite evident that Frasch recognized that the hot water he pumped into the wells probably passed off in these flowing wells, for as soon as Hoffman's first well, No. 14, was drilled, Frasch directed the 13 wells to be shut off. On that point Hoffman says:

"We had rigged up one well, as I before stated, for bathhouse purposes. After we had been steaming well No. 14 for some time, I noticed in bathing that the water we used in this bathhouse well was warmer than it had been. I took the temperature of the water, and found that it had increased. I advised Mr. Frasch, who was in Cleveland, of my observation, and he in turn advised me to shut off all the flowing wells, so as not to allow any of our hot water to possibly escape through that channel."

Indeed, we cannot read Hoffman's testimony, and escape the conviction that the water they encountered was nothing out of the ordinary, and they met it and neutralized its effects by increasing heat or damming off the incoming cold water. As to meeting the cold water by correspondingly increased heat at the surface, Hoffman's account is:

"Q. Well No. 14, as I understand your testimony, was first steamed and pumped late in December, 1894? A. Yes, sir.

"Q. At that first steaming and pumping, what was the temperature of the water at the heaters? A. 330°.

"Q. You understood at that time that a considerable portion of this heat would be lost by the water while passing down the 6-inch tubing in the well, didn't you? A. We understood some would be lost by coming in contact with the cold water.

"Q. And it would be lost before the water ever reached the sulphur deposit? A. Yes, sir.

"Q. And that is one reason that you applied such a high temperature at the boilers or heaters? A. The matter of the proper temperature of the water that we were to put into the well was given us by Mr. Frasch. He stated that we would want to maintain a temperature of about 330 degrees to get our best results. I believe that about 95 pounds' steam pressure at the boilers gave us a temperature of 330 degrees at the heaters, and we had the safety valves on our boilers set that they would blow off at about 100 pounds' steam pressure, so that we would not increase the temperature of the water above the figure set by Mr. Frasch. He said at that time, if we used the water at a higher temperature, it would have a tendency to thicken the liquid sulphur."

In drilling the next well, No. 15, a fissure of 7 feet was discovered, and the incoming water was dammed back with sawdust. With reference to it, Hoffman testifies:

"In well No. 15, as I recall it, we struck some fissures after reaching the sulphur deposit, one fissure of which was at least 7 feet deep. Before turning the hot water into well No. 15, we pumped a considerable quantity of sawdust mixed with the water down the 6-inch casing, and allowed this to flow out with the cold water, in the hopes of bridging across some of the openings, so that our heat would not flow away when we started to pump the hot water. We probably pumped sawdust for 2 days before turning steam into the well?"

Frasch's account of the use of sawdust was:

"About that time we found that some wells gave out and ceased to pump when there had been no breaking of the pipes. I reached the conclusion that the cold sulphur *water permeating the rock had broken into the melting zone*, and brought the temperature of the melting water below the melting point of sulphur. I thought this might be remedied by pumping large amounts of a material like sawdust into the mine with the melting fluid, and that, if the quantities of sawdust were large enough, *the channels through which the wild waters in the rock entered the melting zone could be sealed.*

"One well, after pumping about 7,000 tons, at the rate of approximately 350 tons per day, ceased to produce. The pipes were all in good order, and we started to pump sawdust into the ground with the melting water. After pumping in about 6 carloads per day for 5 days, the well 'sealed' with the sulphur and promptly produced 39,000 tons more before the caving of the rock broke the pipes."

We are not overlooking the difficulties and delays met with in developing this process up to the complete commercial success it proved itself to be in 1903, but we are satisfied that such delay and difficulties were not caused by defects in Frasch's original conception or in means to utilize it. As already pointed out, Frasch was immersed in other work; he regarded this as a side issue; his visits were infrequent; the work was frequently suspended, for as much as a year at a time; the finances were such that the work was badly hampered, as Hoffman testified at length; and the appliances generally were on such a stupendous scale that changes or improvements required time. In that regard Frasch says:

"These improvements were made slowly, as all experiments had to be made on a ponderous scale, and the smallest change required a great deal of time. During the long intervals which necessarily elapsed between my visits to the mine, *I could give this new enterprise no attention.* It took months to drill a new well, when an old one was lost. At one time the work lay idle for a whole year before I could take it up again, and it was not until 1903 that we could see financial success ahead."

We have thus described at length these earlier operations of Frasch, and the results attending them, with a view of testing the contention on which, in the final analysis, the plaintiff's case is based, or as summarized in the brief of counsel:

"This early conception of Frasch, as set forth in three of his patents long since expired, is relied upon by the defendant as its chief defense in this case; but those patents did not disclose any practical means of mining sulphur. *They stated a problem, and not a solution of it. They suggested a line along which to invent*, and, without further invention, their disclosures were useless."

We cannot agree with this contention, and in our judgment the facts do not warrant any such conclusion. We find no proof to warrant the conclusion now made, namely, that these expired patents of Frasch are based on the assumption that the sulphur deposit was free from water. Answering such contention, we may refer, amongst others, to these considerations: There is no such allegation or suggestion in the patents themselves; the bleed pipe *T*, shown in patent No. 461,430, for the reasons stated in discussing it at an earlier stage, is at variance with the contention now made; the 13 test wells, already drilled into the sulphur bed before Frasch began, told the character of that bed; the flow of sulphur water from these wells indicated sulphur contact; the Louisiana sulphur core, which Frasch said he had, of course, disclosed its own nature and formation, and there is no evidence that Frasch knew anything about the formation of Sicilian sulphur, and whether there was or was not water in the Sicilian mines; the testimony of Hoffman discloses no surprise at encountering water in the sulphur bed, and the account of Frasch makes no mention that the presence of water in the well he drilled (No. 14) caused him any surprise; on the contrary, the extract we have already quoted, and the sequence of events narrated by Frasch, tend to show that it was the water flow in the sulphur which led to the New York Company ceasing shafting operations, and that it was after that company ceased shafting that Frasch began drilling operations; when Frasch applied for the patents in suit, he made no contention or statement that he had discovered water in the sulphur deposit, and that its presence created difficulties which he had overcome by making further inventions.

We also think that a study of the application Frasch filed when he applied for patent No. 800,127, here in suit, clearly shows that his original process contemplated either a porous or nonporous sulphur rock, and that his alternative apparatus contemplated the use of one apparatus when the rock was porous and another when it was nonporous. Turning to the specification, we find Frasch thus describes the pioneer process and the apparatus for using it:

"Heretofore I have secured letters patent of the United States No. 461,429, dated October 20, 1891, for the recovery of sulphur by the process above indicated, and also letters patent No. 461,430 for apparatus for effecting such recovery. In said patents apparatus is described in which there are pipes by which hot water is circulated through the underground deposit, being introduced by one pipe and returned by another, and being always above the temperature at which sulphur melts. For raising the melted sulphur use is made in the patents of one of said pipes, or *else an additional pipe is provided for the purpose.* Either way the melted sulphur is forced up the proper pipe

by the pressure in the mine cavity or by the direct lift of a pump at the bottom of the sulphur pipe. For heating the water, fire-heated boilers are provided in said patents, through which the water to be heated is passed. With a sulphur deposit of such nature that the walls of the mine cavity are tight, and so able to allow the necessary pressure to be developed in the said cavity, the lifting of the melted sulphur by the hydraulic pressure can be effected; but in the case of a sulphur deposit in porous rock, which would not allow a sufficient pressure to exist therein, *it was heretofore necessary to resort to a lifting pump, whose action was not dependent upon the tightness of the walls of the mine cavity.*"

His language and meaning are clear. The original process he was describing might be applied where the sulphur was tight, or as the specification says:

"With a sulphur deposit of such nature that the walls of the mine cavity are tight, and so able to allow the necessary pressure to be developed in the said cavity, the lifting of the melted sulphur by the hydraulic pressure."

On the other hand, if the hydraulic pressure could not be worked because the sulphur was porous, then another agency, to wit, a pump, was provided, or, as the specification says:

"But in this case of a sulphur deposit in porous rock, which would not allow a sufficient pressure to exist therein, it was therefore necessary to resort to a lifting pump, whose action was not dependent upon the tightness of the walls of the mine cavity."

In view of these statements of Frasch himself, made in 1897, when he was describing his original process, that the pump was for use in a porous formation, the contention now made, after his death, that his process was wholly for a tight deposit, does not carry conviction.

Laying aside such contention, and regarding the three patents in suit, in the light of a previous process which applied to both porous and nonporous sulphur, we address ourselves to the question whether they involve invention. Taking first the process patent, No. 799,642, which was applied for May 27, 1897, and granted September 19, 1905, whose claims 2, 3, 6, 12, 19, 21, and 22 are here in issue, we note that, of these claims, Nos. 3, 12, 21, and 22 alone were in the application as originally made, and none of them involve the element of porosity of structure, and that claims 2, 6, and 19, which do involve porosity, and the part of the specification, from line 30 on page 1 to line 9 on page 2, on which said claims are based, were only brought into the application in 1903. Turning to original claims 3, 21, and 22, we find they involve the use of air in raising the melted sulphur, and a top and bottom delivery of hot water to melt the sulphur. Both these agencies may be useful. They were, of course, novel in their application to sulphur mining in place, for sulphur mining was original with Frasch; but when Frasch had already disclosed the process of sulphur mining in place, and had actually melted and brought to the surface such sulphur by other means, we are of opinion it involved no invention to apply the hot water at two different levels, or after he had melted it to use air pressure as a means of bringing the liquefied sulphur to the surface. We therefore hold these claims as lacking invention, and therefore invalid. As to claims 2, 6, and 19, they involve porosity of the sulphur, and are based on the assumption that the process of this

patent disclosed, and the preceding patents of Frasch did not disclose, sulphur rock porosity. In view of what we have already said as to sulphur rock porosity being known to Frasch, and that his former patents were not restricted to tight and nonporous rock, it follows that these claims have no ground on which to rest, and they must also be held invalid.

And we may add that a study of the file wrapper of this patent confirms us in this view, for it discloses earmarks of a not infrequent effort, when the term of a primary patent is near expiration, to obtain an extension for another term of years, that has already been enjoyed. In this case Frasch's original patent expired in 1908. If the claims of the present patent, granted in 1908, were sustained, the plaintiff would have a monopoly of underground sulphur mining of 31 years. This would have been effected by the filing of his second series of patents in 1897, introducing therein claims based on porosity in 1903, and by a consistent series of delays in procedure, whereby the grant of such patents was delayed until 1905. While such course is legal, and involves nothing censurable, yet when the practical effect, if the patent it enforced, as now contended for, be, as we have said, to shut out the public from the field of underground sulphur liquefying for 31 years, it behooves a court, before following such a course, to take great care to avoid being led to a decision which, instead of fulfilling the constitutional purpose of promoting the progress of science and useful arts, in reality blocks the path of improvement.

Turning to the second patent, No. 800,127, for apparatus for mining sulphur, of which claims 2, 3, 7, 11, 21, and 24 are in issue, we are of opinion that claims 2 and 3 embody means necessarily incident to the use of the original, and which, in substantial equivalency, were used in the practice of Frasch's original patents as described in testimony heretofore quoted. As to the several combinations embodied in claims 7, 11, and 21, which embrace delivery of hot water at different levels, we are of opinion they do not involve patentability, and as to claim 24 we are also of opinion that it lacks inventive substance. This leaves for discussion claims 7, 26, and 28 of the third patent in suit, No. 1,008,319, applied for February 6, 1905, granted November 14, 1911, for mining sulphur. Referring to claims 7, 26, and 28, which are alone in issue, we find they include, in combination and in liquefaction mining, a perforated lining which distributes the outgoing hot water over a wider zone, and by its many and widely scattered holes prevents clogging, where the surrounding substances cave in as liquefaction proceeds. The use of a perforated pipe for such general purposes is too manifestly such a mere mechanical expedient that we cannot find any inventive act in using such a strainer in mining by liquefaction. We accordingly hold these claims void.

Arriving at the foregoing conclusions, it follows that, without alluding to the other and many interesting questions discussed in the briefs and at bar, the several claims of said patents must be decreed invalid, and the bill dismissed.

MORSE v. SMYTH et al.

(District Court, E. D. Kentucky. December 21, 1918. On Petition for Rehearing, January 10, 1919.)

1. MINES AND MINERALS ⟸54(2)—CONVEYANCE—MINERAL RIGHTS.
A deed by a grantor of "all his interest" in a tract of land, excepting what he had previously sold "by written contract," *held* to convey the mineral rights in a portion of the tract which he had previously contracted to sell to another, reserving the mineral rights.

2. ESTOPPEL ⟸32(1)—GRANTEE IN DEED—DENIAL OF GRANTOR'S TITLE TO RESERVED MINERAL RIGHTS.
A grantee of the surface of a tract of land by a conveyance reserving the minerals to the grantor is estopped to deny the grantor's title to the minerals.

3. EQUITY ⟸83—LACHES—SUIT BY OWNER TO RECOVER PROPERTY.
An owner of property is not chargeable with laches for not asserting his ownership so long as his rights therein are not invaded.

In Equity. Suit by N. C. Morse, trustee, against Jesse M. Smyth, Douglas B. Crained, and F. B. Creamer. On motion to dismiss bill. Denied.

Martin T. Kelly, of Lexington, Ky., and Worthington, Cochran & Browning, of Maysville, Ky., for plaintiff.

Kelly Kash, of Irvine, Ky., B. R. Jouett and Pendleton & Bush, all of Winchester, Ky., and J. H. Hazelrigg, of Frankfort, Ky., for defendants.

COCHRAN, District Judge. This cause is before me on defendants' motion to dismiss the bill. Plaintiff characterizes his pleading as a "petition in equity." No such pleading is known to this court, and pleadings in this court should be given their proper names.

The questions to be decided by me on this motion have been diminished in the course of discussion. The parties agree that prior to the making of the deed by Duckham to Breck of date July 17, 1838, Duckham had sold by title bond to Crawford 1,000 acres in the Carnan 29,000-acre patent, which includes the 400 acres conveyed by Crawford to Smyth, February 15, 1847, which 400 acres includes the 140 acres conveyed to defendant Jesse M. Smyth in the division of his father's estate, the oil and gas rights in which 140 acres is in dispute herein, reserving to himself the minerals therein. They further agree that on July 17, 1838, Duckham conveyed to Breck all his interest in the Carnan patent, and by this exception in the covenant of special warranty of those to whom the grantor had previously "sold by written contract," Breck had notice of Crawford's previous title bond. They still further agree that on October 16, 1839, Duckham conveyed to Crawford the 1,000 acres reserving the minerals. Such is plaintiff's claim put forth in briefs filed on his behalf, and defendants expressly agree to these three facts in the response brief filed on their behalf. Defendants, however, have it that the reservation of the minerals in the Crawford deed is to the grantor Duckham. But it is not said in the deed that the minerals are so reserved. The statement is simply that they are reserved without saying to or for whom they are reserved. If, as claimed by plaintiff, they were covered by the

deed of Duckham to Breck so that Duckham did not own them, the reasonable inference is that they were reserved to Breck, or rather that the meaning of the reservation was that they were excepted out of the conveyance and not intended to be thereby conveyed. If they were so covered, so far as Breck was concerned no reservation or exception need have been made. The only need of making the reservation was on Duckham's account, and that to keep him from warranting them to Crawford.

The parties did well in so agreeing. Such is the reasonable inference from the undisputed facts. The fact that in 1839 Duckham conveyed the surface in the 1,000 acres to Crawford after he had the year before conveyed his entire interest in the Carnan patent has to be accounted for. It is accounted for, if before the making of the deed to Breck he had given Crawford a title bond for the surface in the 1,000 acres. The exception from this special warranty in the deed to Breck indicates that previous to the making of that deed Duckham had given at least one title bond as to lands in the Carnan patent. The reasonable inference is, therefore, that such title bond was one to Crawford in relation to the 1,000 acres. And the reasonable inference further is that the title bond only covered the surface right in such land, which is all that was covered by the deed. What then are the questions left open for determination on the motion?

[1] 1. Did the minerals pass by the deed of Duckham to Breck? Possibly, though Duckham still had the legal right to the surface right in the 1,000 acres, it did not pass thereby. If it did, nothing was left to pass by the deed of Duckham to Crawford. This would come about by limiting the word "interest" in the deed to Breck to his beneficial interest therein. Thereby his legal title to the surface right in the 1,000 acres would be left to be conveyed by his deed to Crawford.

I understand the defendants to limit their position that the minerals did not pass to Breck to the consideration that the question is controlled by the decision of the Court of Appeals of Kentucky in the case of Kincaid v. McGowan, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289. Is such the case? There Duckham in 1843 conveyed to Kincaid and Plummer "all of the twenty-two thousand acres survey of land only deducting therefrom what Duckham had sold and made deeds to prior to that date."

In 1842 Duckham had made two deeds to McGowan for two specific boundaries in the survey, reserving the minerals, one-half the timber, and a mill site in the one, and one-half the minerals and certain of the timber in the other. The question was whether these reservations in these two specific boundaries passed by the deed to Kincaid and Plummer, or whether that deed was limited to that portion of the survey outside of those two boundaries. It was held that it was so limited and that those reservations did not pass.

Judge Bennett said:

"Now it seems to us clear that the deed from Duckham to Kincaid and Plummer did not embrace the separate and distinct mineral and timber interest and mill site that Duckham owned in these two tracts of land, which had been previously separated from the portion of the survey sold to Kincaid and Plummer."

Again he said:

"So it seems that the mineral and timber interest and mill site reserved by Duckham, in these two tracts of land, being a distinct interest from the surface right conveyed, and also being separated from the balance of the 22,000-acre survey by designated boundaries, it would require apt words to convey these separate interests. To illustrate, suppose the mill site reserved had had upon it a fine flouring mill, or there had been a valuable stone quarry (which is a mineral interest) opened on the land, or a fine lead or silver seam on it, worth thousands of dollars, would it be contended that the conveyance of the adjoining portion of the survey—we say adjoining, because the two tracts had become separated from it by metes and bounds—would include these interests? Surely not. The unhesitating answer would be that these were distinct and separate interests, which could only be conveyed by apt words."

The ground upon which it was held that the reservations in the two previous deeds did not pass by the deed in question was because it contained "no apt words" covering them. The deed was in effect no more than a conveyance of that portion of the survey which adjoined the two tracts previously conveyed. We have no such case here. The deed to Breck contained "apt words" which covered the minerals in the 1,000 acres, the surface of which Duckham had theretofore sold by title bond and subsequently conveyed to Crawford. It conveyed "all his" (Duckham's) interest in a tract of land in the county of Estill patented in the name of John Carnan containing twenty-nine thousand acres." The minerals in the 1,000 acres were part of the Carnan patent and then held by Duckham. So far as now appears, they may have been his entire interest therein apart from the legal title to the surface. I can conceive of no more apt words by which the minerals could have been conveyed. If one conveys all his interest in a tract of land, then all his interest therein, whatever its nature, passes thereby. A decision that a deed conveying the portion of a survey adjoining two specific parcels thereof theretofore conveyed does not cover the minerals in those parcels reserved by the grantor in his deeds thereto is not a decision that a deed conveying all his interest in such survey does not cover such minerals. Possibly, if Duckham had theretofore sold the minerals in the 1,000 acres by title bond, the deed to Breck did not cover them on the idea suggested that the interest conveyed was not a mere naked interest but one that was beneficial. But it does not appear that he had so done, and I do not think it is incumbent on plaintiff to make out that he had not so done.

I conclude therefore that the minerals in the 1,000 acres passed by the deed from Duckham to Breck.

[2] 2. Is it essential for plaintiff to allege and prove title in Duckham to the minerals back to the commonwealth?

What we have is a sale and conveyance by Duckham to Crawford of the surface in the 1,000 acres, with a reservation to himself of the minerals therein. Is not Crawford and those claiming under him estopped to deny the title of Duckham and those claiming under him to such minerals? Defendants think that they are not so estopped because they do not claim the minerals under Duckham. But such result does not follow therefrom. What they are claiming is the surface right under a deed from Duckham which reserved the minerals to the

grantor. I have a distinct impression that by reason thereof Crawford and those claiming under him are estopped to deny that those claiming under Duckham are entitled to the minerals. The plaintiff has given me no assistance on this point. But the impression is so distinct that I feel justified in acting on the idea that the impression is correct, so far as the motion is concerned.

[3] 3. Is plaintiff's claim barred by laches? There is no room for the application of the doctrine of laches in this case. No lapse of time bars one's right to property. It is only in case his right has been invaded that he can be barred of his right thereto. It does not appear from the bill that the invasion of which he complains is other than a very recent one, certainly not long enough to give rise to any claim that he is barred by laches from complaining of such invasion.

These are all the questions which I understand the defendants to raise on this motion. I do not understand that they are now claiming that, if the minerals passed by the deed from Duckham to Breck, they did not pass from Breck to Morse for himself and as trustee by the deed of 1865. There is no room to claim that they did not, for that deed conveyed the grantor's "interest in any reservation of coal, iron, oil or other minerals made by persons who may have heretofore sold and conveyed land" in the Carnan patent.

Possibly the bill is defective in not connecting plaintiff with the grantee in the Breck deed. What he alleges along this line may be no more than a conclusion of law. I do not pass on this question because defendants make no point of it.

The motion to dismiss is overruled.

On Petition for Rehearing.

This cause is before me on petition for rehearing. I treat the additional brief filed since I handed down the opinion herein as such.

The decisions of Brown v. Darling (Ky.) 52 S. W. 936, and Towns v. Brown (Ky.) 114 S. W. 773, are not against any position I have taken. If I had held that plaintiff takes title to the minerals in dispute by virtue of the reservation in the deed from Duckham to Crawford made in 1839, those cases might be in point. But I have not so held. Plaintiff takes nothing by virtue of such reservation. If there had been no such reservation at all, still plaintiff would have been the owner of the minerals. That is so because of the deed from Duckham to Breck in 1838. By virtue of that deed Breck acquired the minerals. He did not need the reservation to give him the minerals. He already owned them.

This being so, the sole significance of the reservation was to limit Duckham's covenant of warranty in his deed to Crawford. This accounts for Duckham reserving the minerals without saying that he reserved them to himself.

The reservation in the deed to Crawford, however, has evidential value. It shows that the title bond to Crawford given before the deed to Breck covered the surface only. It did not cover the minerals. And this being so, the deed to Breck passed them.

The petition for rehearing is overruled.

POORMAN v. CLEVELAND, C., C. & ST. L. RY. CO. et al.

(District Court, E. D. Illinois. November 1, 1918.)

No. 1258.

1. RAILROADS ⊜482(2)—FIRES—"CARE AND MANAGEMENT OF ENGINE."
The engineer is the person having the "care and management of the engine," within Hurd's Rev. St. Ill. 1917, c. 114, § 103, providing that the fact that a fire was communicated shall be prima facie evidence of negligence of those having the care and management of the engine.

2. RAILROADS ⊜267—FIRES—ACTION—PARTIES.
In view of Hurd's Rev. St. Ill. 1917, c. 114, § 103, declaring that the fact a fire is set out by a locomotive shall be prima facie evidence of negligence, *held* that, in an action for damages from fire, the engineer was properly made a defendant.

3. REMOVAL OF CAUSES ⊜36—DIVERSE CITIZENSHIP—FRAUDULENT JOINDER OF DEFENDANT.
Since under Hurd's Rev. St. Ill. 1917, c. 114, § 103, declaring the fact the fire was set out to be prima facie evidence of negligence, the engineer in charge of the locomotive was a proper party, the joinder of the engineer and the railroad company as defendants in a suit in state court cannot be deemed fraudulent, though it prevented the company from removing the cause to the federal court on the ground of diversity of citizenship.

4. REMOVAL OF CAUSES ⊜49(3)—SEPARABLE CONTROVERSY.
Where, in an action for damages from fire set out by a locomotive, both the railroad company, which was a nonresident, and the engineer, who was a resident, were joined in an action in the Illinois state court grounded on Hurd's Rev. St. Ill. 1917, c. 114, § 103, making the fact of fire prima facie evidence of negligence, *held*, there was no separable controversy, authorizing removal by the company.

At Law. Action by Russell F. Poorman against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and Oscar Macey, begun in state court, and removed to the federal court by the filing of a transcript therein, etc., after the state court denied the petition for removal. On motion to remand. Cause remanded.

Arthur Poorman, Stewart L. Clark, and Graham & Snavely, all of Marshall, Ill., for plaintiff.

P. J. Kolb, of Mt. Carmel, Ill., and Scholfield & Scholfield, of Marshall, Ill., for defendants.

ENGLISH, District Judge. This is a suit brought by the plaintiff in the circuit court of Clark county, Ill., against the defendants above named. The facts, as appear from the pleas and files, are that the defendant railroad company is a corporation organized under the laws of the states of Ohio and Indiana, and engaged in operating a line of railroad through Clark county, Ill., and that the defendant Oscar Macey was and is an engineer in the employ of the defendant company, and is a resident of the state of Illinois, and that the plaintiff is also a resident of Clark county, Ill.; that some time prior to the institution of the suit at bar the plaintiff was the owner of certain buildings and elevator property situated along the railroad line of the defendant company in Clark county, Ill.; that while the defendant Oscar Macey, as engineer on one of defendant company's trains, was pulling

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

a train of cars on said railroad passing plaintiff's property, that the defendant company and its codefendant, Macey, through their carelessness and negligence in failing to install proper spark arresters and keeping them in proper condition, and otherwise carelessly and negligently so operated said engine that sparks of fire were allowed to escape from said engine, and caught and set fire to plaintiff's property, and that the same was thereby consumed and destroyed; that in due time the defendant railroad company filed its petition in said circuit court for removal of the case against it to the United States District Court for the Eastern District of Illinois, alleging diversity of citizenship between it and the plaintiff, and also alleging that a separable controversy existed between it and the plaintiff, which could be tried without the presence of its codefendant, Macey, and that said Macey was fraudulently joined with it to prevent the removal of the case into the federal court. The state court denied the petition for removal, and the defendant company then filed a transcript of the record in this court and procured a restraining order, out of the chancery side of the court, restraining the plaintiff from further prosecuting his suit in the state court until the further order of this court, and the plaintiff has filed his motion to remand, and the case is now at issue on the petition of removal and the defendants' motion to remand.

[1-4] The statute of Illinois (Hurd's Rev. St. 1917, c. 114, § 103) provides, among other things, that in actions for damages on account of injury occasioned by fire communicated by any locomotive engine the fact that a fire was so communicated shall be taken as full prima facie evidence to charge with negligence those in the use and occupation of the railroad as owners, lessees, or mortgagees, and those at the time having the "care and management" of the engine. In this case there is no dispute that defendant Macey was operating the engine at the time plaintiff's property caught fire, as complained of, and in the opinion of this court the engineer, the defendant Macey, was at the time in the "care and management of the engine," within the meaning of this statute; that is, that an engineer running an engine for his master has the care and management of that engine while he is so running and operating it, and the engineer being so in charge of the engine and having the care and management of it could have properly been included as a defendant in this suit, and as to whether or not the engineer was negligent in permitting sparks of fire to fly from his engine is a question of proof.

On the question as to whether or not the defendant Macey was included as a defendant by the plaintiff with fraudulent intent, as alleged in plaintiff's petition, it is a well-settled rule of law that there can be no fraudulent joinder of defendants, where the plaintiff has a bona fide belief in the facts upon which he bases his claim for a joint recovery, where he has a reasonable ground for a bona fide belief in the facts upon which the liability of all the defendants depend, his motive in joining them cannot be questioned. It is only when he has not, in fact, a cause of action against the resident defendant, and has no reasonable ground for supposing that he has, and he joins him in order to evade the jurisdiction of the federal court, that the joinder can be said to be fraudulent, entitling the real defendant to a removal, and

in view of the statute above cited, and the facts in this case, it cannot be said, at this time, that the plaintiff has no cause of action against the defendant Macey, neither has he any reasonable ground for supposing that he has not.

In this case the plaintiff, in good faith, so far as appears in the records, seeks the determination of his rights in the state court by filing a declaration in which he alleges a joint cause of action. Does this become a separable controversy, within the meaning of the acts of Congress, because the evidence may show that the plaintiff has misconceived his cause of action? This court thinks that it does not. The court deems it unnecessary to further discuss other points and authorities urged and cited, and for the reasons herein assigned the cause is remanded to the circuit court of Clark county, Ill., for trial.

POORMAN et al. v. CLEVELAND, C., C. & ST. L. RY. CO. et al.

(District Court, E. D. Illinois. November 1, 1918.)

No. 1259.

1. REMOVAL OF CAUSES ⊂=12—ORIGINAL JURISDICTION—DISTRICT.
Where one of the plaintiffs was a resident of Illinois and the other a resident of Texas, defendant, though a nonresident of Illinois, in the court of which state action was begun, cannot remove the cause to the federal court for Illinois, as the plaintiffs could not originally have brought the action there.

2. REMOVAL OF CAUSES ⊂=107(3)—REMAND—PLEA IN ABATEMENT.
Where the plea of plaintiffs to the jurisdiction of the federal court, to which an action begun in state court had been removed, showed that the federal court was without jurisdiction, such plea should be treated as a motion to remand, though not so styled.

At Law. Action by Russell Poorman and Omer Poorman, partners doing business under the name of Poorman Bros., against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and another, begun in state court and removed to the federal court. On motion to strike the plea in abatement to the jurisdiction of the federal court. Motion denied, and cause remanded.

Arthur Poorman, Stewart L. Clark, and Graham & Snavely, all of Marshall, Ill., for plaintiffs.

P. J. Kolb, of Mt. Carmel, Ill., and Schofield & Schofield, of Marshall, Ill., for defendants.

ENGLISH, District Judge. This is a suit brought by the plaintiffs in the circuit court of Clark county, Ill., against the defendants above named. The facts, as appear from the pleas and files, are: That the defendant is a railroad corporation organized under the laws of the states of Ohio and Indiana, and engaged in operating a line of railroad through Clark county, Ill. The plaintiff Russell Poorman is a resident of Clark county, Ill., and Omer Poorman, the other plaintiff, is a citizen and resident of the state of Texas. That the plaintiffs owned, in partnership, certain property in Clark county, Ill., located along the right of way of the defendant, which property was destroyed by fire, and suit was brought, as above mentioned, for the loss sus-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tained by the plaintiffs occasioned by the fire, and in this suit the railroad company, together with Oscar Macey, one of its engineers, were made defendants, alleging, among other things, that the fire was occasioned through the carelessness, negligence, etc., of the defendants.

The defendant company filed its petition in the circuit court of Clark county, Ill., praying for a removal of the cause from said circuit court to this court, on the ground of diversity of citizenship existing between it and the plaintiffs, alleging, in said petition, that the plaintiffs are, and were at the commencement of the suit, citizens of the state of Illinois, and that the petitioning defendant is a citizen of the states of its incorporation. It is also alleged, in said petition for removal, that a separable controversy existing between it and the plaintiffs could be determined without the presence of its codefendant, Macey, and that Macey had been fraudulently joined with the railroad company for the purpose of preventing the removal of the cause into the federal court. The state court denied the petition for removal, whereupon the defendant railroad company filed a transcript of the record of this court and secured from this court a restraining order against the plaintiffs from further prosecuting their suit in the state court until the further order of this court; and thereafter the plaintiffs filed their verified plea in abatement to the jurisdiction of this court, in which they denied that the plaintiff Omer Poorman is, or was, a resident of the state of Illinois, but that he, the said Omer Poorman, was at the time of the commencement of this suit, and still is, a resident and citizen of the state of Texas, residing within the Southern judicial district of said state, and to this plea of the plaintiffs to the jurisdiction of this court the defendant railroad company has filed its motion to strike said plea in abatement from the files, and on this motion to strike this court is now called upon to pass judgment.

[1] On the defendants' motion to strike the plea in abatement from the files, this court has but one question to consider, namely: Could the plaintiffs, as copartners, have brought this suit originally in this court? In this case one of the plaintiffs is a citizen of Clark county, Ill., where the suit was brought, and the defendant is a citizen of the states of its incorporation, Ohio and Indiana; but one of the plaintiffs is a citizen of the state of Texas, and the suit, so far as he is concerned, was not brought in the state of which he is a citizen, as the statute requires. Neither as plaintiff, nor as defendant, is he a citizen of the district where the suit was brought. The argument in support of the motion to strike is to the effect that it is sufficient if the suit is brought in a state where one of the defendants, or one of the plaintiffs, is a citizen. This would be true, if there were but one plaintiff or one defendant. But the statute makes no provisions, or terms, for the case of two defendants, or two plaintiffs, who are citizens of different states. In the case at bar, there being two plaintiffs, citizens of different states, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit, in federal court, in a state of which either of them is a citizen. It therefore follows, in the opinion of this court, that the plaintiffs, as copartners, could not have brought their suit originally against the

defendants in this court, and that this court, for that reason, is without jurisdiction to try the cause. The motion to strike the plea in abatement from the files is overruled, and the plea in abatement sustained.

[2] While the defendants' plea is styled "Plea to the Jurisdiction of the Court," it may be treated as a motion to remand, since, should this court have assumed jurisdiction of this case without knowledge of the facts, as above stated, and should it appear, upon the trial of the case in this court, that one of the plaintiffs was a resident in this jurisdiction, and that the other plaintiff was a resident of the state of Texas, it would then be the duty of this court to terminate the trial and remand the case to the state court.

For the reasons assigned, this cause is remanded to the circuit court of Clark county, Ill.

MEMORANDUM DECISIONS

ALASKA ANTHRACITE R. CO. v. MATARELLI. (Circuit Court of Appeals, Ninth Circuit. February 28, 1919.) No. 3266. In Error to the District Court of the United States for the Third Division of the Territory of Alaska. Lyons & Ritchie, of Valdez, Alaska, and R. M. Jones, of Seattle, Wash., for plaintiff in error. Donohoe & Dimond, of Valdez, Alaska, and R. F. Lewis, of San Francisco, Cal., for defendant in error.

PER CURIAM. Upon motion of counsel for the plaintiff in error, writ of error ordered dismissed.

COMMERCIAL CREDIT CO. v. McGILL. (Circuit Court of Appeals. Fourth Circuit. November 29, 1918.) No. 1632. Appeal from the District Court of the United States for the District of Maryland, at Baltimore, in bankruptcy. For opinion below, see 243 Fed. 637. Sylvan H. Lauchheimer, of Baltimore, Md., and Leo Oppenheimer, of New York City, for appellant. Robert P. Levis, of New York City, for appellee.

PER CURIAM. Cause dismissed under rule 20 (233 Fed. xiii, 146 C. C. A. xiii), in accordance with agreement of counsel.

In re DUNCAN. (Circuit Court of Appeals, Fourth Circuit. October 9, 1918.) No. 1677. Original application for leave to file petition for writ of mandamus, directed to Hon. Alston G. Dayton, United States District Judge for the Northern District of West Virginia, and brief in support of same, presented before Judges Knapp, Woods, and McDowell, and submitted. See, also, 249 Fed. 155, 161 C. C. A. 207. Cloyd H. Duncan, of Fairmont, W. Va., in pro. per.

PER CURIAM. Application denied.

In re DUNCAN. (Circuit Court of Appeals, Fourth Circuit. February 13, 1919.) No. 1699. Application for leave to file a petition for a writ of mandamus directed to Hon. Alston G. Dayton, United States District Judge for the Northern District of West Virginia. See, also, 249 Fed. 155, 161 C. C. A. 207. Cloyd H. Duncan, of Fairmont, W. Va., in pro. per.

PER CURIAM. Cause submitted before Judges Pritchard, Knapp, and Woods. Mandamus denied.

FALCONER v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. February 3, 1919.) No. 3233. In Error to the District Court of the United States for the Northern Division of the Western District of Washington. Winter S. Martin, of Seattle, Wash., for plaintiff in error. Robert C. Saunders, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., both of Seattle, Wash.

PER CURIAM. Pursuant to stipulation of counsel for the respective parties, filed February 3, 1919, writ of error ordered dismissed.

FUJIWARA v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. February 3, 1919.) No. 3291. In Error to the District Court of the United States for the Territory of Hawaii. S. C. Huber, U. S. Atty., of Honolulu, T. H., Annette Abbott Adams, U. S. Atty., of San Francisco, Cal.

PER CURIAM. Motion to dismiss writ of error for noncompliance by plaintiff in error with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (208 Fed. ix, 124 C. C. A. ix) granted.

GLORIEUX v. STEELE. (Circuit Court of Appeals, Second Circuit. January 15, 1919.) No. 129. In Error to the District Court of the United States for the Southern District of New York. Action by Ray Steele against Jules Glorieux. Judgment for plaintiff, and defendant brings error. Affirmed. H. A. Talbot, of New York City (Moses Feltenstein, of New York City, of counsel), for plaintiff in error. Edward Maxson, of New York City (James G. Martin, of Norfolk, Va., of counsel), for defendant in error. Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

HAYS, Collector of Internal Revenue for the District of West Virginia, v. DUNCAN. (Circuit Court of Appeals, Fourth Circuit. October 21, 1918.) No. 1507. In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg. S. W. Walker, U. S. Atty., of Martinsburg, W. Va., for plaintiff in error. Holt, Duncan & Holt, of Huntington, W. Va., for defendant in error.

PER CURIAM. Cause dismissed per agreement of attorneys.

HAYS, Collector of Internal Revenue for the District of West Virginia, v. HOLT. (Circuit Court of Appeals, Fourth Circuit. October 21, 1918.) No. 1506. In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg. S. W. Walker, U. S. Atty., of Martinsburg, W. Va., for plaintiff in error. Holt, Duncan & Holt, of Huntington, W. Va., for defendant in error.

PER CURIAM. Cause dismissed per agreement of attorneys.

HERMAN & HERMAN, Inc., v. CHEMICAL PRODUCTS OF CANADA, Limited. (Circuit Court of Appeals, Second Circuit. January 15, 1919.) No. 112. In Error to the District Court of the United States for the Southern District of New York. Action by the Chemical Products Company of Canada, Limited, against Herman & Herman, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed. Myers, Kutner & Schuhmann, of New York City (David C. Myers and Joseph H. Kutner, both of New York City, of counsel), for plaintiff in error. Crisp, Randall & Crisp, of New York City (W. Benton Crisp and Cyril F. dos Passos, both of New York City, of counsel), for defendant in error. Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

JOSEPH LAY CO. v. AMERICAN BROOM & BRUSH CO. (Circuit Court of Appeals, Second Circuit. January 15, 1919.) No. 139. Appeal from the District Court of the United States for the Northern District of New York. Suit by the Joseph Lay Company against the American Broom & Brush Company for infringement of the Lay patent, No. 946,234, for metal case broom. Decree for defendant holding patent void (248 Fed. 513), and complainant appeals. Affirmed. R. R. Martin, of Utica, N. Y., and V. H. Lockwood, of Indianapolis, Ind., for appellant. F. C. Curtis, of Troy, N. Y., for appellee. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

KAUZLAVICH v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. March 3, 1919.) No. 3308. In Error to the District Court of the United States for the Southern Division of the Eastern District of Washington. Francis A. Garrecht, U. S. Atty., of Spokane, Wash.

PER CURIAM. Motion for dismissal of writ of error for noncompliance by the plaintiff in error with subdivision 1 of rule 16 of the Rules of Practice of this court (208 Fed. ix, 124 C. C. A. ix) granted.

LEARY v. MAYOR AND ALDERMEN OF JERSEY CITY et al. (Circuit Court of Appeals, Third Circuit. February 18, 1919.) No. 1599. Appeal from the District Court of the United States for the District of New Jersey. Suit by Daniel J. Leary against the Mayor and Aldermen of Jersey City and others. Decree for defendants, and complainant appealed. Modified and affirmed. For prior opinions, see 189 Fed. 419, 208 Fed. 854, 126 C. C. A. 12, and 248 U. S. 328, 39 Sup. Ct. 115, 63 L. Ed. —.

PER CURIAM. Decree affirmed, with costs, with the modification that there be remitted from the amount due the city of Jersey City under said decree the sum of $3.111.46, as stipulated on behalf of said appellees in the election of basis for disposition of rehearing filed in this court.

MEYERS v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. February 25, 1919.) No. 3306. In Error to the District Court of the United States for the First Division of the Northern District of California. Herbert Chamberlain, of San Francisco, Cal., for the plaintiff in error.

PER CURIAM. Upon oral motion of counsel for the plaintiff in error writ of error ordered dismissed.

MUDD et al. v. ALABAMA MINERAL LAND CO.* (Circuit Court of Appeals, Fifth Circuit. February 26, 1919.) No. 3318. Appeal from the District Court of the United States for the Northern District of Alabama; Henry D. Clayton, Judge. Suit between John H. Mudd and another and the Alabama Mineral Land Company. From the judgment, the former appeal. Modified and affirmed. J. Reese Murray, of Birmingham, Ala. (Murray & Hanna, of Birmingham, Ala., and Judson, Green & Henry, of St. Louis, Mo., on the brief), for appellants. John P. Tillman and John S. Stone, both of Birmingham, Ala. (Tillman, Bradley & Morrow, of Birmingham, Ala., on the brief), for appellee. Before PARDEE, WALKER, and BATTS, Circuit Judges.

BATTS, Circuit Judge. A majority of the court are of the opinion that the record establishes that the property, which is the subject-matter of the suit, is incapable of equitable partition, and the writer is of the opinion that there is evidence upon which the conclusion of the trial judge to that effect could be based. The appellants complain that the terms of sale are onerous. A slight modification may be made without injury to the parties. The judgment will be so amended as to require that, if the appellee should be the purchaser, the costs (exclusive of the costs of appeal) and four-fifths of the balance of the purchase price be paid in cash; that, if the appellants be the purchasers,

*Certiorari denied 249 U. S. —, 39 Sup. Ct. 495, 63 L. Ed. —.

the costs (exclusive of the costs of the appeal) and one-fifth of the balance of the purchase price be paid in cash. So modified, the judgment of the court below is affirmed, with costs against appellants. Modified and affirmed.

PRZEPIS v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. December 9, 1918.) No. 1674. Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond. Habeas corpus. Nicholas Aleinikoff, of New York City, for appellant. Richard H. Mann, U. S. Atty., of Petersburg, Va.

PER CURIAM. Cause dismissed, under rule 20 (233 Fed. xiii, 146 C. C. A. xiii), in accordance with agreement of counsel.

R. M. SUTTON CO. et al. v. PRINGLE. (Circuit Court of Appeals, Fourth Circuit. October 4, 1918.) No. 1587. Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston, in Bankruptcy. Mordecai & Gadsden & Rutledge, of Charleston, S. C., for appellants. Julian Mitchell, of Charleston, S. C., for appellee.

PER CURIAM. Cause dismissed, under section 3 of rule 22 (233 Fed. xiv, 146 C. C. A. xiv).

SMITH v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. February 3, 1919.) No. 3264. In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska. R. F. Roth, U. S. Atty., and Harry E. Pratt, Asst. U. S. Atty., both of Fairbanks, Alaska, and Annette Abbott Adams, U. S. Atty., of San Francisco, Cal.

PER CURIAM. Motion for dismissal of writ of error for noncompliance by the plaintiff in error with the provisions of subdivision 1 of rule 16 of the Rules of Practice of this court (208 Fed. ix, 124 C. C. A. ix) granted, and writ of error dismissed.

VIRGINIA & WEST VIRGINIA COAL CO. v. CHARLES. (Circuit Court of Appeals, Fourth Circuit. December 5, 1918.) No. 1605. In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg. After judgment of District Court (251 Fed. 83, —— C. C. A. ——) was affirmed in 254 Fed. 379, —— C. C. A. ——, order allowing writ of error to Supreme Court was filed. J. L. Jeffries, of Norfolk, Va., and S. B. Avis, of Charleston, W. Va., for plaintiff in error. Greever, Gillespie & Divine, of Tazewell, Va., E. M. Fulton, of Wise, Va., and Wm. H. Werth, A. S. Higginbotham, and Geo. C. Peery, all of Tazewell, Va., for defendant in error.

END OF CASES IN VOL. 255